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Cover Page Footnote

Thanks to Ellen Pader, Bob Schwemm, participants in the Lat-Crit workshop in Cleveland, OH, Scott Chang, Richard Marcantonio, Sara Pratt, and Anne Houghtaling. Thanks to my USF colleagues especially Susan Freiwald, Josh Rosenberg, Maria Ontiveros, and Josh Davis for commenting on earlier drafts. Thanks to librarians Lee Ryan, John Shafer, Carol Specter, and Locke Morrissey, and students Laura McKibbin and Darcy Keith for research assistance. Special thanks to Ann, Lucia, and Gregor for their encouragement and patience.

CLARIFYING THE FEDERAL FAIR HOUSING ACT'S EXEMPTION FOR REASONABLE OCCUPANCY RESTRICTIONS

Tim Iglesias*

What is crowded to some is exactly what is comfortable to others; what is comfortable to some is exactly what is lonely to others.¹

My house is open to my relatives. I give them a helping hand.²

It's a public health and safety issue.³

INTRODUCTION: LIVING CLOSELY AND THE REGULATION OF "OVERCROWDING"

This article argues that a deceptively simple "exemption" to the 1988 Fair Housing Act Amendments (FHAA) for "reasonable" governmental occupancy standards has been misinterpreted by numerous courts, particularly by the Sixth Circuit in *Affordable Housing Advocates v. City of Richmond Heights*.⁴ This misinterpretation undercuts the protection from housing discrimination that the FHAA provides for families, especially families of color. This article sorts through the confusion about the "exemption" and offers two plausible versions of a "reasonable" standard.

Large families and extended families living closely together in a single-family house or apartment unit have been a widespread and

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1. Ellen Pader, *Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land*, 19 J. ARCHITECTURAL & PLAN. RES. 300, 305 (2002) [hereinafter Pader, *Housing Occupancy Standards*].

2. Jonathan Kaufman, *Relative Values: Whites and Hispanics Fall Out Over Quest for Suburban Dream*, WALL ST. J., Jan. 10, 2002, at A1 (quoting Jose Lara).

3. *Id.* (quoting William Cogley, corporation counsel of Elgin, IL referring to enforcement of housing codes challenged as discrimination).

4. 209 F.3d 626 (6th Cir. 2000).

longstanding practice in the United States.⁵ Choosing to live all together makes financial sense for many low-income workers and their families. There is also clear evidence that many households living closely do so based upon enduring cultural preferences and non-economic interests.⁶ In short, living closely produces substan-

5. See KENT W. COLTON, HOUSING IN THE TWENTY-FIRST CENTURY: ACHIEVING COMMON GROUND 27, 35 (2003) (stating that in 1945 there were "2.6 million doubled-up households (two or more households sharing one housing unit)" and "[u]nemployment and poor consumer confidence caused more people to live with family or friends during these economic downturns" (referring to recessions of 1981-82 and 1990-91) rather than to start new households); C. Theodore Koebel & Margaret S. Murray, *Extended Families and Their Housing in the U.S.*, 14 HOUSING STUD. 125, 134 (1999) (finding that an analysis of the 1989 American Housing Survey showed that 26.3% of family households included persons outside the household's nuclear family); Dowell Myers et al., *The Changing Problem of Overcrowded Housing*, 62 J. AM. PLAN. ASS'N 66, 66-67 (1996) [hereinafter Myers, *Changing Problem*] ("Early in the century, lower-income households were doubled and tripled up in sub-standard tenement housing.").

6. One researcher's review of the literature found four primary reasons why people share housing: (1) emergency situation and need; (2) an opportunity to live in a better quality home and/or neighborhood; (3) instrumental social support (e.g. material and financial assistance, practical advice, assistance with domestic tasks and responsibilities, and child care) and emotional support (e.g. encouragement and companionship); and (4) caretaking. Sherry Ahrentzen, *Double Indemnity or Double Delight? The Health Consequences of Shared Housing and 'Doubling Up,'* 59 J. Soc. ISSUES 547, 551-52 (2003); Koebel & Murray, *supra* note 5, at 72, 126 ("It may be that [these] households are slow to use the added income to escape from overcrowding, because they prefer to use their still relatively limited finances for more urgent priorities Household extension, often labelled 'doubling up,' is automatically considered . . . a problem to be solved. However, evidence documenting this problem is scarce. To others, extension represents a more complex pattern of sharing economic and emotional resources and is complicated by race, ethnicity and culture."); Myers, *Changing Problem*, *supra* note 5, at 70 ("Among racial and ethnic groups, Hispanic and Asian households have the highest incidences of overcrowding [E]ven the native-born members of these two ethnic groups have proportionately much higher levels of overcrowding than do the native-born counterparts among black or white households."); *id.* at 72 ("Overcrowding levels are very high for Asians and Hispanics, not dropping markedly until incomes exceed 80 percent of the median level. . . . Even at income levels twice the median, 8 percent of Asian and Hispanic households remain overcrowded, which is a percentage well above the national level."); Dowell Myers & Seong Woo Lee, *Immigration Cohorts and Residential Overcrowding in Southern California*, 33 DEMOGRAPHY 51, 64 (1996) (finding that "[m]ajor differences between race/ethnic groups in reduction of overcrowding appear to be due to differences in their rate of income growth Yet even with income controlled to the mean across all groups, Hispanics displayed markedly higher incidence of overcrowding") [hereinafter Myers, *Immigration Cohorts*]; Ellen Pader, *Housing Occupancy Codes*, in THE ENCYCLOPEDIA OF HOUSING (W. Van Vliet ed., 1998) ("Cross-cultural and historical analyses provide evidence that concepts concerning the preference to share sleeping and living spaces often relate to deeper core values, such as emphasis on individualism or communality.") [hereinafter Pader, *Housing Occupancy Codes*]. A recent group of studies commissioned by the U.S. Department of Housing and Urban Development ("HUD") confirms that housing preferences of minority family

tial economic, psychological, and social benefits for many households.⁷

On the other hand, too many people sharing a dwelling space is characterized as “overcrowding.” Commentators believe that overcrowding creates significant problems for tenants, such as inability to exit the building safely in an emergency, transmission of disease, psychological stress, as well as for neighbors such as excessive noise and traffic, and parking congestion.⁸

households are different from those of other households. JENNIFER JOHNSON & JESSICA CIGNA, U.S. DEP’T OF HOUS. & URBAN DEV., OVERVIEW OF ISSUE PAPERS ON DEMOGRAPHIC TRENDS IMPORTANT TO HOUSING vi (2003) (“As the number of households who are married with no children, minority with children, and elderly households continue to grow proportionately, housing industry participants must analyze their true preferences rather than rely on past assumptions of housing demand. For instance, minority households have larger families that sometimes include multiple generations of relations. Assuming that their housing needs are the same as non-Hispanic white family households would be imprudent.”); see also Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 296 n.8 (2002) (referring to preferences for “clustering” even among higher-income Latinos and Asians).

7. See Ahrentzen, *supra* note 6, at 548 (calling for further research into the benefits of sharing housing); Myers, *Immigration Cohorts*, *supra* note 6, at 64 (“[R]ecent immigrants may have chosen to save their incomes for purposes they consider more important, such as remittances to family members in their home country or savings to start a business.”). The capacity of low-income extended families to maintain extensive mutual aid networks is suggested by Annette Lareau in *The Long-Lost Cousins of the Middle Class*, N.Y. TIMES, Dec. 20, 2003, at A19 (describing practices of extended family visits by many working-class and poor families). The benefit to these households of living closely may redound to society because these living arrangements make it possible for people to become more productive workers by attending school and job training, to save money, to become home purchasers, and to use our housing stock more efficiently.

8. While the term “overcrowding” carries an unambiguously negative connotation, the actual phenomenon is hotly disputed. A substantial study reviewing the previous scientific literature on the subject reports still disputed linkages between definitions of “overcrowding” and actual bad consequences. See Myers, *Changing Problem*, *supra* note 5, at 67 (“Implicit in all discussions of crowding is the assumption that it is a policy problem—that the effects from crowding, and especially overcrowding, are deleterious to people’s physical and mental health. Although much analysis has been marshaled to support this conclusion, it has never been definitively established. After a century of debate it is still in question whether so-called overcrowding is harmful to the people affected, or merely socially distasteful to outsiders who observe its presence among others.”). A more recent similar review of the literature comes to same conclusion. See Ahrentzen, *supra* note 6, at 549 (“Scientific findings about the relationships between crowding and health have been inconsistent—some demonstrating links between household density and disease or stress, others finding no such links. Innumerable research studies suggest that other physical environmental factors, . . . personal variables . . . and social conditions . . . mediate or moderate health outcomes in light of household density.”). In housing literature and housing needs reports, “overcrowding” is sometimes considered in the category of “substandard housing conditions” which primarily concerns physical conditions of

Since the early 1900's local governments have regulated the numbers of inhabitants of a dwelling to prevent overcrowding⁹ by enforcing residential occupancy standards.¹⁰ Residential occupancy standards are maximum limits on "internal density." By setting the minimum space required per occupant, they set the maximum number of persons who can legally occupy any given amount of space. There are many types of governmental residential occupancy standards¹¹ and a wide variation in standards.¹²

housing units, such as functioning toilets, leaky roofs, and hazardous conditions. See, e.g., THE STATE OF THE NATION'S HOUSING: 2003, at 26 (Joint Ctr. for Hous. Studies of Harvard Univ. ed., 2003) ("Some 9.3 million households live in overcrowded units or housing classified as physically inadequate.") [hereinafter NATION'S HOUSING]. In many cases enforcing occupancy restrictions, there are both substandard physical conditions and violations of the local occupancy standard. See, J.K. Dineen, *Slumlord Slapped with Fine*, S.F. EXAMINER, Sept. 12, 2003, at 1 (describing building "fraught with code violations" as well as being overcrowded); Jennifer Mena, *In Housing Density, It's Too Close for Comfort*, L.A. TIMES, Sept. 15, 2003, at B1 (describing problem of Santa Ana, California as attracting "poor working families resigned to sharing houses with strangers and tolerating faulty plumbing and electricity and other deficiencies."). It is unclear if many of the negative consequences for tenants attributed to "overcrowding" would occur in the absence of physical substandard housing conditions.

9. See generally Pader, *Housing Occupancy Codes*, *supra* note 6. In particular, the image of New York City tenements teeming with immigrant workers at the time of the industrial revolution has seared itself into America's collective consciousness. Under pressure from public health and progressive housing reformers and, initially, against the wishes of landlords, New York City began regulating internal density in the late nineteenth century. See Pader, *Housing Occupancy Codes*, *supra* note 1. The 1901 New York City Tenement Act became a national model for local governments. Interestingly, San Francisco, CA, was actually the first city to enact occupancy restrictions in its 1870 Lodging House Ordinance, popularly known as the anti-Coolie Act (Chinese workers were called "coolies."). See *id.* This ordinance required 500 cubic feet of air space per person and was "disproportionately enforced in Chinatown where low-paid, single, working Chinese men shared rooms with less air space each than mandated." Pader, *supra* note 6.

10. Pader, *Housing Occupancy Codes*, *supra* note 1. Occupancy standards generally regulate how many people can legally occupy a particular space. *Id.* Most people are familiar with a broad range of occupancy standards in elevators, motor vehicles, bathrooms, pools, and restaurants. Residential occupancy standards regulate the amount of space required for a person to legally dwell in a detached house, a condominium, a cooperative, a mobile home, or an apartment.

11. Most governments control internal density by numerical limits, such as requiring a minimum amount of square feet of floor space for the first occupant and some additional minimum amount square feet of floor space for each additional occupant. For example, Madison, WI requires apartments to contain 150 square feet for the first occupant and at least 100 additional square feet for each additional occupant. MADISON, WIS., MINIMUM HOUSING AND PROPERTY MAINTENANCE CODE § 27.06 (2003). Some governments also set "person per bedroom" limitations. See, e.g., 55 PA. CODE § 2620.52 (1991). Pennsylvania requires that bedrooms for more than one person have at least sixty square feet of space for each person, and provides that no more than four residents may be housed in a bedroom regardless of its size. *Id.* Clas-

sifications can become complex because they require regulations to define "bedroom," "sleeping area," and "habitable space." For example, in some cities basements can be used as sleeping areas, and in others not. *See, e.g.,* David W. Chen, *Be It Ever So Low, the Basement Is Often Home*, N.Y. TIMES, Feb. 25, 2004, at A1. Numerous other housing and planning code provisions affect occupancy and internal density, including ventilation and lighting requirements. Regulations limiting the composition of households, such as by definitions of "family" for single family neighborhoods ("family" for single family zone is persons related by blood and a maximum of two unrelated persons) limit occupancy. This article primarily considers cases regarding facially neutral residential occupancy standards that arguably contravene the federal fair housing act (as amended) as "familial status" discrimination. It does not discuss facially discriminatory "familial status" cases (such as a landlord's written "no children" policy), numerical occupancy standards and definitions of "family" that discriminate against groups of unrelated persons, or occupancy standards maintained in federally-subsidized housing. For an example of the latter, see *DeBolt v. Espy*, 47 F.3d 777 (6th Cir. 1995) (affirming dismissal of claim against Farmer's Home Administration by government-subsidized tenant threatened with eviction for violating program-imposed occupancy standard).

12. There is no formal national occupancy standard applying to privately owned, non-subsidized housing. The International Property Maintenance Code, the ICC's code which includes its residential occupancy standard, has only been adopted statewide, while many states, such as California and Rhode Island, mandate or effectively mandate residential occupancy standards, allowing local governments to set their own residential occupancy standards. *See* *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486 (Ct. App. 1992) (holding that Uniform Housing Code adopted by state preempts local government occupancy standards unless local government follows specified procedures and makes certain findings); *see also* IOWA CODE § 364.17 (2004) (allowing cities of 15,000 or more residents to adopt one of several codes, but if the city does not adopt one, the state considers the city to have adopted one); R.I. GEN. LAWS § 45-24.3-11 (2004) (requiring a minimum of 150 square feet of floor space for the first occupant, and at least 130 square feet for every additional occupant). For several decades there has been an effort on the part of building official organizations (Building Officials and Code Administrators, International Conference of Building Officials, and Southern Building Code Congress, now united as the International Code Council ("ICC")) to standardize residential occupancy restrictions. These efforts have been only partially successful. The International Property Maintenance Code (ICC's code, which includes its residential occupancy standard) had only been adopted statewide by five states and the District of Columbia. International Code Council, *International Codes—Adoption by State*, available at <http://www.iccsafe.org/government/stateadoptions.xls> (last visited May 7, 2004). Governmental residential occupancy standards can vary considerably. The ICC International Property Maintenance Code provides that the minimum space requirements for three to five occupants are an 120 square feet living room, an 80 square feet dining room, and every room occupied for sleeping purposes must contain at least 70 square feet for the first occupant or 50 square feet for each occupant if the bedroom is occupied by more than one person. Sections 404.4 and 404.5 (2003). The City of Phoenix, AZ requires 250 square feet of floor space for the first two occupants and 150 square feet for every additional occupant thereafter, calculated on the basis of gross dwelling unit area, not counting children under thirteen years of age. PHOENIX, AZ., CODE § 39-5 (2004). Randolph Township, NJ requires that for "living space," "[e]very dwelling unit shall contain at least 600 square feet of habitable floor area for the first two occupants, at least 100 square feet of additional habitable floor area for each of the next three occupants, and at least 75 square feet of additional habitable floor area for each additional occupant." RANDOLPH TOWNSHIP, N.J., CODE § 26-38 (2003). For "sleeping

The primary policy justification for residential occupancy standards is protecting public health and safety.¹³ Governments require both private housing providers and residents to abide by residential occupancy standards. Governments enforce occupancy standards when issuing occupancy certificates and by code enforcement actions, which are sometimes government-initiated, but are usually in response to neighbor complaints.¹⁴

Much is at stake in the regulation of internal density for governments, neighbors, and housing providers. In addition to protecting public health and safety, occupancy standards are one means governments use to control density and population in their jurisdictions.¹⁵ Neighbors are generally concerned about "overcrowding"

space" it has essentially the same requirements as the ICC International Property Maintenance Code, but adds "[n]o room shall be occupied for sleeping purposes by more than two adults" making an exception for children under three years old. *Id.*

13. See generally JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 309 (2003). But it is clear from the history of occupancy standards that racism, classicism, paternalism, moralism (concern for the sexual immorality of others), and pressure to assimilate immigrants have also played an important role. "The history of occupancy standards follows the prevailing social, cultural, economic and health rationales of particular eras and particular sectors of society; they are the product of socially constructed personal feelings and opinions." Pader, *Housing Occupancy Standards*, *supra* note 1, at 306; see also Ellen J. Pader, *Spaces of Hate: Ethnicity, Architecture and Housing Discrimination*, 54 RUTGERS L. REV. 881, 885-87 (2002) (providing a history of occupancy standards in the U.S.) [hereinafter Pader, *Spaces of Hate*]; Ellen J. Pader, *Spatiality and Social Change: Domestic Space Use in Mexico and the United States*, 20 AM. ETHNOLOGIST 114 (1993) (comparing the sociospatial frameworks of Mexicans in several locales in the western Mexican state of Jalisco with those of Mexican Americans and of the dominant U.S. society) [hereinafter Pader, *Spatiality and Social Change*].

