FILLING UP FROM THE RIGHT SOURCE: WHY HUD'S INTERPRETATION OF WHAT MAKES A HOUSING ACCOMMODATION "REASONABLE" SHOULD BE GIVEN *CHEVRON* DEFERENCE

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I. INTRODUCTION

Amidst the rise of the American administrative state, Congress has frequently enacted statutory text that appears lifeless, lacking in tangibility beyond the

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cold, black ink that would rub off on your fingers should you choose to trace the letters of the law with your hand.[1] Our legislature has increasingly relied on administrative agencies to add meaning to bare legal language by passing regulations interpreting federal statutes.[2] As a result, federal courts have often had the option of deferring to agency interpretations when resolving issues of statutory construction.[3] Indeed, under certain circumstances, courts *must* give controlling weight to an agency's judgment. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[4] the Supreme Court held that courts should defer to an agency's interpretation of a statute if 1) Congress did not clearly intend for the text to have a specific meaning,[5] and 2) the interpretation is not "arbitrary, capricious, or manifestly contrary to the statute."[6]

This Article maintains that if the *Chevron* test is applied to the regulation[7] that interprets the Fair Housing Act's (FHA)[8] reasonable accommodation provision,[9] then courts should grant that interpretation deference. No federal court has opted to do this,[10] even though the regulation, issued by the U.S. Department of Housing and Urban Development (HUD) in 1989,[11] clearly defines what makes a housing accommodation reasonable.[12] Instead, every court interpreting the term "reasonable" has used the body of law that developed under

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[1] *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 795 (2007).

[2] Edward L. Rubin, *Law and Legislation in the Administrative State*, COLUM. L. REV. 369, 372–75 (1989).

[3] *Id.*

[4] 467 U.S. 837 (1984).

[5] *Id.* at 842–43.

[6] *Id.* at 844.

[7] 24 C.F.R. § 100.204(b) (2013).

[8] 42 U.S.C. §§ 3601–19 (2012).

[9] *Id.* § 3604(f)(3)(B).

[10] Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008); Giebler v. M & B Assocs., 343 F.3d 1143, 1154 (9th Cir. 2003); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 604 (4th Cir. 1997); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d, 781, 795 (6th Cir. 1996); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995); Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011); Groteboer v. Eyota Econ. Dev. Auth., 724 F. Supp. 2d 1018, 1024 (D. Minn. 2010); Dev. Servs. of