14. See JUERGENSMEYER & ROBERTS, *supra* note 13, at 313.

15. Families need schools for children, larger families will send more children to schools and make demands on social services, so more families mean more costs. Governments may be tempted to use residential occupancy standards as a means of "fiscal zoning." Cities have an economic interest in making zoning decisions (for example, preferring the development of one and two bedroom dwellings to larger ones) that steer families with children away. Occupancy restrictions can be used by governments to control the "character of the community" as a form of exclusionary zoning similar to minimum lot size or floor space requirements to exclude unwanted households. See PETER SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW 379-80 (2003); see also *United States v. Town of Cicero*, No. 93C-1805, 1997 WL 337379, at *6 (N.D. Ill. June 16, 1997) (adoption in 1991 of more restrictive residential occupancy standard in response to increased Latino immigration); *Briseno*, 6 Cal. App. 4th at 1378 (finding that state occupancy standard preempts locality's attempt to enact stricter standard in response to increased Latino residency). For an in-depth analysis of the history and broader social situation behind the Santa Ana case, see Stacy Harwood & Dowell Myers, *The Dynamics of Immigration and Local Governance in Santa Ana: Neighborhood Activism, Overcrowding, and Land-Use Policy*, 31 POL'Y STUD. J. 70 (2002); see also Ben Darvil, Jr., *Neighborhood Preservation or Xenophobia?: An*

because of its expected spillover effects: excessive noise and parking and traffic congestion.¹⁶ Private housing providers often claim their own business reasons for setting and enforcing residential occupancy standards, such as to avoid higher management costs, higher insurance costs, and extra maintenance and repair.¹⁷

Internal density regulation is also important to families. Residential occupancy standards can conflict with a household's desired level of internal density. For example, a family of five who would be happy to live in a one or two bedroom dwelling may be required by occupancy standards to get a dwelling of three or four bedrooms.¹⁸ In many cities the stock of three bedroom apartments and larger is small.¹⁹ Often larger detached homes are in old, run-

Examination of the Issues Surrounding the Town of Brookhaven's Rental Occupancy Law, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 122 (2003) (discussing the "Neighborhood Preservation Act" adopted by town in response to "overcrowding" under conditions of intense anti-Latino sentiment).

16. It has been suggested, however, that some neighbor resistance to high levels of internal density proceeds from preferences about how others should live. See generally Myers, *Changing Problem*, *supra* note 5.

17. As an indication of the importance of this issue, the National Multi Housing Council and the National Apartment Association (the two largest lobbies for apartment owners and investors) lists "Preserving an owners' two-person-per-bedroom occupancy standard as presumptively reasonable under the Fair Housing Act" as one of its "critical issues" for 2003. National Multi Housing Council's website is available at <http://www.nmhc.org> (last visited August 23, 2004) (source on file with author). "Housing providers know that overcrowding, excessive noise, and deterioration of properties often occur when more than two persons reside in a bedroom." Nat'l Multi Hous. Council, 2003 Legislative and Regulatory Priorities: Property and Asset Management (on file with the author). These costs, however, have rarely been documented in court. See Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families With Children*, 9 ADMIN. L.J. AM. U. 297, 319-27 (1995) (finding, inter alia, no evidence of higher insurance rates among apartments renting to children, but noting landlord's ability to charge more for child-free units). But see *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 703 (Ct. App. 1971).

18. In Bedford Heights, OH, they would probably have to rent a three bedroom dwelling. The 1991 amendments to the Bedford Heights ordinance required 200 square feet of habitable space for the first person and 150 square feet of habitable space for each additional person. BEDFORD HEIGHTS, OH., CODIFIED ORDINANCE § 1387.14. Due to the composition of the housing stock in Bedford Heights, the effect of this ordinance would be that more than 80% of two bedroom apartments in major apartment complexes would be limited to three persons. Fair Hous. Advocates Ass'n. v. City of Richmond Heights, 998 F. Supp. 825, 828 (N.D. Ohio 1998).

19. Nationally, based upon U.S. Census Bureau data, the National Association of Home Builders calculated that between 1985 and 2002, 80% or more of all apartments are two bedrooms or less (between 50% - 60% two bedrooms, and the rest one bedroom and studios); only between 10% and 21% [sic] of all apartments are three bedrooms or larger. Nat'l Ass'n of Home Builders, *Characteristics of Units Completed in Multifamily Buildings (1985-2002)*, available at <http://www.nahb.org/generic.aspx?genericContentID=375> (last visited May 7, 2004).

down urban areas.²⁰ Residential occupancy standards may severely restrict families' housing choices in many cities and suburbs.

Latino and Asian families are disproportionately and adversely affected by residential occupancy standards because they tend to have larger households (because of more children and extended families) as well as stronger preferences for living closely.²¹ Occupancy restrictions limit the housing opportunities for these families²² and increase racial and economic residential segregation by restricting which jurisdictions and neighborhoods where they may live.²³ They also force many families to purchase more space than they feel they need.²⁴ Even apparently small changes in occupancy

20. See generally Pader, *Housing Occupancy Codes*, *supra* note 6.

21. See Myers, *Changing Problem*, *supra* note 5, at 72, 81. Demographically, residential occupancy standards will impact these groups more than other groups. Family households are on average larger than non-family households. Even though households with children are a small percentage of total households in the U.S., they constitute 70% of all households with four or more persons. Jim Morales, *Resolving the Debate Over Occupancy Standards*, YOUTH L. NEWS (FHF Project, New York, N.Y.) Nov.-Dec. 1996, at 11. There are statistical overlaps between families, especially larger families, and race/ethnicity. People of color are more likely to have children than other households. They are more likely to have more children in their households than the average family. And they are more likely to have extended families living together which also tends to increase relative household size. According to the 1990 census, in California, Latino households constitute 17.7% of all households, but 43.6% of households with five or more persons. *Id.*

22. For example, the two person per bedroom standard championed by private housing providers means that a couple with a baby must rent at least a two bedroom house or apartment. Restrictive residential occupancy standards also combine with other zoning and land use decisions to restrict housing opportunities. And cities have fiscal incentives to limit the development of dwellings with more units. See SALSICH, JR. & TRYNIECKI, *supra* note 15, at 380.

23. In many cities, the only larger houses or apartments are older ones which are often located in less desirable neighborhoods with inferior schools and less access to services, jobs, and transportation.

24. See, e.g., *United States v. Badgett*, 976 F.2d 1176, 1180 (8th Cir. 1992) ("Appellees admitted that occupancy of the two-bedroom and three-bedroom apartments is restricted to two persons. As a result of this policy, no family which consisted of two parents and a child, or a single parent and two children, could rent any apartment at Georgetown [apartment complex]."). Most apartment bedrooms range in size from 100 square feet (10' x 10') to 120 square feet (10' x 12'). A common residential occupancy standard provides: "Every bedroom occupied by one person shall contain at least seventy square feet of floor area, and every bedroom occupied by more than one person shall contain at least fifty square feet of floor area for each occupant thereof." International Code Council's International Property Maintenance Code § 404.41 (2003) [metric equivalents omitted]. Madison, Wisconsin's housing code provides that the floor area of a lodging room shall provide not less than eighty square feet of floor area for one occupant and sixty square feet for each additional occupant. MADISON, WIS., MINIMUM HOUSING AND PROPERTY MAINTENANCE CODE § 27.06 (2003). A "Lodging Room" is defined in section 27.03 as "a portion of a dwelling used primarily for sleeping and living purposes, excluding cooking facilities." *Id.* § 27.03. The ICC

standards can have significant effects on the housing available to families.²⁵

When Congress included "familial status" as a newly protected class for the first time in the 1988 federal Fair Housing Acts Amendments (FHAA), it recognized that families regularly suffered from housing discrimination.²⁶ The FHAA provides families whose housing opportunities were negatively impacted by residential occupancy standards a potential claim for housing discrimination against both governments and private housing providers.²⁷ The same amendments also included an exemption for "reasonable" governmental occupancy restrictions.²⁸ *Affordable Housing*

standard will allow two persons per bedroom in a bedroom of typical size because it requires 100 square feet for two persons, but the Madison Code would technically restrict bedrooms of typical size to one person since it would require 140 square feet for two persons (80 + 60 = 140).

25. Occupancy standards can also have incidental effects on housing opportunities. Eligibility for federal relocation benefits can turn on whether occupancy is lawful or not. *See Haddock v. Dept' of Cmty. Dev.*, 526 A.2d 725 (N.J. Super. Ct. App. Div. 1987) (reversing lower court's denial of relocation benefits for tenants who were unaware of violating code, so that the violation was not primarily caused by their conduct and whose tenancy was therefore "lawful"); Leslie Kaufman, *A Catch-22 For Parents Trying to Do Better*, N.Y. TIMES, Jan. 20, 2004, at B1 (explaining how the inability of a mother to afford an apartment the size required by state housing occupancy standards prevents her from reuniting with her children).

26. 42 U.S.C. § 3601 (2004).

27. *Id.* Plaintiffs could bring cases grounded in both disparate treatment and disparate impact theories.

28. 42 U.S.C. § 3607(b)(1) (2004). This one sentence exemption and the related enforcement of occupancy standard violations has been the subject of an extraordinary amount of conflict. The exemption provoked significant comments in response to HUD's proposed regulations. "A number of commenters indicated that the proposed rule did not adequately address the question of what occupancy standards, if any, can be used by persons in connection with the sale and rental of dwellings." Implementation of the Fair Housing Standards of 1988, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989) (to be codified at 24 C.F.R. pt.100) [hereinafter HUD Preamble]. HUD's attempts to clarify the liability of private housing providers for discriminatory occupancy standards included three internal guidance memoranda by HUD General Counsel, two of which were hastily withdrawn after uproars they caused among housing interest groups. *See Nat'l Multi Hous. Council, Occupancy Standards: Regulatory and Legislative History* (Dec. 1, 1997) (on file with author); HOUSING DISCRIMINATION: LAW AND LITIGATION § 9:6 (Robert G. Schwemm ed. 2003). In 1995, 1996, 1998, and 1999, Congress considered several bills regarding occupancy standards. These are the United States Housing Act of 1995, H.R. 2406, 104th Cong. (1995); State Occupancy Standards Affirmation Act of 1996, H.R. 3385, 104th Cong. (1995); State Occupancy Standards Affirmation Act of 1999, H.R. 176, 106th Cong. (1999). Two bills were passed concerning the issue: The Omnibus Appropriations Bill, Pub. L. No. 104-134, passed by Congress in 1996 included a provision prohibiting HUD from using any funds to take any enforcement action with respect to fair housing allegations against a private housing provider's occupancy standard unless the standard contravened the so-called "Keating Memorandum," issued by HUD General Counsel

Advocates v. City of Richmond Heights,²⁹ decided by the Sixth Circuit in 2000, construed the exemption to give considerable leeway to governments.³⁰ Additionally, some courts appear ready to extend the exemption for reasonable *governmental* occupancy standards to *private housing providers* if private residential occupancy standards are consistent with governmental restrictions, in effect using the governmental exemption to provide a "safe harbor" for private housing providers.³¹ In a time when the proportion of housing needed for families of color is expected to grow³² and our

Frank Keating on March 20, 1991. See HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6. In 1998, Congress mandated that HUD adopt the Keating Memorandum as an official policy and publish a Notice of statement of policy to this effect in the Federal Register. See 63 Fed. Reg. 70256 (1998) (HUD Notice of Statement of Policy implementing the requirements of § 589 of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461). This legislation also specifically amended HUD's regulatory authority: "The Secretary of Housing and Urban Development shall not directly or indirectly establish a national occupancy standard." *Id.* In 1995, Professor Edward Allen described the exemption as "the most contentious FHAA issue which affects newly protected categories." Allen, *supra* note 17, at 319. He concluded:

Despite criticism of recent HUD decisions, no court or commentator has managed to propose a practical solution or lend tangible guidance which satisfies all parties as to what is "reasonable." The dearth of large units combined with the abundance of large families will likely continue and present both political and legal issues for the foreseeable future. This is especially true given the cultural diversity of many residents, some of whom may well have lived voluntarily in extremely crowded conditions, others of whom may have no viable options because of their modest incomes.

Id. at 326. In the 2001 update of his nationally-recognized treatise on fair housing law, Professor Schwemm noted: "The question of what constitutes 'reasonable' occupancy standards has continued to cause problems throughout the 1990s." HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6.

29. 209 F.3d 626 (6th Cir. 2000).

30. The Sixth Circuit held that governments bear the burden of proof to demonstrate that their occupancy restrictions are reasonable but otherwise deferred to the governments setting of an occupancy standard as a "legislative act." See *infra* discussion Part II.A.3.

31. See, e.g., *Reeves v. Rose*, 108 F. Supp. 2d 720, 724 (E.D. Mich. 2000); *CHRO v. J.E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *10-15 (Conn. Super. Ct. July 20, 2001).

32. "Last summer, the Census Bureau announced that Latinos had surpassed blacks as the country's largest minority, with blacks making up 13.1 percent of the population in 2002, and Hispanics 13.4 percent." Mireya Navarro, *Blacks and Latinos Try to Find Balance in Touchy New Math*, N.Y. TIMES, Jan. 17, 2004, at A1. "Because of both differences in fertility and immigration, a greater number of younger, more family-structured households will be minority households. . . . A large part of future minority growth is among Hispanic households currently in residence." JOHNSON & CIGNA, *supra* note 6, at v-vi. Immigration by both Hispanics and Asians is likely to continue. Six states are most likely destinations for Hispanic immigrants: California, Texas, New York, New Jersey, Florida, and Illinois. *Id.* at vii.

national housing crisis continues unabated,³³ *City of Richmond Heights*' broad definition of "reasonable" together with a "safe harbor" defense threaten to undercut these families' fair housing rights.³⁴

Part I recounts the adoption of the FHAA's familial status provision and the "reasonable" standard exemption.³⁵ In Part II, analyzes relevant case law and the legislative history to demonstrate that "reasonable" must mean "non-discriminatory." I argue that the *City of Richmond Heights* "reasonable" standard is wrong because it fails to incorporate this needed non-discrimination element. I suggest that a better alternative "reasonable" standard can be derived from *Elliott v. City of Athens*,³⁶ a 1992 Eleventh Circuit decision. In the process of deriving an alternative "reasonable" standard, the article confronts the conundrum caused by Congress' language in the "exemption" and its legislative history which has heretofore been ignored by the courts. Part IV offers a potential justification of the safe harbor extension and clarifies how courts should apply it. The article concludes that if courts apply the safe harbor defense, they should require private housing provider defendants to demonstrate that the governmental occupancy restrictions upon which they rely qualify for the exemption. Courts

33. See, e.g., NATION'S HOUSING, *supra* note 8.

34. Most enforcement of residential occupancy standards is done by private housing providers when tenants apply for apartments. Most FHAA challenges of residential occupancy standards are against private housing providers. See, e.g., *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739 (9th Cir. 1996); *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992); *Reeves*, 108 F. Supp. 2d at 720; *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991); *Burnett v. Venturi*, 903 F. Supp. 304 (N.D.N.Y. 1995); *CHRO*, 2001 WL 951374; *Human Rights Comm'n v. LaBrie, Inc.*, 668 A.2d 659 (Vt. 1995). Private housing provider defendants regularly raise the safe harbor defense. If accepted by courts, this exemption would potentially reach all private housing in every city. So, government-adopted standards could become the baseline for what is discriminatory under the FHAA. This means that this exemption could become a huge loophole for restrictive occupancy standards to become exempt from the FHAA.

35. Most law review literature on "overcrowding" concerns the important and serious problem of overcrowding in prisons, ironically the one situation in which the government has an affirmative duty to provide housing. There has been little attention to the regulation of internal density in law reviews. See Allen, *supra* note 17; Harry Kelly, *Discrimination and Occupancy Limits: Finding a Middle Ground*, 4 J. Affordable Housing & Community Dev. L. 51 (1995); Jim Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, 9 LA RAZA L.J. 103 (1996). Also see national occupancy standard expert Ellen Pader's articles cited herein. An article entitled "A Clarification of the Maximum Occupancy Restriction of the FHA," by Clover S. Pitts, 17 Miss. C. L. REV. 381 (1997), merely reviews the *City of Edmonds* case decided in 1995. A recent exception is Dravil, *supra* note 14.

36. 960 F.2 975 (11th Cir. 1992).

should reject the *City of Richmond Heights* "reasonable" standard and adopt one that comports with the exemption's language, Congress' legislative intent, and the FHAA's remedial purposes.

I. THE EXEMPTION AND THE SAFE HARBOR EXTENSION OF THE EXEMPTION

A. The FHAA "Familial Status" Provision

In 1968, Congress enacted the Fair Housing Act ("FHA") prohibiting housing discrimination on the basis of race, color, religion, or national origin.³⁷ The stated policy of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States."³⁸ Twenty years later, in the Fair Housing Amendments Act of 1988 ("FHAA"), Congress prohibited housing discrimination on the basis of "familial status."³⁹ The addition of familial status to protected classes followed extensive documentation of discrimination against families and the effects of such discrimination.⁴⁰ Congress' primary goal in enacting the familial status provision was to protect families from housing discrimination.⁴¹ It also sought to address the use of familial discrimination as a subtle form of racial discrimination.⁴² In particular, landlords accused of racial discrimination would often contend that their refusal to rent was based upon the presence of children in the household rather than the race of the proposed occupants.⁴³ There was

37. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968).

38. 42 U.S.C. § 3601 (2004).

39. Familial status is defined in the FHAA as "one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or other person having legal custody of such individual or individuals." 42 U.S.C. § 3602(k), Pub. L. 100-430, 102 Stat. 1619 (2004).

40. For example, a 1980 national study "found that 25% of the 79,000 rental units surveyed banned families with children entirely and another 50% imposed at least some restrictions." HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 11E-3 (citations omitted).

41. "The basic purpose of the familial status provisions was said to be to protect families with children from discrimination in housing, without unfairly limiting housing choices for elderly persons." HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 27, § 11E-6.

42. "Another purpose was to eliminate a form of discrimination that has a discriminatory effect on black and Hispanic households and that 'is often used as a smokescreen to exclude minorities from housing.'" *Id.* §§ 11E-6, E-7.

43. "Congress was also concerned that discrimination against children often camouflages racism or has an undesirable impact on minorities." *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 821 (2d Cir. 1992) (citing H.R. Rep. No. 711, 100th Cong.). See, e.g., *Reeves v. Rose*, 108 F. Supp. 2d 720, 728 (E.D. Mich. 2000) (denying defendant's motion for summary judgment on familial status and racial dis-

also, at least among some legislators, a concern about families' ability to afford housing.⁴⁴ Although the legislative history behind the provisions adding familial status as a protected category is not extensive,⁴⁵ the Supreme Court has recognized the FHA's "broad and inclusive" compass as a remedial statute.⁴⁶

The FHAA prohibits housing discrimination in housing production, sale, and finance as well as in landlord-tenant relations and zoning for its protected classes.⁴⁷ Congress recognized restrictive residential occupancy standards applied by governments and by private housing providers as one significant form of discrimination.⁴⁸

Restrictive residential occupancy standards may subject governments or private housing providers to liability under the FHAA's familial status provision in several ways.⁴⁹ If governments or private housing providers enforce residential occupancy standards that treat families differently from non-family households, they may be liable under a disparate treatment theory.⁵⁰ A residential

crimination claims where landlord's rental agent refuses to rent a two bedroom apartment to an African American family of four citing occupancy standard limiting maximum of three persons in a two bedroom apartment, but later tells a white tester to falsify his rental application to get around the occupancy restriction); HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 11E-2 (citing additional legislative history and pre-1988 cases).

44. See *United States v. Lepore*, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (citing statement of Rep. Miller).

45. Aside from some references in floor debates, there is only one legislative report, U.S. House of Representatives, Committee on the Judiciary, Report 100-711: The Fair Housing Amendments Act of 1988, 100th Cong., *reprinted in* 1988 U.S.C.C.A.N. 2173.

46. See *City of Edmonds v. Oxford House*, 514 U.S. 725, 731(1995) (citing *Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).

47. 42 U.S.C. §§ 3603-3608, 3617, 3631 (2004).

48. Pre-1988 cases in which landlords defended their refusals to rent based upon children or too many children include *Fred v. Kokinokos*, 347 F. Supp. 942 (E.D.N.Y. 1972) and *Bush v. Kaim*, 297 F.Supp. 151 (N.D. Ohio 1969). Courts applying the statute have also recognized the discriminatory potential of restrictive occupancy standards. For example, in *United States v. Tropic Seas*, the court stated, "Clearly, Tropic Seas' occupancy provision has a direct 'discriminatory effect' on the Sallees; the provision impacts on them based on their familial status by restricting their choice of housing." 887 F. Supp. 1347, 1360 (D. Haw. 1995). Plaintiff's statistical expert indicated that "Tropic Seas' occupancy provision regarding studio and one-bedroom apartments would exclude 92 to 95% of all families with children, but only 19 to 21% of all families without children." *Id.*

49. This article focuses on concerns about claims of discrimination under "familial status." Plaintiffs alleging that occupancy standards discriminate on the basis of race, color, national origin, or handicap can also bring a suit under the FHAA.

50. Numerous types of disparate impact claims have been brought against landlords. Variations of this type of claim include if a landlord will accept three adults but

occupancy standard that does not mention family status is not immune from a charge that discriminates on the basis of family status.⁵¹ If governments or private housing providers enforce residential occupancy standards that disproportionately burden families, they may be liable under a disparate impact theory.⁵²

B. The Exemption for “Reasonable” Governmental Occupancy Standards

During Congressional consideration of the bill that would become the FHAA, both governments and private housing providers were concerned that the “familial status” provision would create significant new liability for their traditional regulation of internal density and change the relationship between governmental and private regulation of internal density.⁵³ Before the FHAA, with few exceptions, governments could regulate internal density under the police power subject only to deferential “rational basis” review if an ordinance was challenged as offending due process or equal

not a mother and her two children, if a landlord accepts a household of three unrelated persons but not a family of four persons for a two-bedroom apartment, or if a landlord would rent to two parents and two children but not to single mother and three children. For an example of the latter, see *Reeves v. Rose*, 108 F. Supp. 2d 720, 728 (E.D. Mich. 2000). The U.S. Department of Justice has successfully prosecuted claims of discriminatory treatment against several local governments, including three cities in Illinois (Cicero, City of Elgin, and Waukegan). See Pader, *Spaces of Hate*, *supra* note 13, at 889-91 (describing the Illinois cases). In Wildwood, N.J., the Department of Justice found that enforcement of a new occupancy ordinance was targeted only at potential Latino home buyers. Ellen Pader, *Restricting Occupancy, Hurting Families*, Planners Network, available at <http://www.plannersnetwork.org/htm/pub/archives/134/pader.htm> (last visited August 24, 2004).

51. For example, courts might find a violation of the FHAA where there is evidence that a neutral occupancy rule was put in place in order to discriminate based upon familial status to favor households without children. See, e.g., *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991); *Human Rights Comm’n v. LaBrie, Inc.*, 668 A.2d 659 (Vt. 1995).

52. By 1988, the applicability of disparate impact theory of discrimination was well established in fair housing law. See *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977) (recognizing impact theory in FHAA and setting out four part test). The fact that disparate impact theory could be used to prove liability for familial status based upon a facially neutral residential occupancy standard was confirmed in 1992 by the first federal appellate decision applying the exemption to an occupancy restriction. See *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) (remanding case because the district court erred in failing to apply disparate impact test). While occupancy cases can and have been brought on a disparate treatment theory of discrimination, this article is directed only to disparate impact cases.

53. See *infra* Part III.

protection.⁵⁴ Private housing providers were merely subject to (usually local) government occupancy standards: they could not “overcrowd” their properties, but they were free to restrict occupancy more than governmental standards required.

Governments and private housing providers realized that the addition of “familial status” would change this traditional regulatory structure. Congress was not proposing to completely preempt state and local government regulation of internal density, but to restrict it by introducing a novel anti-discriminatory limitation to governmental regulation of internal density. With the new legislation it would become possible that a government’s occupancy restrictions could be a constitutionally valid exercise of police power but *still* might violate the FHAA as discriminatory.⁵⁵ In addition, private housing providers would now become subject to another layer of regulation—both to state and local laws regulating overcrowding *and* to the FHAA for possible discrimination for their restrictions on occupancy.⁵⁶ Many private housing providers had limited occu-

54. Professor Schwemm surveys the limited protection against discrimination families received prior to 1988. HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 11E:1-5. He concludes, “In short, not a single jurisdiction had a law whose coverage and remedies were as broad as those envisioned by the 1988 Amendments Act, which called for banning familial status discrimination in every one of Title VII’s substantive provisions (excepting only housing for older persons) and which provided the same enforcement procedures and remedies for familial status discrimination as were made available to victims of more traditional forms of discrimination.” For another discussion of pre-1988 anti-discrimination law, see Allen, *supra* note 17, at 305-07.

55. In fact, some elected officials feared that a broad interpretation of the FHAA could ruin single family neighborhoods by completely overriding local zoning authority. In the first case regarding the exemption to reach the Supreme Court, *City of Edmonds v. Washington State Building Code Council*, the Ninth Circuit reversed a district court’s decision which found a local jurisdiction’s definition of “family” exempt from the FHAA. 18 F.3d 802 (9th Cir. 1994). “The basic building block for the exercise of zoning powers by a local jurisdictions [sic] is the creation of a zone in each community set aside for the residential use of single families.” *Petition for Cert.*, No. 94-23 1994 WL 16011973 at *18 (June 13, 1994). “The Ninth Circuit’s decision in this case would remove the basic zoning block of single family residential zoning and place the federal courts [in the place of zoning boards]. Nothing in the legislative history indicates Congress’ intent to overturn single family zoning.” *Id.* at *22-23.

56. After the enactment of the FHAA, there were three possible relationships between local government occupancy standards and private housing provider occupancy standards vis-à-vis FHAA and local code enforcement liability. First, if a private housing provider’s policy is less restrictive than applicable local governmental occupancy standard (i.e. would allow more people to occupy room that applicable governmental restriction allows—allow “overcrowding” by governmental definition), it would be subject to a code enforcement action. And, if the applicable local governmental standard was particularly restrictive, it could also be violating the FHAA. Second, if a private housing provider’s policy is the same as the applicable local gov-

pancy to adults or placed restrictions on families with children for decades prior to 1988.⁵⁷ These new provisions raised concerns about their liability. They seemed caught in a bind: if they accepted families in apartments that private housing providers thought inappropriate for families, they might be liable in tort; if they did not accept families, they might be liable for discrimination based upon familial status under the FHAA.⁵⁸

In these ways, the possibility of familial status discrimination liability created uncertainty among both governments and private housing providers about the legality of their traditional efforts to regulate internal density.

Congress recognized these concerns by including a specific exemption in the FHAA which limits liability for discrimination claims based upon occupancy restrictions.⁵⁹ The exemption provided: "Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum

ernmental occupancy standard, it would be in compliance with it, but they might still violate the FHAA if the local governmental occupancy standard violates the FHAA. Third, if private housing provider's policy is more restrictive than the applicable local governmental occupancy standard, it would not violate it, but might still violate the FHAA.

57. See *supra* note 40.

58. See, e.g., *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 100th Cong., 656 (1987) (remarks of Rep. Edwards) (questioning whether under the proposed FHAA a landlord must allow a family with ten children to live in a two-bedroom apartment). Housing providers feared they would have to accommodate families even to the extent of violating governmental occupancy codes. HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6. Housing providers also expressed their concerns to HUD during the notice and comment period while it drafted regulations to implement the FHAA. See HUD Preamble, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989). Landlords and investors in apartments feared that FHAA familial status provisions would force them to accept tenants that their premises are not appropriate for thus exposing them to tort liability, force them to accept more tenants than they feel they can "manage," and force them to deplete their property at a faster rate than they prefer. See, e.g., *United States v. Tropic Seas*, 887 F. Supp. 1347, 1354 (D. Haw. 1995) (defendant sent letter to HUD Secretary Jack Kemp regarding fear of exposure to tort liability if forced to allow children, and sought an exemption for apartments to exclude children). A report commissioned by concerned interest groups warned that enforcement of FHAA law against occupancy standards would have the unintended consequence of reducing the supply and quality of affordable housing. WILLIAM C. BAER, RENTAL CROWDING AND OCCUPANCY STANDARDS: A LITERATURE REVIEW AND POLICY ANALYSIS (1995); see also Allen, *supra* note 17, at 301-04 (discussing private housing providers' opposition to familial status provisions).

59. In addition to this exemption, the FHAA recognized several other explicit exemptions from its provisions: certain dwellings, certain religious organizations and private clubs, and certain housing for older people were exempted. 42 U.S.C. §§ 3603(b), 3607 (2004).

number of occupants permitted to occupy a dwelling.”⁶⁰ In January 1989, HUD promulgated its final regulations on the FHAA. The one sentence regulation regarding occupancy standards merely quoted the exemption’s statutory language.⁶¹ HUD also included an extensive “Preamble” intended as “analytical guidance” to its final regulations on the FHAA.⁶² Regarding the exemption, the Preamble only repeated language from the House Report that provided: “That provision is intended to allow reasonable governmental limitations on occupancy to continue as long as they are applied to all occupants, and do not operate to discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin.”⁶³ HUD has provided no guidance as to what constitutes a “reasonable” governmental occupancy restriction for purposes of the exemption.⁶⁴

60. 42 U.S.C. § 3607(b)(1) (2004).

61. 24 C.F.R. § 100.10(a)(3) (2004). The same sentence is repeated at 24 C.F.R. § 100.301(b) under Subpart E: Housing for Older Persons.

62. 54 Fed. Reg. 3232. The Preamble was published as an appendix to the final regulations in the Federal Register for the public’s convenience in response to the request of a commenter “to assure its availability to the public.” *Id.* at 3280.

63. *Id.* at 3237 (citing H.R. REP. NO. 711, 100th Cong. (1988)). “Many jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit; HUD also issues occupancy guidelines in its assisted housing programs. Reasonable limitations do not violate the Fair Housing Act as long as they apply equally to all occupants.” *Id.* at 3253 (citing 24 C.F.R. § 100.301 (2004)). There is also a reference to the exemption in the section of HUD’s regulations relating to HUD’s certification of substantially equivalent agencies in 24 C.F.R. § 115.202(c) (2004): “The requirement that the state or local law prohibit discrimination on the basis of familial status does not require that the state or local law limit the applicability of any reasonable local, state or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”

64. HUD has never issued any formal regulations on what constitutes “reasonable” governmental occupancy standards. On July 12, 1995, Nelson Diaz, HUD’s General Counsel, issued an “Internal Memorandum,” in force for about three months, which stated that governmental restrictions which were more restrictive than the standard articulated in that Memorandum would be subject to further evaluation to determine if they were “reasonable.” Memorandum from Nelson A. Diaz, U.S. Department of Housing and Urban Development, to All Field Assistant General Counsel (July 12, 1995) (on file with the author) (regarding occupancy standards under the Fair Housing Act). A subsequent memo, issued by Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Initiatives, officially withdrew the Diaz Memorandum. Memorandum from Elizabeth K. Julian, Acting Deputy Assistant Secretary for Policy and Initiatives, to Fair Housing Enforcement Directors, Investigative Division Directors, FHAP, and FHIP Divisions (Sept. 25, 1995) (on file with the author) (regarding occupancy cases). In litigation against the Town of Cicero, Ill., the Department of Justice took the position that an occupancy code would be “reasonable” “if the ordinance allows at least as many persons as would be allowed under section PM-405 of the 1996 Building Officials & Code Administrators International, Inc. National Property Maintenance Code (with additional qualifications).”

II. CLARIFYING THE FHAA "EXEMPTION"

Since 1989, the law of familial discrimination as applied to occupancy standards and the exemption has become quite muddled. There is no dispute that the exemption applies to reasonable *governmental* standards. The statutory language,⁶⁵ the legislative history,⁶⁶ HUD's comments⁶⁷ and case law,⁶⁸ all agree on this point.⁶⁹ There has not been a clear understanding, however, of what consti-

United States v. Town of Cicero, No. 93C-1805, 1997 WL 337379, at *3 (N.D. Ill. June 16, 1997). This position was taken during the time the Diaz Memorandum was in force. Federal agency internal memoranda and litigation positions, however, are not typically accorded deference by courts.

65. The statutory language appears plain; it specifically refers to "local, State and Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1) (2004). In this frequently used phrase, "local" refers to units of government subordinate to States, such as municipalities, cities, townships, and counties.

66. These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R. REP. NO. 711, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2192.

67. HUD Preamble, 54 Fed. Reg. 3232 (Jan. 23, 1989). "Many jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit." *Id.*

68. Several decisions have applied the language to governmental restrictions challenged as violating the FHAA. See *United States v. Town of Cicero*, No. 93C-1805, 1997 WL 337379, at *3 (N.D. Ill. June 16, 1997) (denying defendant's motion for summary judgment, *inter alia*, because of lack of evidence that its ordinance was "reasonable" and thus qualifying for exemption). The exemption was also challenged as "void for vagueness" by a private housing defendant in a 1995 district court case. *United States v. Tropic Seas*, 887 F. Supp. 1347, 1362 (D. Haw. 1995). The court responded: "The Act is clear on its face that it is illegal to discriminate on the basis of familial status. Similarly, § 3607(b)(1) is clear on its face regarding its application to government ordinances or rules." *Id.* at 1362; see also *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000) (clarifying burdens of proof and "reasonable" standard of exemption for government defendants' occupancy restrictions); *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992) (holding that zoning ordinance definition of family was eligible for the exemption), *overruled by* *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995).

69. Part III, *infra*, discusses whether courts should extend this exemption for reasonable governmental standards to provide a "safe harbor" defense for private housing providers whose occupancy standards are consistent with governmental occupancy restrictions.

tutes a "reasonable" governmental restriction which qualifies for the exemption.⁷⁰

This section reviews the three principal cases that shed light on the meaning of "reasonable." *City of Edmonds* is the only Supreme Court case to consider the exemption.⁷¹ *City of Edmonds* Court, however, did not define "reasonable." Instead, it identified three requirements for *eligibility* for the exemption.⁷² Other courts have provided three distinct interpretations of the "reasonable" standard.⁷³ The district court in *City of Richmond Heights* equated "reasonable" with the traditional "rational basis" test.⁷⁴ The Sixth Circuit *City of Richmond Heights* court reversed the lower court; it articulated a standard in which the government bears the burden of proof but otherwise adopted the traditional "rational basis" test.⁷⁵ Finally, the court in *Elliot v. City of Athens* interpreted "reasonable" to require balancing the governmental objective against the amount of discrimination caused by the occupancy standard.⁷⁶

What follows is a complex argument. For this reason, I offer the following summary of my reasoning. In creating the "reasonable" standard Congress appears to be requiring that, in order to be exempt from FHAA liability, governmental occupancy restrictions must meet some level of scrutiny that is in between being merely constitutionally valid (which would effectively read "reasonable" out of the statute), on the one hand, and being in full compliance with the FHAA's normal standard of non-discrimination on the other (which would effectively read the exemption itself out of the statute because it would be a nullity). Recognizing the inherent ambiguity of the term "reasonable," I rely on legislative history to argue that "reasonable" must mean *non-discriminatory*.⁷⁷ But the challenge is not simply to find an intermediate non-discriminatory

70. Professor Schwemm identifies the meaning of "reasonable" as an unresolved issue. HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6.

71. 514 U.S. 725.

72. *See id.*; *infra* Part II.A.1.

73. Many of the cases brought against governmental entities were brought by HUD or the Department of Justice and were settled before trial. *See, e.g.,* United States v. Town of Cicero, No. 93C-1805, 1997 WL 337379, at *3 (N.D. Ill. June 16, 1997) (denying defendant's motion for summary judgment, *inter alia*, because of lack of evidence that its ordinance was "reasonable," but not defining "reasonable").

74. I reject this version as reading "reasonable" out of the statute. *See infra* Part II.

75. *Id.* I reject this version of the standard as failing to incorporate a necessary non-discriminatory dimension.

76. *Id.* The *City of Athens*'s interpretation has been ignored since its primary holding was overruled by the *Edmonds* Court.

77. *See infra* Part II.

standard, because Congress' specific language in the legislative history "not operate to discriminate" requires that "reasonable" mean non-discriminatory as understood in a disparate impact theory. I then argue that it is impossible to identify two different disparate impact standards (the "duplication problem"), one to apply to determine if an ordinance qualifies for the "exemption," and another to apply if it does not qualify.⁷⁸ To save the exemption from being a nullity, I argue that it should be interpreted to be the sole defense for governments' occupancy standards from FHAA liability.⁷⁹ I then derive two plausible versions of a "reasonable" standard based upon the Eleventh Circuit's opinion in *City of Athens*:⁸⁰ a "reasonable balance" standard and a "reasonable means-ends fit" standard.⁸¹

A. *City of Edmonds, the City of Richmond Heights Cases, and City of Athens*

1. City of Edmonds

The United States Supreme Court interpreted the exemption only once: in the 1995 case *City of Edmonds v. Oxford House, Inc.*⁸² The Court gave some important guidance regarding the ap-

78. See *infra* Part II.C.

79. See *infra* Part II.D.

80. *Elliott v. City of Athens*, 960 F.2d 975, 983 (11th Cir. 1992).

81. See *infra* Part II.D.

82. 514 U.S. 725 (1995). The majority's 6-3 opinion, authored by Justice Ginsberg, was expressed in a "bright line" fashion treating the issue as primarily one of definition. This is a common way that many statutory exemptions work. Justice Thomas disagreed with the majority's interpretation of the scope of exemption. *Id.* at 738. In a vigorous dissent, he took the majority to task for its supposed "plain reading" of the statutory text and its importation of planning concepts that Congress may not have been aware of. *Id.* at 738-48.

Section 3607(b)(1) limits neither the permissible purposes of a qualifying zoning restriction nor the ways in which such a restriction may accomplish its purposes. Rather, the exemption encompasses "any" zoning restriction—whatever its purpose and by whatever means it accomplishes that purpose—so long as the restriction "regard[s]" the maximum number of occupants.

Id. at 747.

Justice Thomas also wrote:

[T]he category of zoning rules the majority labels "maximum occupancy restrictions" does not exhaust the category of restrictions exempted from the FHA by § 3607(b)(1). The plain words of the statute do not refer to "available floor space or the number and type of rooms"; they embrace no requirement that the exempted restrictions "apply uniformly to all residents of all dwelling units"; and they give no indication that such restrictions must have the "purpose . . . to protect health and safety by preventing dwelling overcrowding."

plication of the exemption, but did not directly determine the meaning of "reasonable."⁸³

In *City of Edmonds*, a group home provider challenged a local zoning restriction defining "family" for single family zones as discriminatory under the FHAA.⁸⁴ The ordinance's definition of "family" as "an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage" prevented the operation of a ten to twelve person group home.⁸⁵ The defendant city claimed its zoning ordinance qualified for the exemption as a reasonable occupancy standard.⁸⁶ The district court held that the Edmonds ordinance was exempt from the FHAA under Section 3607(b)(1).⁸⁷ And the Ninth Circuit reversed and remanded, holding that the ordinance was not exempt.⁸⁸

The meaning of "reasonable" was presented as part of the question for review.⁸⁹ The parties fully briefed the issue⁹⁰ and it was

Id. at 745-46. The decision's "plain language" reading was also criticized as a form of "new textualism." *Leading Cases*, 109 HARV. L. REV. 111, 314-16 (1995). New textualism is an interpretative method that "purports to discern a statute's 'plain language,'" but is actually driven more by other concerns, such as policy interests. *Id.* at 314.

83. See *infra* note 92.

84. See 514 U.S. at 729-30.

85. See *id.* at 729.

86. See *id.* at 729-30.

87. See *City of Edmonds v. Washington State Bldg. Council*, No. C91-215 (D. Wash. July 14, 1992) (order on cross-motions for summary judgment).

88. See *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806-07 (9th Cir. 1994).

89. According to petitioners, the "Question Presented for Review" in *Edmonds* was: "Does the traditional zoning definition of a 'single family,' established to limit the use and occupancy of residences in single family residential zones, constitute a 'reasonable occupancy limitation' pursuant to the exemption created by the Fair Housing Act Amendments, 42 U.S.C. Sect. 3607(b)(1) . . . ?" Pet. for Writ of Cert., *City of Edmonds*, 18 F.3d 1802, at *1 (No. 94-23) 1994 WL 16011973. "At issue is whether [Edmond's provisions] constitute such a reasonable occupancy limitation." *Id.* at *3. The Respondents agreed that the issue involved the meaning of "reasonable." "The question presented is whether the City's zoning provision falls within the FHAA's exemption for reasonable maximum occupancy standards." Brief for Respondents Oxford House, Inc. at *1, *City of Edmonds* (No. 94-23), 1994 WL 16012016.

90. Petitioner's specifically argued how the Edmonds ordinance was "reasonable" throughout its Brief on the Merits. See Petitioner's Brief on the Merits, at *10, 18, 21-22, 24-32, *City of Edmonds* (No. 94-23), 1994 WL 704077; Petitioner's Reply Brief on the Merits, *City of Edmonds* (No. 94-23), 1995 WL 258886. The Pacific Legal Foundation, an amicus curiae of the Petitioner, similarly contended that the ordinance was "reasonable" in its brief. Motion for Leave to File Brief Amicus Curiae and Brief amicus curiae of Pacific Legal Foundation in Support of the Petition for Writ of Certiorari at *6-7, *City of Edmonds* (No. 94-23), 1994 WL 16012092. Respondents specifically discussed "the difficulty of divining an appropriate test" for the reasonable in the

discussed in oral argument before the Supreme Court.⁹¹ The Supreme Court, however, did not address the meaning of "reasonable" in its majority opinion,⁹² but it did give substantial guidance on when the exemption should be applied. The *Edmonds* Court explained that the provision "entirely exempts from the FHA's compass 'any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.'" ⁹³ The Court held that, "Section 3607(b)(1)'s absolute exemption removes from the FHA's scope only total occupancy limits, i.e. numerical ceilings that serve to prevent overcrowding in living quarters" and not "provisions designed to foster the family character of a neighborhood."⁹⁴ The Court continued, "[m]aximum occupancy restrictions . . . cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms These restrictions ordinarily apply uniformly to *all* residents of *all* dwelling units. Their purpose

exemption in their brief. Respondents' Brief at *14-15, 17-18, 32-35, 47, *City of Edmonds* (No. 94-23), 1994 WL 28444, .

91. At oral argument, the meaning of the "reasonable" standard was the very first topic raised by Petitioner's counsel and discussed in colloquy with the Justices. Oral Argument of W. Scott Snyder on Behalf of the Petitioner at *4-11, *City of Edmonds* (No. 94-23), 1995 WL 117624.

92. *City of Edmonds*, 514 U.S. 725 (1995). Nowhere in the majority opinion does the Court purport to interpret "reasonable." Justice Thomas, in dissent, mentions the issue as not decided in two footnotes. First, he writes, "I would also remand the case to the Court of Appeals to allow it to pass on respondents' argument that petitioner's zoning code does not satisfy § 3607(b)(1)'s requirement that qualifying restrictions be 'reasonable.'" *Id.* at 741 n.3. "[A]s I have already noted . . . restrictions must be 'reasonable' in order to be exempted by § 3607(b)(1)." *Id.* at 747 n.8.

93. *Id.* at 728. This type of regulation is often called a residential occupancy standard and is often contained in a local housing or building code. "Occupancy restrictions are typically found in housing codes. Housing codes . . . set minimum standards for the occupancy of residential units. Items covered in such codes may include minimum space per occupant The major purpose of housing codes is to prevent overcrowding and the blighting of residential dwellings." *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994) (citations omitted). Justice Thomas, in dissent, identifies what the majority defines as the kind of regulation eligible for the exemption as a form of "density control." *Id.* at 741. "Because § 503(b), as the majority describes it, 'caps the number of occupants a dwelling may house, based on floor area,' . . . it actually caps the density of occupants, not their number." *Id.*

94. *City of Edmonds*, 514 U.S. at 728. The Court's description of the exemption as "absolute" is curious and not based in language from any cited source. It may suggest that the Court was interpreting the provision as a typical "exemption" operating as an affirmative defense.

is to protect health and safety by preventing dwelling overcrowding.”⁹⁵

In contrast to residential occupancy standards, the Court held that zoning regulations—such as definitions of “family” which often include a limited number of unrelated persons allowed to reside in single-family zones but which primarily limit occupancy by defining the permissible composition of household—were not eligible for the exemption.⁹⁶

In excluding such zoning regulations, the majority embraced the view that the type of regulations eligible for the exemption were only those aimed at protecting health and safety. Other governmental objectives, however legitimate they may be under the police power, could not support regulations that qualified for the exemption.⁹⁷ The Court thereby reaffirmed the traditional health and safety policy justification behind regulation of internal density to prevent “overcrowding.”⁹⁸

The *Edmonds* Court suggested a rationale for the exemption. The exemption is justifiable as a means of protecting governments from liability under FHAA when they fulfill their duty to protect general health and safety of their residents by passing neutrally ap-

95. *Id.* at 733. The model occupancy codes cited by the *Edmonds* Court as exemplary are grounded in preventing overcrowding for health and safety purposes, for example ensuring enough space for exit in case of fire or other emergency. *See id.*; Letter from Kenneth M. Schoonover, Vice President, Codes and Standards, Building Officials & Code Administrators International, Inc., to Clarine Nardi Riddle (Aug. 2, 1995) (on file with author) (“Occupancy limitations in existing buildings are regulated as a health related issue The floor area allowances for residential occupancies . . . are intended to establish the smallest number of occupants for whom exits must be provided in new construction.”). Public health and safety is the basis for the other kinds of more familiar occupancy standards, for example restaurant, elevator, vehicles, and public transportation.

96. *City of Edmonds*, 514 U.S. at 734-35.

97. *Id.* at 733. Other zoning regulations do not necessarily violate the FHAA, but they do not qualify for this exemption.

98. The Court also cited the majority in *Moore v. East Cleveland*, 431 U.S. 494 (1977). *City of Edmonds*, 514 U.S. at 733-34. The *Moore* Court made the same point: the purpose of maximum occupancy restrictions is to prevent overcrowding and for related health and safety concerns. *Moore*, 431 U.S. at 521. Justice Stevens wrote, “to prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space.” *Id.* (Stevens, J., concurring). Justice Stewart, in dissent, also distinguished restrictions designed to “preserv[e] the character” of a residential area from prescription of “a minimum habitable floor area per person,” in the interest of community health and safety. *Moore*, 431 U.S. at 539; *see Pader, Housing Occupancy Codes*, *supra* note 6 (“The official purpose of the standards is to promote health and safety by eliminating undue overcrowding.”).

plied numerical limits on density.⁹⁹ The *Edmonds* Court emphasized that its decision narrowly addressed the single question before the Court—whether a zoning ordinance defining “family” was eligible for the exemption.¹⁰⁰ The Court also stressed the broad remedial nature of the FHAA and emphasized that this exemption should be construed narrowly.¹⁰¹

The *City of Edmonds* opinion seems to distinguish between governmental occupancy regulations that are “eligible” for the exemption in the first place, and those that actually “qualify” for it by being “reasonable.”¹⁰² In fact, rather than interpret the “reasonable” standard, the *City of Edmonds* Court offered an important and significant narrowing of what governmental restrictions that affect occupancy can be eligible for this exemption. In particular, the *City of Edmonds* Court provides three eligibility criteria for the exemption: 1) that it be a maximum numerical restriction on occupancy (what this article will refer to as the “permissible type” requirement);¹⁰³ 2) that the governmental restriction “apply to all

99. See *City of Edmonds*, 514 U.S. 725; see also *Elliott v. City of Athens*, 960 F.2d 975, 983 (11th Cir. 1992) (“The exemption contained in Sect. 3607(b)(1) relating to maximum occupancy limitations is an attempt on the part of Congress to advance the interests of the handicapped without interfering seriously with reasonable local zoning.”). HUD’s view of the policy rationale behind the exemption complements this. HUD explained that Congress provided this exemption to governmental entities in part because of its intention that local and state governments take the lead in establishing fair housing standards: “While the statutory provision providing exemptions to the Fair Housing Act states that nothing in the law limits the applicability of any reasonable Federal restrictions regarding the maximum number of occupants, there is no support in the statute or its legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. This interpretation is consistent with Congressional reliance on and encouragement for States and localities to become active participants in the effort to promote achievement of the goal of Fair Housing.” HUD Preamble, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989). The FHA allowed states to adopt their own fair housing laws that could be more protective of housing rights than the federal fair housing act. See generally 24 C.F.R. § 115.

100. See *City of Edmonds*, 514 U.S. at 730-32.

101. *Id.* at 731-32. “Accordingly, we regard this case as an instance in which an exception to a ‘general statement of policy’ is sensibly read ‘narrowly in order to preserve the primary operation of the [policy].’” *Id.* (citations omitted).

102. Instead of defining “reasonable,” the *Edmonds* Court created an eligibility analysis that was not explicitly provided in the statute. This analysis, premised on a “plain reading” of the statute, evoked a blistering dissent and other commentary criticizing its textualism. See *id.* at 738-48.

103. See *id.* at 728. “[Section] 3607(b)(1)’s absolute exemption removes from the FHA’s scope only total occupancy limits, i.e. numerical ceilings that serve to prevent overcrowding.” *Id.*

occupants" (the "uniform application" requirement),¹⁰⁴ and, 3) that it be adopted for health and safety reasons to prevent overcrowding (the "permissible purpose" requirement).¹⁰⁵ Without directly saying so, the *City of Edmonds* Court held that government restrictions that met its eligibility criteria would qualify for the exemption if they were "reasonable." But it left the task of defining "reasonable" to lower courts.¹⁰⁶

2. *The City of Richmond Heights Cases*

In *Fair Housing Advocates Assn. v. City of Richmond Heights*,¹⁰⁷ a local fair housing organization challenged the facially neutral occupancy ordinances of three cities in Ohio: the City of Bedford Heights, the City of Fairview Park, and the City of Warrensville Heights.¹⁰⁸ The City of Bedford Heights ordinance required "200 square feet of habitable space for the first person and 150 square feet of habitable space for each additional person."¹⁰⁹ The City of Fairview Park's occupancy ordinance required "at least 300 square feet of habitable floor area for the first occupant thereof and at least 150 additional square feet . . . for every additional occu-

104. See *id.* at 733. "These restrictions ordinarily apply uniformly to all residents of all dwelling units." *Id.* (emphasis omitted).

105. See *id.* at 734 (citing H.R. REP. NO. 100-711, 100th Cong. (1988)). The Court cites to the House Report to reinforce its interpretation of the exemption.

106. An interpretation of the *Edmonds* Court's opinion as supplying the definition of reasonable, precisely in identifying the three requirements, fails because the *Edmonds* Court majority never purports to define "reasonable." And, the Court's explicit "plain language" method could not plausibly interpret the single word "reasonable" with such specificity. While no commentators addressing the issue have interpreted *Edmonds* to define "reasonable," one state court did so in an unpublished opinion applying its own state fair housing law. See *CHRO v. J.E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *10-12 (Conn. Super. Ct. 2001). Note that while *City of Edmonds* effectively overruled *City of Athens*' holding as to what kinds of governmental restrictions are eligible for the exemption, because the *Edmonds* Court did not interpret the term "reasonable," it did not reach the *Athens*' Court interpretation of the term "reasonable."

107. 998 F. Supp. 825 (D. Ohio 1998). The city which gave the case its name, Richmond Heights, was not a defendant at the time of trial. The plaintiff had filed a stipulation voluntarily dismissing it. *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 209 F.3d 626, 628 n.1 (6th Cir. 2000).

108. *City of Richmond Heights*, 998 F. Supp. at 825.

109. *Id.* at 827. The ordinance further requires a minimum of 650 square feet of habitable space for dwellings having four occupants." *Id.* "Habitable floor area" is generally defined in the ordinances as "the floor area in any room in any multiple dwelling, which floor area is required to be contained within such multiple dwelling . . . in order to meet the minimum requirements of this [Housing] Code." *Id.* A "habitable room" is defined as "a room or enclosed floor space used or intended to be used for living, sleeping, or eating purposes." *Id.* at 826-27.

pant.”¹¹⁰ The City of Warrensville Heights occupancy ordinance required “at least 350 square feet of habitable floor area for the first occupant thereof and at least an additional 100 square feet . . . for every additional occupant.”¹¹¹ In their defense, the cities claimed that their ordinances qualified for the reasonable governmental occupancy restriction exemption.¹¹²

In sum, the district court in *City of Richmond Heights* equated “reasonable” to the “rational basis” standard used to test the constitutionality of legislative acts adopted as exercises of the police power for the general health, welfare, and safety.¹¹³ The court satisfied itself that the ordinances were eligible for the exemption under *City of Edmonds* finding that “[t]he three ordinances at issue in this trial place a cap on the total number of occupants per dwelling unit based on a minimum number of square feet in the unit and fall within the exemption from the Fair Housing Act’s governance found at 42 U.S.C. § 3607(b)(1).”¹¹⁴ The court then explained that as exercises of “local government’s police power on social legislation” the ordinances were “entitled to a presumption of validity.”¹¹⁵ “Plaintiff has the burden to show that the ordinance is unreasonable.”¹¹⁶ The court stated that the “city defendants need only point out ‘a state of facts either known or which could be reasonably assumed’ to support their ordinances in order to be enti-

110. *Id.* at 827. “Further, a minimum of 750 square feet is required for a dwelling unit with four occupants. [E]ach bedroom in a dwelling unit must have a minimum of 80 square feet of habitable floor area for each bedroom for the first occupant and a minimum of 50 square feet for each additional occupant.” *City of Richmond Heights*, 209 F.3d at 629-30.

111. *City of Richmond Heights*, 998 F. Supp. at 827. “Further, the occupancy ordinance requires a minimum of 650 square feet of habitable space for dwellings with four occupants.” *City of Richmond Heights*, 209 F.3d at 630.

112. See *City of Richmond Heights*, 209 F.3d at 628-31.

113. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is the traditional authority for the “rational basis” test. This same argument was made and developed by the concurrence in the Sixth Circuit *City of Richmond Heights* case. 209 F.3d at 638-44. The district court recognized, however, that no HUD regulation was on point. It noted that HUD’s regulation regarding the exemption “tracks the language in 42 U.S.C. Sect. 3607(b)(1).” *City of Richmond Heights*, 998 F. Supp. at 830. It also noted that “HUD has no current regulations that apply to local government restrictions . . . that would be applicable to the defendants.” *Id.* The court also mistakenly cited another HUD regulation that was inapplicable, 24 C.F.R. 115.202(c), which concerns HUD’s determination of whether state fair housing laws can be certified as equivalent with federal fair housing law. See *id.*

114. *City of Richmond Heights*, 998 F. Supp. at 830. Here, the court partially applied one of the *Edmonds* Court’s eligibility criteria: the permissible type requirement.

115. *Id.*

116. *Id.*

tled to the presumption of validity.”¹¹⁷ While the parties had each introduced conflicting expert testimony as to the “reasonableness” of the ordinances, the cities prevailed on the court’s standard of review because they had provided evidence for a rational basis and the plaintiffs failed to show that the ordinances were unreasonable.¹¹⁸

By interpreting the “reasonable” standard to mean nothing more than having a rational basis, the district court in *City of Richmond Heights* held that any legislation that could survive a due process or equal protection attack as constitutionally valid would also be “reasonable” for purposes of the exemption to the FHAA.¹¹⁹ On this view of the reasonable standard, the FHAA provided no more protection for families from discrimination by governments than was already provided by the constitution for general social and economic legislation. But in enacting the FHAA, Congress clearly intended to go farther.¹²⁰ The *Richmond Heights* district court’s opinion effectively read the word “reasonable” out of the statute, contrary to fundamental principles of statutory interpretation.¹²¹ Standard canons of statutory interpretation and the Supreme Court require that every word of a statute is given meaning and effect if possible.¹²²

The Sixth Circuit *City of Richmond Heights* court rejected the district court’s interpretation of the “reasonable” test.¹²³ In a care-

117. *Id.*

118. *Id.* at 830-31. In response to Plaintiff’s evidence “tending to show that the ordinances of the three defendant cities had a disproportionate impact on large families seeking rental housing in these communities,” the court, without further discussion, simply concluded that Plaintiffs had not “shown the defendants intended to discriminate against large families, or have actually done so.” *Id.*

119. This article contends that “reasonable” must mean something more than merely rational.

120. “The Supreme Court noted that courts must remain ‘mindful of the Act’s stated policy to provide, within constitutional limitations, for fair housing throughout the United States.’” *Fair Hous. Advocates Ass’n. v. City of Richmond Heights*, 209 F.3d 626, 633 (6th Cir. 2000) (citing *City of Edmonds v. Oxford House, Inc.* 514 U.S. 725, 731 (1995)).

121. Combined with the “safe harbor” extension, such an interpretation could even lead to the perverse result that a housing provider imposing a discriminatorily restrictive occupancy standard escapes liability under the FHAA by claiming a “safe harbor” exemption relying upon a similarly restrictive and discriminatory governmental ordinance.

122. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute, rather than emasculate a section.’”) (citations omitted).

123. *City of Richmond Heights*, 209 F.3d at 636 (finding that the mere fact that an occupancy restriction is part of a valid municipal ordinance “does not remove [it] from the reasonableness requirement”).

fully crafted decision that considered the fair housing act statute, its legislative history, and administrative regulations,¹²⁴ the Sixth Circuit *City of Richmond Heights* court implicitly recognized the *City of Edmonds* Court's apparent distinction between eligibility for the exemption and qualifying for it.¹²⁵ The Sixth Circuit went on to hold that "[t]he exemption specifically requires that the ordinances be 'reasonable,' and in interpreting that exemption, we must give effect to this requirement."¹²⁶

Before doing that, however, the Sixth Circuit *City of Richmond Heights* court clarified the allocation of the burden of proof and the presumption of validity. Contrary to the district court's approach, the Sixth Circuit agreed with those federal courts that "have repeatedly concluded that the party claiming the exemption 'carries the burden of proving its eligibility for the exemption.'"¹²⁷ Therefore, the court reasoned, governmental restrictions challenged under the FHAA do not enjoy a presumption of reasonableness.¹²⁸

The Sixth Circuit *City of Richmond Heights* court found that the ordinances at issue met all three eligibility requirements set forth by the *City of Edmonds* Court.¹²⁹ Regarding the uniform applica-

124. *Id.* at 633. The court cited the actual final rule and some language from HUD's Preamble to the regulations.

125. *Id.* at 633 ("[The *Edmonds*] Court made clear that such restrictions are not simply 'rubber stamped' by the courts, but instead, require some level of scrutiny.").

126. *Id.* at 636.

127. *Id.* at 634. The *City of Richmond Heights* court did not interpret this burden of proof to be required by the "reasonable" standard but by a wholly separate principle. *Id.* at 634-35.

128. The Sixth Circuit's holdings regarding the allocation of the burden of proof have been followed by other courts. See, e.g., *Reeves v. Rose*, 108 F. Supp. 2d 720 (E.D. Mich. 2000); *CHRO v. J. E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *11. (Conn. Super. Ct. 2001). The dissent would have affirmed the district court's decision. Beyond an attitude of extreme judicial deference to the legislative branch, the only basis that the dissent offered to support this view are two quotes from the *City of Edmonds* Court opinion that employed unfortunate phrasing but were not endorsing this view. The *City of Edmonds* Court made a few statements that omitted the phrase "reasonable" as a requirement for the exemption, and appeared to substitute terms such as "complete" and "absolute." See, e.g., *City of Edmonds*, 514 U.S. at 728 ("The case presents the question whether a provision in petitioner City of Edmonds zoning code qualifies for Sect. 3607(b)(1)'s complete exemption from FHA scrutiny."). The court found that "rules that cap the total number of occupants in order to prevent overcrowding of a dwelling 'plainly and unmistakably' fall within Sect. 3607(b)(1)'s absolute exemption." *Id.* at 735. "Instead, Sect. 3607(b)(1)'s absolute exemption removes from the FHA's scope." *Id.* at 728.

129. *City of Richmond Heights*, 209 F.3d 626. In fact, however, this finding was contrary to the evidence as found by the district court. At least one of the ordinances (Bedford Heights) did not meet it because it applied "only to multi-family units of two or more units," thus applying only to some rental dwellings and not to all residents in all dwelling units. *City of Richmond Heights*, 998 F. Supp. 825, 828 (1998).

tion requirement, in its findings the Sixth Circuit *City of Richmond Heights* court stated: “[f]irst, the Cities’ occupancy ordinances ‘apply uniformly to *all* residents of *all* dwelling units.’”¹³⁰ Regarding the permissible purpose requirement, the Sixth Circuit *City of Richmond Heights* court found “the Cities have presented convincing evidence that the ordinances were enacted ‘to protect health and safety by preventing dwelling overcrowding.’”¹³¹ Regarding the permissible type requirement, the Sixth Circuit *City of Richmond Heights* court explicitly found that the ordinances were ordinances regarding “the maximum number of occupants permitted to occupy a dwelling,” as required by the plain language of the statute.¹³²

The court then turned to the “reasonableness inquiry.”¹³³ Initially, the court considered the form of occupancy standards that the defendant cities had adopted—a minimum square feet per person form—and the particular numerical standards that each city had adopted.¹³⁴ The plaintiffs had argued that only a two-person per bedroom standard or a less restrictive minimum square foot per person standard would be reasonable.¹³⁵ But the court recalled that “Congress made clear that there is no national occupancy standard.”¹³⁶ Then, without further explanation, the court interpreted the reasonableness inquiry to require the court to give judicial deference to the exercise of legislative discretion.¹³⁷ The court held that selecting any particular actual standard was a “legislative, not a judicial function,”¹³⁸ citing as authority a case that employed a rational basis test.¹³⁹ The court concluded that the conflicting evi-

130. 209 F.3d at 636 (citing *City of Edmonds*, 514 U.S. at 733).

131. *Id.* at 636.

132. *Id.* at 633.

133. *Id.* at 635-38.

134. *Id.*

135. *See id.* at 636.

136. *Id.*

137. *See id.* at 636-37 (noting that “[t]he Cities were surely permitted to choose which of these standards was the most appropriate for that particular city.”).

138. *Id.* at 637. This distinction is used in considering the constitutionality of law. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (stating that “[t]hat exercise of discretion, however, is a legislative, not a judicial function” in upholding a zoning ordinance against a constitutional challenge); *Doe v. City of Butler*, 892 F.2d 315, 319 (1989) (“Therefore we believe that for due process purposes this ordinance must be evaluated under the same reasonableness standard applicable to the vast majority of legislative judgments relating to zoning.”).

139. *City of Richmond Heights*, 209 F.3d at 637. “The rationale of *Oxford House* applies with equal force here. The ‘exercise of discretion’ as to whether to require a minimum of 650 square feet for an apartment of four people, as opposed to a minimum of 500 square feet or 800 square feet, is a legislative, not a judicial function.” *Id.*

dence in the trial record sufficiently met the cities' burden.¹⁴⁰ It therefore affirmed the district court's judgment, albeit on different grounds.¹⁴¹

The Sixth Circuit correctly required that the government seeking the benefit of the exemption bear the burden of proof, but the court imposed too light a burden on the government by interpreting the "reasonable" inquiry to be a deferential standard of review based upon the legislative character of the ordinance at issue.¹⁴²

Unlike *Elliot v. City of Athens*,¹⁴³ to which I now turn, neither the *City of Richmond Heights* district court decision nor the Sixth Circuit's opinion included a non-discriminatory requirement in its reasonable standard.

The Sixth Circuit *City of Richmond Heights* court is citing *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996). The *Oxford House-C* court applied the rational basis test to an occupancy standard limiting unrelated adults, citing *Village of Belle Terre*. *Id.* at 252.

140. *City of Richmond Heights*, 209 F.3d at 638.

141. *Id.* The evidence included expert testimony about occupancy standards, the reasons for adopting the ordinances, the participation of landlords and management companies in setting the standards, and more. *Id.* at 631. The court describes the cities' evidence with regard to the permissible purpose requirement as "convincing" despite the fact that "Housing Advocates further established that the Cities did not conduct any formal studies before enacting their respective ordinances." *See id.* "Before enacting the ordinances, none of the municipalities in this action conducted or reviewed studies or reports to determine the existence of overcrowding or what would constitute a reasonable occupancy standard." *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 998 F. Supp. 825, 827 (1998). Interestingly, the evidence included testimony by landlords who followed their own "two-person-per-bedroom" standard despite the city's more restrictive standards and there had been no enforcement of the city's standards against them. *Id.* at 828. A careful reading of the case suggests that, despite its clarification of the burdens of proof, the court continued to require the plaintiffs to demonstrate that the challenged ordinances were unreasonable. The court found that despite the trial having been conducted employing incorrect burdens of proof that there was sufficient evidence in the record to find that the challenged ordinances qualified for the exemption as "reasonable" and, contrary to plaintiff's request, no remand was required. *See City of Richmond Heights*, 209 F.3d at 635-36.

142. As further evidence that the Sixth Circuit *City of Richmond Heights* court did not include a non-discriminatory element in its "reasonable" test, after it completed its analysis of the exemption in which it found that ordinances at issue were "reasonable" and qualified for the exemption, the court then considered plaintiff's argument that "the occupancy ordinances were invalid because they (1) were enacted to discriminate against families of four; and (2) had a discriminatory impact on families of four." 209 F.3d at 637-38. It then purported to apply an analysis of whether or not the governmental ordinances under review were discriminatory under the FHAA. *See id.*

143. No. CIV.A.89-89-ATH, 1991 WL 388125 (D. Ga. Jan. 23, 1991).

3. City of Athens

In *Elliott v. City of Athens*,¹⁴⁴ an organization seeking to establish a group home for recovering alcoholics challenged a single-family zoning ordinance as violating the FHAA.¹⁴⁵ The ordinance defined "family" as "one (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage, or adoption, no such family shall contain over four (4) persons."¹⁴⁶ The defendant claimed the benefit of the exemption, while the plaintiff claimed the ordinance was "unreasonable because it has a disparate impact on handicapped individuals."¹⁴⁷ The district court found the zoning ordinance to be exempt under the FHA as a reasonable governmental restriction pursuant to 42 U.S.C. § 3607(b)(1),¹⁴⁸ and the Eleventh Circuit affirmed.¹⁴⁹

In its opinion, the Eleventh Circuit *City of Athens* court explicitly addressed the "reasonable" requirement.¹⁵⁰ The court explained: "In determining the reasonableness of the ordinance, this court must strike a balance between a municipality's interest in maintaining the residential character of a particular area and the interests of the handicapped in remaining free from a zoning restriction."¹⁵¹ The court found the plaintiff's evidence of discriminatory impact was weak.¹⁵² It stated, "there was no attempt to establish that the ordinance had a harsher effect on handicapped persons wanting to live in group homes than on college students or other non-handicapped persons desiring to live in group homes."¹⁵³ In contrast, the court found that the city had a "very substantial interest in controlling density, traffic, and noise in single family residential districts, and in preserving the residential character of such

144. *Id.*

145. *Id.* at *2.

146. *Elliot v. City of Athens*, 960 F.2d 975, 976 (11th Cir. 1992).

147. *Id.* at 981.

148. *Elliot*, 1991 WL 388125, at *6.

149. *Id.*

150. *Elliot*, 960 F.2d at 981. The *City of Athens* court was the first appellate court to directly interpret the reasonableness requirement of the exemption. *See id.* at 984.

151. *Id.* at 981. For authority, the court cited *Alexander v. Choate*, 469 U.S. 287 (1985), a Supreme Court case applying § 504 of the Rehabilitation Act of 1973. *Id.*

152. *See id.* The plaintiff only offered the fact of the denial of its own proposed project and the economic infeasibility of operating a group home with fewer than twelve residents. *Id.*

153. *Id.*

districts.”¹⁵⁴ The city’s purpose was “to control the large University of Georgia student population” and its negative effects.¹⁵⁵ The defendant had provided expert testimony documenting the particular harms that persistent overcrowding of students had wrought in a neighborhood.¹⁵⁶ The Court accepted the district court’s finding that the municipality’s definition of family which limited the number of unrelated persons permitted to occupy a single dwelling was “the most practical means of accomplishing the City’s legitimate interests.”¹⁵⁷ The court further reasoned that the exclusion of group homes such as the one proposed by appellants was only an “incidental effect” of the restriction.¹⁵⁸ The court concluded that “the zoning restriction as applied in this case is reasonable, and thus the exemption is applicable.”¹⁵⁹

The *City of Athens* court interprets “reasonable” to mean “non-discriminatory” because it specifically balances the defendant city’s interests in regulating overcrowding with the discriminatory impact of that policy on members of the protected class. In noting that the negative effects on the plaintiffs were only an “incidental effect” of the restriction, the court implies that if the discriminatory effects had been “substantial,” it would have found the ordinance “unreasonable.”

154. *Id.* at 982. There is a long history of strong judicial deference to municipalities zoning regulations to provide for and protect “single family zones.” See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Note that the “density” at issue here is not internal density but neighborhood density, for example number of units per acre.

155. *Elliot v. City of Athens*, 960 F.2d 975, 982 (11th Cir. 1992).

156. *See id.*

157. *Id.* Later the opinion refers to the limitation as “the only practical method of serving its legitimate interests.” *Id.* at 983.

158. *Id.* at 982. Other evidence showed that such group homes “would be permitted in other residential areas of the city as well as non-residential areas.” *Id.*

159. *Id.* at 983. The dissent also interpreted “reasonable” in the statutory language to encompass non-discriminatory but argued that “reasonable accommodation” analysis was appropriate instead of disparate impact analysis. See *id.* at 984-88 (Kravitch, J., dissenting). Citing the legislative history of the exemption, the dissent predicted the *City of Edmonds* Court’s interpretation regarding the “uniform application” and “permissible type” eligibility requirements. *Id.* It disagreed with the majority’s interpretation of “reasonable” as requiring a balancing test. *Id.* The dissent also raises the complex and to some degree parallel question addressed by this article: how the “reasonable accommodation” requirement included in the FHAA for persons with disability is to be considered in conjunction with the FHAA’s exemption for “reasonable” occupancy restrictions; and whether it is should be integrated into a disparate impact analysis. See *id.*

No cases that have cited *City of Athens* have discussed its interpretation of "reasonable" to mean nondiscriminatory.¹⁶⁰ The probable reason for this is that the *City of Athens* court's primary holding was later overruled by the Supreme Court in *City of Edmonds*, discussed in Part II.A.1.

B. The Meaning of "Reasonable"

In applying the exemption to governmental entities, courts have struggled with the meaning of "reasonable" in the context of this exemption. "Reasonable" is not defined in the statute and is indisputably ambiguous. Thus, courts must look to relevant regulations, the rest of the statute, and legislative history to determine its meaning. As the federal agency charged with implementing the FHAA, HUD's guidance, if any, would be relevant and worthy of consideration and perhaps even given deference by the courts.¹⁶¹ Unfortunately, HUD's guidance on this issue has been minimal and unhelpful because it has not offered a meaning for "reasonable."¹⁶²

When a statute is ambiguous and no regulation is applicable, legislative history can provide guidance to courts.¹⁶³ In this case, there is only one committee report to consider, but courts and commentators have not given it sufficient attention. Referring to the exemption, the House Report states, "Reasonable governmental limitations by governments [on occupancy] would be allowed to continue, as long as they were applied to all occupants, and *did not*

160. Secondary sources generally criticize the *City of Athens* opinion in light of the later *City of Edmonds* opinion overruling its primary holding. See, e.g., Scott Casher, *Closing a Loophole in the Fair Housing Act: City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776 (1995), 70 TEMP. L. REV. 369, 387-89 (1997).

161. In certain cases, courts must defer to authoritative interpretations of federal statutes by federal agencies charged with administering them. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

162. The 1989 regulation merely repeats the statutory language. 24 C.F.R. §100.10(a)(3) (2004). The Preamble to the final regulations merely quotes the House Report. HUD Preamble, 54 Fed. Reg. 3232 (Jan. 23, 1989). Since the 1989 regulation, HUD has not provided any guidance on what constitutes a "reasonable" governmental occupancy restriction. In contrast, HUD has provided extensive guidance on the application of the FHAA to private housing providers, albeit without ever adopting any formal regulation.

163. *Toibb v. Radloff*, 501 U.S. 157 (1991); *Columbia Pictures Indus. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 280 n.4 (9th Cir. 1989). "The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

operate to discriminate on the basis of race, color, religion, sex, handicap, or familial status.”¹⁶⁴

The House Report language explicitly requires that governmental restrictions qualifying for the exemption be *non-discriminatory*. The House Report’s “did not operate to discriminate” language is cited in full in Supreme Court’s *City of Edmonds* opinion,¹⁶⁵ in the Sixth Circuit’s opinion in *City of Richmond Heights*,¹⁶⁶ and in the Eleventh Circuit’s *City of Athens* opinion.¹⁶⁷ Only the *City of Athens* opinion appears to use it to define the “reasonable” standard.¹⁶⁸

Yet, when read with the *Edmonds* opinion, the overlooked language in the House Report is the key to defining the meaning of “reasonable.” The word “reasonable” itself is ambiguous, and not amenable to a “plain reading” interpretation.¹⁶⁹ There are no authoritative regulations available to assist courts in interpreting it.

164. H.R. REP. NO. 711, 100th Cong., at 31 (1988) (emphasis added).

165. *City of Edmonds v. Oxford House*, 514 U.S. 725, 734 (1995).

166. *Fair Hous. Advocates Ass’n. v. City of City of Richmond Heights*, 998 F. Supp. 825, 832 (D. Ohio 1998). Interestingly, in its review of the exemption’s legislative history, but before actually defining its test, the Sixth Circuit *City of Richmond Heights* court implicitly acknowledged that the governmental occupancy restriction must be non-discriminatory. “Despite its broad goal of eradicating discrimination in housing based on familial status, however, Congress also recognized the legitimate interests local and state governments have in enacting non-discriminatory occupancy restrictions.” *Fair Hous. Advocates Ass’n. v. City of Richmond Heights*, 209 F.3d 626, 632 (6th Cir. 2000).

167. *Elliot v. City of Athens*, 960 F.2d 975, 979 (11th Cir. 1992). It is also cited in *United States v. Town of Cicero*, No. 93C-1805, 1997 WL 337379, at *6 (N.D. Ill. June 16, 1997).

168. See generally *Elliot*, 906 F.2d at 975.

169. I have argued, above, that the *City of Edmonds* opinion did not interpret the term “reasonable,” but can be read to distinguish between “eligibility” for the exemption and “qualification” for it by being “reasonable.” See *supra* Part II.A.1. Clearly, the *City of Edmonds* Court’s eligibility criteria for the exemption alone do not ensure that a governmental restriction is non-discriminatory because a restriction that satisfies all three eligibility criteria may still be discriminatory towards families. For example, an occupancy restriction requiring 300 square feet per person which applied to all dwellings in order to protect health and safety caused by overcrowding would meet all of the eligibility criteria, but would certainly have a disparate impact on families, especially families of color. The *City of Edmonds* Court’s apparent reluctance to define “reasonable” may be related to the fact that it purported to provide a “plain reading” of the statutory language. The *City of Edmonds* Court referred to the House Report language to reinforce its reading of the exemption, in particular, the permissible type requirement. See *City of Edmonds v. Oxford House*, 514 U.S. 725, 734 n.8 (1995). The dissent explicitly distinguished itself from the majority by not taking a position on the authority of House Report and legislative history. See *id.* at 746. Interestingly, the defendant cities in the *City of Richmond Heights* case asserted that their ordinances were “valid, non-discriminatory efforts to limit occupancy.” *City of Richmond Heights*, 209 F.3d at 633.

The House Report is the only source available of what Congress might have intended "reasonable" to mean. It is part of the meager but authoritative legislative history of the exemption. And, the language in the House Report clearly intends that the exemption only encompass non-discriminatory governmental restrictions. Therefore, the "did not operate to discriminate" language in the House Report must supply the meaning for the "reasonable" standard;¹⁷⁰ no other statutory language or other legislative history can do so.¹⁷¹ And given the remedial purpose of the statute, it makes sense that Congress would not want governmental occupancy restrictions that were discriminatory to *qualify* for this exemption.

Because "reasonable" must mean non-discriminatory, both the district court and Sixth Circuit opinions in *City of Richmond Heights* must be rejected because they fail to offer an adequate interpretation for the term since neither included a non-discriminatory requirement as part of their "reasonable" test. The *City of Athens* opinion did adopt a non-discriminatory meaning for "reasonable," and it will be revisited, in Part D for consideration of the adequacy of its definition.

C. The Duplication Problem and Its Solution

The conclusion that "reasonable" must mean "non-discriminatory" leads to a quandary: How can there be both a non-discriminatory test to *qualify* for the exemption and a non-discriminatory test for governmental restrictions that do *not qualify* for the exemption and are subject to the statute?¹⁷²

170. One commentator who considered this issue disagrees. Casher, *supra* note 160. In light of the *City of Edmonds* case, he criticizes the *City of Athens* court's interpretation of reasonable as meaning non-discriminatory. *Id.* "The Eleventh Circuit's analysis mistakenly equated 'reasonable' under 3607(b)(1) with 'constitutional' and 'nondiscriminatory,'" and it confused the issue of compliance with the issue of exemption." *Id.* at 388. His criticism appears to be that understanding "reasonable" to mean non-discriminatory requires a court to consider the merits of an ordinance which is not required when a typical "exemption" operates. He offers, however, no alternative meaning for "reasonable" and therefore, like the lower court in *City of Richmond Heights*, effectively reads it out of the statute. And, as this article argues, since the "exemption" is best understood as a special defense, consideration of the merits is appropriate.

171. Also, the *City of Edmonds* Court appealed to the first sentence in this two-sentence passage in the House Report to support its interpretation of the exemption. Without some justification it seems odd to ignore the next sentence in the same source when it too was included in the Court's citation.

172. This quandary may be part of the reason the *City of Edmonds* Court avoided defining "reasonable," despite the fact that the issue was fully briefed and discussed in oral argument. See Petitioner's Brief on the Merits, *City of Edmonds* (No. 94-23), 1994 WL 704077; Petitioner's Reply Brief on the Merits, *City of Edmonds* (No. 94-

There seem to be two possibilities for resolving this quandary, both of which are problematic. One possibility is that there are two non-discriminatory standards, one for qualification for the exemption (the "reasonable" standard), and a different one for review of a governmental occupancy restriction that does not qualify for the exemption. The second possibility is that the "reasonable" standard is the only standard applicable to review *governmental* occupancy standards for compliance with the FHAA.

Regarding the first possibility—that there are two non-discriminatory standards—it initially appears that this solution would most completely effectuate the structure Congress appears to have intended in designing the FHAA. When Congress used the term "exemption," it seemed to contemplate that *some* governmental occupancy restrictions (those qualifying for the exemption) would not be reviewed further by courts, while others (those not qualifying for the exemption) would be subject to full review for compliance with the FHAA. This solution, which requires the articulation of two non-discriminatory standards of review, however, only creates a further problem. If qualifying for the exemption requires that a governmental restriction be "non-discriminatory," what good is the exemption, since *if a government's ordinance does not discriminate, it does not need an exemption?*¹⁷³

This concern might be met if the two standards required different kinds of proof of non-discrimination. One possibility would be that the exemption would apply to government ordinances that were not facially discriminatory or perhaps if there was no evidence of intentional discrimination under a disparate treatment theory. On this view, Congress intended to prevent blatant or intentional discrimination by governments in setting their occupancy standards, but would grant the exemption to neutral standards that nevertheless had some disparate impact. This view is bolstered by the *City of Edmonds* Court's requirements mandating that only ordinances that are neutral on their face will be *eligible* for the ex-

23), 1995 WL 258886. Some of the arguments by the parties in their briefs specifically refer to this problem.

173. See *Elliott v. City of Athens*, 960 F.2d 975, 981 (11th Cir. 1992) (noting that the dissent's interpretation of "reasonable" requiring the court to apply the "reasonable accommodation" analysis to determine "reasonableness" for the purposes of the exemption "would effectively nullify the exemption; that is, under the dissent's construction, the only time the exemption could apply is when there is no statutory violation in the first place.").

emption.¹⁷⁴ The argument would go that once such ordinances are shown to be neutral, they are immune from further challenge under the FHAA.

While plausible, this solution seems wrong. First, this solution would credit the *City of Edmonds* Court with defining "reasonable" which it clearly did not do. Second, this position would be contrary to the language of the House Report in which the non-discrimination requirement is stated as: "did not operate to discriminate."¹⁷⁵ When this language appears in other contexts, it usually refers to *disparate impact-type discrimination*.¹⁷⁶ It is hard to argue that Congress was unaware of the distinction between disparate treatment and disparate impact theories of discrimination in 1988. So, given its choice of words, Congress seems to have intended that in order to qualify for the exemption a governmental restriction must not be discriminatory on a disparate impact theory.¹⁷⁷ Third, this solution would undercut the remedial goals of the statute emphasized by the *Edmonds* Court by exempting from FHAA liability neutral occupancy standards that nonetheless discriminate.

Yet, the conclusion that governmental occupancy restrictions must be non-discriminatory under a disparate impact theory to qualify for the exemption raises the difficult question of what the *other* discriminatory standard would be for governmental restrictions not qualifying for the exemption (i.e. subject to the FHAA) and what benefit the exemption provides to government defendants.

Logically, if both are non-discriminatory standards, the standard for liability *under the statute* could certainly not be less demanding than the standard to qualify *for an exemption* from the statute. But if the test to qualify for the exemption is based upon a disparate impact theory of discrimination, what test for discrimination could

174. See *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

175. See *supra* note 163 and accompanying text.

176. Pre-1988 cases using "operate to discriminate" to mean disparate impact discrimination include: Justice Stevens dissenting in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 678 n.29 (1989) (describing the critical inquiry into disparate impact theory, "is whether an employer's practices operate to discriminate. Whether the employer intended such discrimination is irrelevant."); *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982) (employment discrimination); *Horace v. City of Pontiac*, 624 F.2d 765 (6th Cir. 1980) (Title VII sex discrimination); and *Clark v. Alexander*, 489 F. Supp. 1236 (D.D.C. 1980) (Title VII sex discrimination).

177. Also, the use of this phrase demonstrates that Congress was aware of this theory of liability in fair housing cases, and, at least in the context of challenges to governmental occupancy restrictions under the FHAA, appears to have endorsed it.

be more demanding to use for ordinances that failed to qualify for the exemption? The conduct considered “discriminatory” under a disparate treatment theory is a subset of the conduct that would be “discriminatory” under a disparate impact theory.¹⁷⁸

This problem combined with the fact that qualifying for the exemption would be functionally the same as defending against liability under the statute on the merits in turn raises the issue of whether the “exemption” is really an “exemption” in the traditional sense of an affirmative defense not requiring consideration of the merits. Usually, if a statute includes an exemption provision, it is possible in principle for a challenged law to *not* qualify for the exemption and then to be either found to violate or not to violate the statute. If a governmental restriction must be “non-discriminatory” under a disparate impact theory to qualify for the exemption, however, any governmental restriction that fails to qualify for the exemption will almost certainly be found to violate the statute.

In conclusion, it appears impossible to articulate two distinct non-discriminatory standards: one to qualify for exemption under a disparate impact theory and a different one to test for a violation of the statute on the merits if a governmental restriction does not qualify for the exemption.

The second possibility—that the “reasonable” standard is the only standard applicable to review *governmental* occupancy standards for compliance with the FHAA—is the best solution. The argument is that despite naming the defense an “exemption,” in fact Congress provided for only one defense and only one standard of review for *governmental* occupancy restrictions—that they be “reasonable.” Under this view, if a governmental occupancy restriction is not “reasonable,” it violates the FHAA. There is no other standard of review.

Under this interpretation, the “reasonable” standard does not function as a typical “exemption” or affirmative defense because it

178. Intentional discrimination is the focus of disparate treatment analysis. Disparate impact analysis casts a wider net than disparate treatment analysis because disparate impact theory defines more conduct as potentially “discriminatory” than disparate treatment analysis. It is not hard to identify rules that have discriminatory impacts but would not be found to constitute discrimination under a disparate treatment analysis. It is hard to imagine the reverse: a rule that is discriminatory in that it fails a disparate treatment analysis but does not have any discriminatory disparate impacts. Intentional discrimination that does not also have an adverse impact on protected classes would be ineffective discrimination, so while still unlawful, it is not much to worry about.

engages the court in considering the merits.¹⁷⁹ “Exemptions” are usually treated as affirmative defenses: the defendant must raise them in its answer to a complaint and the defendant bears the burden of proving that it is eligible for the defense.¹⁸⁰ Generally, exemptions are meant to give clear notice of what is covered or not by a statute. Usually, proving eligibility for an exemption is often a matter of proving that the entity charged or the activity claimed to violate the act do not come under the coverage of the statute by reference to some definition. In other words, exemptions usually take an entity or an activity out of the scope of a statute by virtue of some characteristic of the entity or an activity. What is required is proof of fitting the exemption definition, *not* proving that the entity is not liable for a substantive violation under the statute. For a defendant, the ability to prove that it fits an exemption saves it most of the costs of defending against the claim.¹⁸¹

This solution is also problematic. Initially, this solution appears to render the exemption a nullity which courts should avoid if at all possible. Upon further consideration, however, this solution does effectuate the intent of Congress understood as enacting the exemption to provide for a particular defense for certain governmental occupancy restrictions employing a “reasonable” standard of liability. It just is not a traditional “exemption.” On this analysis, the “exemption” specifies a different standard of liability for gov-

179. In each of the other exemptions explicitly provided in the FHAA, parties seeking to take advantage of the exemption merely need to demonstrate that they fit within the definition of the exemption. Regarding religious organizations, see *United States v. Columbus Country Club*, 915 F.2d at 877 (3rd Cir. 1990) (country club not controlled by or operated in conjunction with a church did not qualify for religious organization exemption); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (D. Va. 1975) (exemption for certain religious organizations is to be read strictly and not apply to a children's home which was open to children of all creeds). Regarding private clubs, see *Columbus Country Club*, 915 F.2d 877 (country club homes were not “lodgings” under the exemption). Regarding housing for older persons exemption, see *Lanier v. Fairfield Communities, Inc.*, 776 F. Supp. 1533 (M.D. Fla. 1990) (not qualifying for exemption because of location and failure to provide relevant services).

180. See FED. R. CIV. P. 8(c).

181. Yet, sometimes a defendant must put on substantial evidence to demonstrate its eligibility for an exemption, particularly in regard to the FHAA “housing for older persons” exemption. See, e.g., *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (to qualify for “older persons” exemption, defendants need to show that they are operating housing specifically designed for older persons by showing that “at least 80% of the units are occupied by at least one person age 55 or older[,] that they have published and adhered to policies and procedures that demonstrate an intent to restrict leasing to those age 55 or older, [and] that they provide services specifically designed to meet the needs of older persons, or if the provision of such services is impractical, that [the housing] is needed to provide important housing opportunities for older persons in the community”).

ernments than for private parties.¹⁸² It does not render the provision a nullity because it plausibly makes the provision operate in a manner effectuating the intent of Congress.

Assuming that "reasonable" means non-discriminatory under a disparate impact theory, and that the provision styled as an "exemption" is actually a special defense for certain governmental occupancy standards, a complete clarification of the provision still requires a definition for what the one "reasonable" standard would be that is distinct from the standard disparate impact analysis.¹⁸³

D. Two Proposed "Reasonable" Standards: *City of Athens* Revisited

This section will articulate two alternative "reasonable" standards that courts could apply to determine if a defendant government qualifies for the special defense the Congress created in 42 U.S.C. § 3607(b)(1). Because of the "not operate to discriminate" phrasing, the traditional disparate impact analyses applied to government defendants in fair housing cases, such as *Village of Arlington Heights*¹⁸⁴ and *Town of Huntington*¹⁸⁵ provide the initial point of reference. Yet, the reasonable standard should be distinct from these to give meaning to the "reasonable" term which appears to suggest something of an easier standard than traditional disparate impact liability.¹⁸⁶

182. The idea that governments should be subject to a different standard of liability under a disparate impact theory from private parties has been endorsed by a careful analysis of disparate impact theory in the Fair Housing Act. See Peter Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (1998). While the "safe harbor" extension of the exemption effectively extends this same standard of review to private parties, this occurs only at the option of private parties who must qualify for this defense. Otherwise, they are subject to a different standard of liability.

183. This conclusion does not leave the same quandary as before because the task is now to articulate two different non-discriminatory standards for two different situations. If an occupancy standard meets all the eligibility requirements, meeting the "reasonable" standard is the only defense available for it. If it does not meet the requirements, then it violates FHAA. It is then no longer subject to review under the statute by the application of another non-discriminatory test. But, the "reasonable" standard must be distinct from the standard disparate impact analysis, otherwise the special defense would be a nullity. See *supra* Part III.

184. *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977).

185. *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

186. This article does not address the disputed issue of whether a disparate impact test under the FHAA does or should include an intent element because it assumes that in selecting a standard for the defense, Congress did not intend that governments

The *City of Athens* court's interpretation of the "reasonable" standard as non-discriminatory was never reached by the *City of Edmonds* Court and deserves reconsideration.¹⁸⁷ Two versions of a "reasonable" standard can be derived from the *City of Athens* opinion. In the "reasonable balance" version, a court would balance the benefits of local government's health and safety objectives in regulating overcrowding with the costs in discrimination to families, ensuring that any discrimination caused by the regulation is only "incidental" not substantial. In the "reasonable means-ends fit" version, a court would scrutinize the fit between the local government's stated health and safety objectives and the actual consequences of the specific ordinance in preventing or reducing overcrowding, ensuring that any discrimination caused by the regulation is only "incidental" and not substantial.

The *City of Athens* court contemplated that litigation regarding the exemption would proceed in the following way: First, the plaintiff must produce evidence of the discriminatory impact of the restriction.¹⁸⁸ Second, the government bears the burden of proving that it qualifies for the exemption and must produce evidence that its specific occupancy restriction serves its stated purpose.¹⁸⁹ Then, the court balances the governmental interests actually served by the restriction against the discriminatory impacts of the restriction.¹⁹⁰ In its discussion, the *City of Athens* court characterized the ordinance at issue as having only an "incidental effect" on the interests of the protected class and as the "most practical means" of serving the governmental interest.¹⁹¹

prove they have no discriminatory intent. For a good discussion of this issue, see Mahoney, *supra* note 182.

187. The *City of Athens* court's primary holding—that a zoning ordinance "defining family" from the FHAA qualified for the 42 § U.S.C. 3607(b)(1) exemption—was abrogated by the *City of Edmonds* Court's holding that such a zoning ordinance was not eligible for the exemption because it was not a "maximum occupancy limitation." See *City of Edmonds v. Oxford House*, 514 U.S. 725, 730 (1995). Professor Schwemm's treatise on fair housing law queries the ongoing vitality of the *City of Athens*'s reasonable standard. See HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6.

188. See *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992).

189. See *id.*

190. See *id.*

191. *Id.* "As noted above, and as the district court found . . . the most practical means of accomplishing the City's legitimate interests was a limitation on the number of unrelated persons permitted to occupy a single dwelling." *Id.* at 982. "In addition, of course, the restriction had the incidental effect of excluding group homes such as the one proposed by appellants." *Id.*

In light of the preceding analysis, the *City of Athens* opinion offers a promising basis for defining the "reasonable" standard for governments' occupancy standards.¹⁹² For example, placing the burden on government to prove its qualification for the defense was correct.¹⁹³ But since the *City of Athens* case was decided before the *City of Edmonds*, the *City of Athens*' "reasonable" test must be refined to include the relevant holdings from that case, in particular, the permissible purpose requirement. The types of governmental interests balanced in the *City of Athens* decision included controlling density, traffic, and noise in single family residential districts, but primarily "preserving the residential character" of such districts.¹⁹⁴ But, the *City of Edmonds* Court limited the "permissible objectives" of government in occupancy restrictions to health and safety reasons to prevent overcrowding.¹⁹⁵

Governments often present a variety of objectives as to their efforts to reduce or prevent "overcrowding."¹⁹⁶ Many of these are

192. In any appropriate test, for plaintiffs to demonstrate that the occupancy restriction causes a disparate impact on the protected class, they would typically need to demonstrate the restriction's disproportionate impact on members of the protected class using population statistics (e.g. numbers of households that consist of certain numbers and how many of these household are families with children) and housing statistics (e.g. the capacity and configuration of the existing housing stock in the jurisdiction). See, e.g., *Tsombanidis v. W. Haven Fire Dept.*, 352 F.3d 565 (2d Cir. 2003) (explaining appropriate comparisons required for plaintiff's prima facie case under the *Town of Huntington* analysis). A prima facie case of disparate impact requires a comparison between two groups—those affected and those unaffected by the facially neutral policy. The comparison must reveal (generally by statistics) that the challenged policy imposes a "significantly adverse or disproportionate impact" on a protected group of persons. In the case of a plaintiff demonstrating that an occupancy policy creates a disparate impact burdening familial status she must show that occupancy policy actually or predictably creates a shortage of housing for a significant number of family households compared to (similarly-situated) non-family households. In other words, she must show: 1) that X% of all of the protected group need (or have good reason) to live in the [housing] but are prohibited by the facially neutral occupancy policy; 2) that Y% of all of the non-protected class need (or have good reason) to live in [same housing] are prohibited by the facially neutral occupancy policy; and 3) that X is significantly greater than Y. Plaintiff's prima facie case would depend upon other zoning and housing supply facts. Her evidence should focus on the local housing market and local family statistics (not national statistics), including the characteristics of class members' households living in the jurisdiction or wanting to live there and the availability of three bedroom or four bedroom or other relevant housing in the jurisdiction.

193. *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 209 F.3d 626, 634-35 (6th Cir. 2000).

194. See *Elliot v. City of Athens*, 960 F.2d 975, 982 (11th Cir. 1992).

195. See *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

196. In *City of Athens*, the city's primary stated objective was not "health and safety" but "maintaining the residential character of a particular area." 960 F.2d at 981-83.

not related to "health and safety." While other objectives, such as general welfare objectives raised in the *City of Athens* case, may be relevant for consideration of the ordinance's constitutional validity for purposes of due process and equal protection, under *City of Edmonds* they are not relevant for purposes of avoiding liability under the FHAA. Rather, under *City of Edmonds*' permissible purpose requirement, the government must show that its restriction is "reasonable" based only upon health and safety grounds.¹⁹⁷

In addition to comporting with the *City of Edmonds* opinion, the *City of Athens*' "reasonable" test should reflect but not be the same as traditional disparate impact analyses applied to government defendants in fair housing cases, such as *Village of Arlington Heights* and *Town of Huntington*. The two primary models for disparate impact analysis in FHAA for government defendants are: *Town of Huntington*¹⁹⁸ and the four prong test of the Seventh Circuit on remand in *Village of Arlington Heights*.¹⁹⁹ Both include consideration of the government's interest in the challenged policy or practice and the extent of discriminatory impact caused by that policy or practice. In light of the *Town of Huntington* and *Village of Arlington Heights* analyses, the *City of Athens* analysis could be interpreted in two ways with two different emphases.

1. *The "Reasonable Balance" Standard*

The *City of Athens* court defined its analysis as "striking a balance between a municipality's interest in maintaining the residential character of a particular area and the interests of the handicapped in remaining free from a zoning restriction."²⁰⁰ This balancing of the government's interests with the interests of the persons burdened by the regulation construes the "reasonableness" standard to be something akin to a "constitutional" test such as those used in first amendment, equal protection, and due process cases. One astute commentary on the appropriate standards in dis-

197. As explained in more detail below, this requirement might constitute a significant limitation on restrictions that governments could adopt that would pass muster under this standard. For a similar limitation on the permissible governmental reasons to exercise police power, see California Government Code § 65589.5 (2004) (requiring local governments which want to deny use permits for qualifying affordable housing to making findings regarding specific adverse health and safety impacts, not general welfare reasons).

198. NAACP v. City of Huntington, 844 F.2d 926 (2d Cir. 1988).

199. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (7th Cir. 1977).

200. Elliot v. City of Athens, 960 F.2d 975, 981 (11th Cir. 1992) (citing Alexander v. Choate, 469 U.S. 287 (1985)).

parate impact jurisprudence in fair housing cases argues that such a balancing test is appropriate for *government* defendants because of the important differences between government defendants (whose collective “intentions” are hard to fathom and reliably identify) and private defendants (whose “intentions” may be more coherent and susceptible to proof).²⁰¹

Merely balancing the health and safety benefits a government received with the extent of discriminatory impact caused by the occupancy restriction at issue is insufficient as a “reasonable” standard because it fails to sufficiently reflect the anti-discriminatory concerns of the FHAA. The *City of Athens* court’s consideration of whether the discriminatory effect is “incidental” or “substantial” may provide the necessary missing element. This standard would provide a court with more direction in how to strike the appropriate balance.

2. The “Reasonable Means-Ends Fit” Standard

The *City of Athens* analysis requires a defendant government to produce evidence that its selected ordinance actually serves its stated objective.²⁰² And, the court considered the district court’s finding that the ordinance at issue was the “most practical means” of serving the governmental interest to be significant. An alternative “reasonable” standard would define “reasonable” as requiring a reasonably close fit between the government’s means and ends. Analyzing the relationship between a government’s means to its stated ends is reminiscent of the *Town of Huntington* court’s requirement that a government defendant show that “its actions furthered, *in theory and in practice*, a legitimate, bona fide governmental interest.”²⁰³ Without more, however, such a stan-

201. See Mahoney, *supra* note 182, at 434-43 (discussing the important differences between disparate impact standards for government defendants as compared to private defendants). Note that the *CHRO* court failed to make this distinction: “the considerations that are to apply once a prima facie case is established would appear to be the same no matter what the status of the defendant in a fair housing case. Basically, a court must weigh any adverse impact of a policy against its justification.” *CHRO v. J.E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *3 (Conn. Super. Ct. July 20, 2001).

202. *Accord* United States v. Town of Cicero, No. 93C-1805, 1997 WL 337379, at *6 (N.D. Ill. June 16, 1997). “Cicero’s failure to describe any basis for enacting this ordinance and failure to conduct research about the effect that it would have in Cicero calls its reasonableness into question. Where this and much of the evidence heretofore discussed casts a shadow of doubt upon [the ordinance’s] reasonableness, this issue needs to be resolved by a trier of fact.” *Id.* at *20.

203. *NAACP v. Huntington*, 844 F.2d 926, 936 (2d Cir. 1988) (emphasis added).

dard should be rejected as insufficient because of its perverse incentive: in practice a tighter means-ends fit would almost certainly cause more discriminatory impact. Allowing governments to adopt restrictive residential occupancy standards that can be shown to serve health and safety interests directly and robustly but which cause significant amounts of discriminatory impact fails to reflect the *Town of Huntington* and *Village of Arlington* analyses' fundamental consideration of governmental objectives in relation to their discriminatory effects.²⁰⁴ Courts need some further direction to assess the degree of means-ends fit required with the extent of discrimination caused. The vital connection between governmental objectives and discriminatory effect can be provided by incorporating the *City of Athens* court's consideration that any discrimination caused by the policy be "incidental" rather than "substantial." This additional requirement combines a heightened means-ends fit with a weak version of the familiar "least restrictive means" test from the *Town of Huntington* case. If the discriminatory impact were "substantial," then even if the means-ends fit was tight, the court should find that the governmental restriction is not "reasonable."

In summary, in the "reasonable balance" version of the standard, a court would balance the benefits of local government's health and safety objectives in regulating overcrowding with the costs in discrimination to families, ensuring that any discrimination caused by the regulation is only "incidental" not "substantial." In the "reasonable means-ends fit" version, a court would scrutinize the fit between the local government's stated health and safety objectives and the actual consequences of the specific ordinance in preventing or reducing overcrowding, ensuring that any discrimination caused by the regulation is only "incidental" not "substantial."

What both versions of the "reasonable" test have in common is the use of the "incidental" or "substantial" test as a limit on the discrimination that will be tolerated as "reasonable." Incorporating the full-bodied "least restrictive means" prong from the *Huntington* case would engage the court in a complex search for less restrictive alternatives²⁰⁵ that serve a government's health and

204. And, such analysis would not serve the FHAA's remedial purpose. It is unlikely that Congress intended for governments to adopt occupancy standards that pursue health and safety at any discriminatory cost.

205. This analysis is common in discrimination cases and derives from Title VII employment discrimination cases. See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118-19 (11th Cir. 1993). In the fair housing context, see *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 n.37 (3d Cir. 1977).

safety objective. Such a requirement would make the "reasonable" standard indistinguishable from the traditional disparate impact standard, and thus render the resulting test inapt as the "special defense." But, adopting the *City of Athens* inquiry into the extent of the disparate impact caused as being either "incidental" or "substantial" identifies a genuinely distinct test for disparate impact.

These two variations on the *City of Athens* court's approach are plausible and viable interpretations of the "reasonable" standard to determine if a governmental restriction qualifies for the § 3607(b)(1) defense. In practice, both versions of the "reasonable" standard are less demanding than a standard disparate impact analysis because they could allow a governmental restriction that had some "incidental" discriminatory impact to nonetheless qualify as a "reasonable" restriction under the exemption.

Applying either version of the standard to the facts in the *Richmond Heights* case would have led the court to remand the case to the trial court for further proceedings to determine whether the cities could present evidence demonstrating that their chosen occupancy standards actually served their health and safety objectives. In addition, the court would have had to determine whether or not the resulting disparate impact on families would be substantial or merely incidental. Evidence in the record suggests that the impact might well have been characterized as substantial.²⁰⁶

Both versions of a "reasonable" standard would tend to require that a city perform research before adopting a residential occupancy ordinance to determine: 1) if an overcrowding problem affects or may soon affect health and safety; 2) whether a residential occupancy standard is the "most practical means" to address the particular health and safety concerns in view; and 3) if so, what occupancy standard would be appropriate to prevent or resolve such health and safety concerns resulting from actual or expected overcrowding. Cities enacting ordinances based upon such analysis could try to secure their qualification for the defense by placing their analysis, studies, and findings in the legislative record when they adopt the ordinance.²⁰⁷ Such research and consideration would further the FHAA's goals.

206. See *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 998 F. Supp. 825, 828 (N.D. Ohio 1998) ("Under the 1991 amendments to the Bedford Heights ordinance, more than 80% of two bedroom apartments in major complexes would be limited to three persons.").

207. "Cicero's failure to describe any basis for enacting this [residential occupancy] ordinance and failure to conduct research about the effect that it would have in Cicero calls its reasonableness into question." *Town of Cicero*, 1997 WL 337379, at *6.

If such research were conducted, a primary issue would be what—or rather whose—health and safety concerns are implicated by internal density? Arguably, only the health and safety concerns of tenants of the dwellings to be regulated would be implicated. Generally, neighbors' concerns about overcrowding—noise, parking, and congestion—are “quality of life” issues that ought to be considered as coming under the rubric of general welfare rather than health and safety.²⁰⁸ Similarly, the typical private housing provider's concerns about overcrowding primarily concern business interests rather than health and safety concerns.²⁰⁹

The health and safety concerns of tenants relating to internal density or “overcrowding,” have been identified as having adequate space for exiting the dwelling in an emergency, preventing communication of disease, and maintaining psychological health.²¹⁰

Note that in the *City of Richmond Heights* case the district court found: “Before enacting the ordinances, none of the municipalities in this action conducted or reviewed studies to determine the existence of overcrowding or what would constitute a reasonable occupancy standard for the respective municipalities.” 998 F. Supp. at 827. Evidence in the record did show that the cities consulted local apartment managers to work out their occupancy standards. *Id.*

208. It is also possible that excessive trash generated by “overcrowded” tenants might create a health hazard for neighbors, though this would be easily avoided by the provision of additional trash cans. Neighbors' quality of life concerns can be addressed directly by the enforcement of noise ordinances, parking requirements, and similar regulations which almost every city has on its books.

209. See, e.g., *Pfaff v. United States Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 749 (9th Cir. 1996) (“preserving the value of one's property”); *Snyder v. Barry Realty, Inc.*, 953 F.Supp. 217, 222 (N.D. Ill. 1996) (“avoid the risk of damage caused by large numbers of students”); *Fair Hous. Council of Orange County, Inc. v. Ayers*, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (“prevent damage and destruction to the apartments from excessive wear and tear”). Courts have held that when a landlord can demonstrate health and safety issues presented by excessive internal density, these can justify restrictive residential occupancy standards—for example, if applying less restrictive occupancy standards would increase occupancy such that water or sewage systems would be overtaxed. See *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev.*, 56 F.3d 1243, 1256 (10th Cir. 1995) (sewer system capacity); *United States v. Weiss*, 847 F. Supp. 819, 831 (D. Nev. 1994) (hot water capacity). But see *United States v. Lepore*, 816 F. Supp. 1011, 1021 (M.D. Pa. 1991) (defendants failed to show water and septic problems justified occupancy standard); *Human Rights Comm'n v. LaBrie, Inc.*, 668 A.2d 659, 666 (Vt. 1995) (defendants failed to show water and septic problems justified occupancy standard). At least one prominent fair housing advocate agrees that documented health and safety reasons can justify strict occupancy standards without creating FHAA liability. See *Morales, supra* note 21.

210. See, e.g., *Kalimian v. Olson*, 130 Misc. 2d 861, 862-63 (N.Y. Sup. Ct. 1986) (“maximum occupancy provisions” requiring eighty square feet per person were “intended to prevent practices common earlier in the century, when landlords overcrowded cramped tenements and rooming house rooms with large numbers of tenants,” which caused “fire and health hazards, unsatisfactory provisions as to sanita-

Such interests have regularly justified the imposition of residential occupancy standards by both governments and private housing providers.²¹¹ Governments, however, might find it difficult to collect persuasive evidence linking particular levels of internal density regulation as actually protecting tenants' health and safety.²¹² Numerous studies have failed to confirm what seems obvious.²¹³

tion, [and] insufficient provisions for light and air"); *Home Builders League of S. Jersey, Inc. v. Township of Berlin*, 405 A.2d 381, 390 (N.J. 1979) (referring to American Public Health Association minimum recommended square footage per occupant as "affect[ing] public health, family stability and emotional well being"); *Nolden v. E. Cleveland City Comm'n*, 232 N.E.2d 421, 425-426 (Ohio Common Pleas Ct. 1966) (purpose of square-footage requirement was to prevent overcrowding that "overtaxes the use of plumbing," fosters spread of "infectious disease," including respiratory, digestive, and skin diseases, elevates risks of "home accidents," and may cause problems in "social development").

211. Sometimes, landlords defend their occupancy restrictions as necessary to ensure the "quality of life" of their tenants. *See, e.g., Mountain Side*, 56 F.3d at 1252; *Burnett v. Venturi*, 903 F.Supp. 304, 314 (N.D.N.Y. 1995) (Subjective judgments that a house is "too small" for a particular size family sufficient to avoid summary judgment).

212. As yet, there is no basis in the scientific literature for choosing one standard of unacceptable crowding standard over another. The basic research issues are so problematic that researchers never get to the standard-setting stage in applying their findings. Indeed, in a curious twist, they use the unproven standard (e.g., > 1.00 [person per room]) to measure the basic phenomena whose extent they are trying to determine. Thus researchers tend to implicitly leave standard setting to professional organizations such as the American Public Health Association, or to building code officials . . . meanwhile, these organizations pretend the standards have some basis in science. Myers, *Changing Problem*, *supra* note 5, at 68. Most of the identified health and safety concerns can be addressed by other measures, for example installing more smoke and CO₂ alarms to give tenants more time to escape their dwelling in an emergency, while strengthening window and ventilation requirements and trash disposition requirements address the communication of disease concern. It is more likely that persuasive scientific evidence can be marshaled to support specific occupancy standards for elevators, motor vehicles, bathrooms, restaurants, and perhaps even pools than for housing. All the parties in *City of Richmond Heights* found experts to testify concerning the "reasonableness" of the ordinances at issue in that case, but their opinions were not specifically limited to showing that the specific standards actually furthered public health and safety. *See Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 998 F. Supp. 825, 829 (1998) (discussing testimony of plaintiff's and defendants' experts).

213. Ahrentzen, *supra* note 6, at 47-56 (casting doubt upon the conclusion that the net costs/benefits for tenants' health from "doubling up" is known because of poor study design and because few studies have been done to see what the benefits of "doubling up" might be to tenants). Note that in states which have adopted the doctrine of implied warranty of habitability by statute or by court decision, tenants already have a right to deal with physical substandard housing issues which they believe are harmful to their health and safety. *See, e.g., Hilder v. St. Peter*, 144 Vt. 150 (1984) (adopting an implied warranty of habitability for residential dwellings).

This section clarified the meaning of the FHAA exemption by demonstrating that the “exemption” is best understood as a special defense for governmental occupancy restrictions and by showing that “reasonable” must mean non-discriminatory. The section then offered two plausible versions of a “reasonable” standard derived from the *City of Athen*’s opinion.

III. THE “SAFE HARBOR” EXTENSION OF THE EXEMPTION

Private housing providers have frequently argued that the § 3607(b)(1) exemption should be interpreted as providing a “safe harbor” for private defendants who provide housing with occupancy standards that are consistent with applicable governmental standards.²¹⁴ These defendants contended that the exemption provided them a complete “safe harbor” defense against familial status liability.²¹⁵ The plain language of the exemption—“any reasonable local, State, or Federal restrictions”—would appear to cover only governmental occupancy restrictions.²¹⁶ While no court has yet ap-

214. It is not clear if the defendant in *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992), specifically raised the safe harbor defense. After citing the exemption, the court states, “The restrictions at issue in this case are not governmentally imposed, and are far in excess of restrictions imposed by the applicable municipal code.” *Id.* at 1179; *see also* *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991) (noting that defendant’s occupancy restriction is more stringent than city’s requirements). The defense is implicitly recognized in *United States v. Hover*, No. C-93 20061 JW, 1995 WL 55379, at * 5 (N.D. Cal. Feb. 16, 1995) (finding occupancy standards in violation of FHAA and enjoining defendants “from enforcing an occupancy standard of less than two persons per bedroom, except under circumstances where California occupancy standards would be violated based upon the size of the mobile home”).

215. In other cases, private housing provider defendants appear to argue that state and local government occupancy standards preempt the FHAA. *See, e.g.,* *United States v. Tropic Seas*, 887 F. Supp. 1347, 1361 (D. Haw. 1995) (claiming that its occupancy standard is “mandated by City Housing and State Health Codes”). On this view, if they are in compliance with state or local governmental occupancy standards, then they cannot be liable for FHAA claims of discrimination related to their imposition of these standards. This reading of the statute and the exemption is incorrect. First, Congress clearly intended in the FHAA to limit state and local government regulation of housing. There is no evidence that Congress intended that state and local government regulation preempt the FHAA. Second, Congress’ inclusion of the “exemption” for “reasonable” governmental occupancy restrictions demonstrates that it did not intend that this federal statute completely preempt state and local governmental regulation of internal density. The view that the FHAA is preempted by state and local government regulation turns Congress’ exemption for “reasonable” state and local governmental occupancy restrictions on its head.

216. *See* *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 746 (9th Cir. 1996) (referring to the exemption, “Congress chose to give special deference to government-imposed occupancy limits only. Congress made no comparable provision for private occupancy policies”). Note that the court stated: “No state or local occupancy standards control, and the decision has always been [the defendant’s] to make.” *Id.* at

plied the safe harbor defense to release a private housing provider defendant from liability, some courts appear open to this extension of the exemption to benefit private housing providers.²¹⁷ This section considers the justification of an extension of the exemption, how it ought to be applied by courts, and the resulting importance for courts' identification of an appropriate standard for "reasonable" occupancy standards under 42 U.S.C. § 3607(b)(1).

The Preamble to HUD's final regulations on the FHAA makes clear that during the comment period before issuing the final regulation, HUD was under significant pressure to provide more guidance to private housing providers to enable them to set occupancy standards that would not violate the FHAA. Immediately following its brief mention of the governmental exemption, the Preamble relates that many commenters on the proposed regulations requested HUD either to develop a non-discriminatory occupancy

742; see also *Tropic Seas*, 887 F. Supp. at 1361 ("Notably, § 3607(b)(1) refers to governmental restrictions.").

217. See, e.g., *Reeves v. Rose*, 108 F. Supp. 2d 720, 727 (E.D. Mich. 2000) ("[D]efendants initially rely on the occupancy restrictions found in the Orion Township building code and [defendant apartment house's] own policies, which defendants say are permitted under the FHA exemption [citing § 3607(b)(1)]."). The Reeves court denied defendants' motion for summary judgment because plaintiff produced evidence that raised genuine issues of material fact regarding the reasonableness of its occupancy restriction. *Id.* at 728. In an unpublished memorandum of decision denying defendants' motion for summary judgment, a Connecticut court applying federal and state fair housing law considers numerous claims by defendants that their occupancy standards are nondiscriminatory because they are applying governmental occupancy standards. See *CHRO v. J.E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *10-15 (Conn. Super. Ct. 2001). In addition, an influential commentator appears to have accepted this extension of the exemption. See *HOUSING DISCRIMINATION: LAW AND LITIGATION*, *supra* note 28, § 11E:3 ("The Fair Housing Act specifically allows housing providers to adhere to 'any reasonable local, State, or Federal restrictions' regarding the maximum numbers of occupants permitted to occupy a dwelling"). Schwemm cites the statute and *Laurenti v. Water's Edge Habitat, Inc.*, 837 F.Supp. 507, 508-11 (E.D.N.Y. 1993), as authority. In *Laurenti*, plaintiffs alleged a violation of the FHAA and sought a preliminary injunction to enjoin defendants from evicting them "so long as the Village of Patchogue takes no action against the defendants to enforce the Village Occupancy Code." *Id.* at 508. Defendants claimed, with supporting evidence from the Village, that their occupancy standard complied with the Village Occupancy Code and that allowing plaintiff's family to occupy an apartment would violate the Code. *Id.* at 510. The plaintiffs disputed the defendant's interpretation of the Village Occupancy Code. *Id.* The court did not absolve defendant of liability in that case under a "safe harbor" theory. Rather, it assumed plaintiffs had made out a prima facie case of discrimination, and only denied the preliminary injunction because of misrepresentations by plaintiffs to defendants in their housing application and, without offering an interpretation of the Village Occupancy Code, found that it would be "unlikely that the plaintiffs can show that the defendants' actions were merely a pretext for discrimination when the defendants reasonably believed those actions were in accordance with the Village Code." *Id.* at 511.

standard upon which they could rely in the absence of a state or local occupancy code, or to designate that the already existing HUD occupancy standard for HUD-assisted housing developments could be relied upon for compliance with the FHAA.²¹⁸

HUD refused these entreaties for further guidance,²¹⁹ explaining that nothing "in the statute or its legislative history [indicates] any intent on the part of Congress to provide for the development of a national occupancy code."²²⁰ Instead, HUD explained: "the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."²²¹ Adding to private housing providers' frustration and anxiety, HUD further promised that it would "carefully examine any such non-governmental restriction to determine whether it operates unrea-

218. Many of these commenters, generally persons involved in the rental of dwellings and associations representing owners and managers of rental dwellings, recommended that the final rule include a HUD-developed occupancy standard, and state that in the absence of a State or local occupancy code, owners or managers complying with the HUD standard would be considered to be in compliance with the Fair Housing Act with respect to the treatment of families with children. In the alternative, several commenters recommended that HUD indicate in the final rule that owners and managers of rental housing would be in compliance with the Fair Housing Act if they developed and implemented occupancy standards which are no less stringent than occupancy guidelines currently used in connection with HUD-assisted housing programs.

HUD Preamble, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989).

219. Numerous issues about the liability of private housing providers for restrictive occupancy standards remain unresolved, for example informal internal guidance by HUD to its investigators appeared to articulate a "reasonable" non-governmental occupancy standard. A future article will clarify additional issues related to the liability of private housing providers under the FHAA for restrictive occupancy standards. There is no consistent standard of liability or analysis applied by the courts to private housing providers' occupancy policies. The courts have inconsistently answered the following questions: how to relate governmental standards to private ones?; what does "reasonable" mean with regard to private housing providers?; how does the "reasonableness" of a private housing provider's occupancy policy relate to traditional disparate impact analyses?; does a HUD policy statement establish a de facto national residential occupancy standard?

220. HUD Preamble, 54 Fed. Reg. 3232, 3237 (Jan. 23, 1989). Further, HUD believed that the occupancy standards it had set for HUD-assisted housing (generally two person per bedroom) would not be an appropriate basis for guiding private housing providers because "these guidelines are designed to apply to the types and sizes of dwellings in HUD programs and they may not be reasonable for dwellings with more available space and other dwelling configurations than those found in HUD-assisted housing." *Id.*

221. *Id.*

sonably to limit or exclude families with children.”²²² HUD elaborated that the lack of guidance both in the statute and the regulations were “consistent with Congressional reliance on and encouragement for States and localities to become active participants in the effort to promote achievement of the goal of Fair Housing.”²²³

There are two plausible justifications for extending the safe harbor defense to private housing providers: the statutory language can be interpreted that way,²²⁴ and the U.S. Supreme Court appears to have once acknowledged the safe harbor defense in a footnote in dicta.²²⁵ But the fact that private housing providers won several other *explicit* exemptions from the FHAA for themselves weighs against reading one into the language here.²²⁶ And the

222. *Id.*

223. While the statutory provision providing exemptions to the Fair Housing Act states that nothing in the law limits the applicability of any reasonable Federal restrictions regarding the maximum number of occupants, there is no support in the statute or its legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. This interpretation is consistent with Congressional reliance on and encouragement for States and localities to become active participants in the effort to promote achievement of the goal of Fair Housing.

Id.

224. The extension of the exemption can find its justification in the statutory language. “Nothing in this subchapter limits the applicability of reasonable [governmental] restrictions” can be reasonably interpreted to mean that Congress intended to exempt reasonable governmental restrictions by whomever they were “applied,” that is, whether they were applied by governments or by private parties.

225. “Section 3607(b)(1) makes it plain that, pursuant to local prescriptions on maximum occupancy, landlords legitimately may refuse to stuff large families into small quarters.” *City of Edmonds v. Oxford House*, 514 U.S. 725, 735 n.9 (1995).

226. *See, e.g.*, 42 U.S.C. § 3607 (a) (2004) (providing explicit exemption from FHAA liability if a “religious organization, association, or society” limits housing or gives housing preference based upon religion, and explicitly exempting a “private club” from FHAA liability if it limits housing or gives preference for its members to housing it owns or operates); 42 U.S.C. § 3607 (b)(2) (2004) (exempting “housing for older persons” as defined in the statute from FHAA liability founded on familial status). Testimony by housing providers to Congress during its deliberations on the FHAA suggests that Congress had housing providers and their concerns in view when it drafted and enacted the legislation. In addition, the “safe harbor” extension of the exemption would appear to conflict with HUD’s “Keating Memorandum” as allowing “owners and managers [to] develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit.” Memorandum from Frank Keating, HUD General Counsel, to all Regional Counsel (March 20, 1991) (regarding “Fair Housing Enforcement Policy: Occupancy Cases”) (reprinted at 63 Fed. Reg. 70256-57 (Dec. 28, 1998)). That memorandum makes compliance with state and local law only one of several factors to be considered in determining whether or not a private housing provider’s occupancy standard would be “reasonable.” *See id.* It does not provide an

Court stressed that exceptions to the FHAA should be construed narrowly.²²⁷ On balance, the safe harbor defense is probably justifiable based upon a reasonable interpretation of the statutory language. It would also provide private housing providers with some useful guidance on complying with the FHAA with regard to occupancy restrictions.

Nonetheless, courts' application of the safe harbor defense requires consideration. Courts cannot appropriately grant the safe harbor defense unless the underlying governmental restriction is shown to be "reasonable" and thus qualifying for the exemption. Otherwise, courts are giving private housing providers the benefit of the exemption for "reasonable" governmental occupancy standards without ever determining if the government standard relied upon meets the statutory requirement of being "reasonable." If courts fail to inquire into a governmental standard's reasonableness, any validly-adopted government standards can be used to avoid FHAA liability. Therefore, in applying the safe harbor defense, court should follow the clearly established rule²²⁸ that the

automatic "safe harbor." See *id.* The legal authority of that memorandum will be analyzed in a future article.

227. "Accordingly, we regard this case as an instance in which an exception to a 'general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" *City of Edmonds v. Oxford House*, 514 U.S. 725, 731-32 (1995); accord *Oxford House, Inc. v. City of Virginia Beach* 825 F. Supp. 1251 (E.D. Va. 1993). This principle has been followed in construing other exemptions to the FHAA. For example, "Congress chose to create an exemption for communities designed to meet the needs of citizens 55 years of age and older. This exemption must be narrowly construed in order to preserve the balance Congress intended to strike between housing for older persons and the prohibition against familial status discrimination." *Park Place Home Brokers v. P-K Mobile Home Park*, 773 F. Supp. 46, 54 (N.D. Ohio 1991) (reviewing defendant's claim to qualify for the "housing for older persons" exemption to the FHAA); see also *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (denying the "religious organization" exemption to an organization with only indirect affiliation with the Roman Catholic Church); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975) (denying the "religious organization" exemption to a private, nonsectarian home for children). Schwemm notes that while there is no definitive case law interpreting the "private club" exemption, it appears to include "temporary rooming facilities of social organizations such as university clubs" which are truly private. HOUSING DISCRIMINATION: LAW AND LITIGATION, *supra* note 28, § 9:6.

228. See *Fair Hous. Advocates Ass'n v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000) (defendant local governments bear burden of proof to show eligibility for exemption for "reasonable" occupancy standards); *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1043 (N.D. Ohio 1998) (stating that party seeking benefit of exemption from FHAA bears burden of proof at all times to demonstrate that they qualify for it—i.e. "religious organization exemption"); see also *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 188 (1985); *Chapman v. Dunn*, 414 F.2d 153, 159 (6th Cir. 1969).

party seeking an exemption from the FHAA bears the burden of proving that it qualifies for it.²²⁹ Most importantly, courts should require that private defendants bear the burden of proving that the governmental standards upon which they rely actually qualify for the exemption, that they are “reasonable.”²³⁰

If accepted by courts, the safe harbor defense could extend the exemption to any private defendant who applies “reasonable” governmental occupancy standards; this defense could affect large amounts of privately owned housing. The effect of the extension of the exemption would be to close the gap between government and private housing provider liability that the FHAA opened up by granting an exemption directly to governments. Because many states delegate authority to local governments to set occupancy standards,²³¹ local governments can effectively set the baseline for liability for themselves and private housing providers under the FHAA. For these reasons, if the safe harbor defense is accepted, it is very important for courts to adopt a proper interpretation of “reasonable” for purposes of the exemption.

If courts apply a suitable non-discriminatory test to determine which governmental standards qualify for the exemption, allowing private housing providers to get the benefit of the exemption under the safe harbor defense for such reasonable occupancy restrictions will not undercut the achievement of the FHAA’s remedial goals and would have the benefit of providing private housing providers with much needed guidance in how to comply with the FHAA.²³²

229. Specifically, courts should: 1) determine if the governmental restriction applies to the defendant’s dwelling at issue in the case, meaning that the defendant is required by law to abide by it; 2) determine if the applicable governmental restriction meets both the eligibility requirements of *Edmonds* and the qualifying “reasonable” test set forth in Part II.D; and, 3) determine if the defendant’s occupancy policy is the same as or less restrictive than the applicable and reasonable governmental restriction.

230. It makes no sense to require plaintiffs to bear this burden. And, if the private housing provider defendant does not bear this burden, then anytime a defendant claimed the safe harbor defense plaintiffs would be required to sue the local jurisdiction to defend the occupancy restriction upon which the private housing provider defendant is relying. See *CHRO v. J.E. Ackley, LLC*, No. CV99550633, 2001 WL 951374, at *10-11 (Conn. Super. Ct. July 20, 2001) (when defendant sought the “safe harbor” defense, the court noted that state occupancy provisions apply to the defendant, and then properly stated that “although local ordinances restricting the maximum number of occupants may be exempt from the operation of the fair housing acts, for such exemption to apply they must be ‘reasonable.’”).

231. See JUERGENSMEYER & ROBERTS, *supra* note 13, at 311.

232. Since governmental occupancy standards would be reviewed for how they actually serve public health and safety interests, they are likely to be less restrictive than

CONCLUSION

One important way that governments and private housing providers distribute housing opportunities is by setting and enforcing residential occupancy standards to prevent overcrowding. Traditional regulation of "overcrowding" conflicts with widespread and long-standing practices of families and extended families living closely together in a way that may be beneficial to them and to society. Overly restrictive residential occupancy standards imposed by both governments and private housing providers unduly burden families, and especially families of color in the context of a chronic and likely worsening housing crisis across the nation.

The FHAA should offer help. An overbroad exemption that allows both government and private housing provider defendants to escape liability under FHAA for potentially discriminatory residential occupancy standards would weaken that promise of assistance. The Sixth Circuit's deferential standard of "reasonable" in *City of Richmond Heights*, and courts' acceptance of the "safe harbor" defense, open the door for governments and private housing providers to unduly restrict living closely practices by exempting restrictive residential occupancy policies from challenge under the FHAA. If courts fail to give the "reasonable" standard any teeth, then this type of housing discrimination will not be challenged because restrictive government standards judged to be exempt from FHAA under a deferential standard can then give legal "cover" to restrictive private housing provider standards.

Closing this loophole requires confronting the puzzle that Congress created by creating an "exemption" based upon a "reasonable" standard that is also non-discriminatory. The best interpretation of the "exemption" is that Congress intended to establish a different standard of liability for governmental entities rather than to create a typical "exemption" that is raised as an affirmative defense. The "exemption" is more accurately called a special defense.

This article has offered two versions of a "reasonable" standard based upon the Eleventh Circuit's *City of Athens* opinion. In the "reasonable balance" version of the standard, a court would balance the benefits of local government's health and safety objectives in regulating overcrowding with the costs in discrimination to families, ensuring that any discrimination caused by the regulation is

only "incidental" not "substantial." In the "reasonable means-ends fit" version, a court would scrutinize the fit between the local government's stated health and safety objectives and the actual consequences of the specific ordinance in preventing or reducing overcrowding, ensuring that any discrimination caused by the regulation is only "incidental" not "substantial."

Since a party seeking to take advantage of an exemption bears the burden of proving its qualification for it, private housing providers seeking to rely on governmental standards to escape FHAA liability under the "safe harbor" defense bear the burden of proving that they are reasonable under the appropriate standard. The consequence of this approach is that governments as well as private housing providers who seek "safe harbor" under governmental standards will be required to demonstrate that their residential occupancy standards are "reasonable," meaning not discriminatory.

When its legal analysis and standards are clarified, FHAA's provisions prohibiting discrimination against familial status via restrictive residential occupancy standards can be reconciled with the enigmatic "exemption" for "reasonable" governmental occupancy restrictions, and the FHAA can be a powerful tool to ensure equity in the distribution of housing opportunities for families in cities and suburbs.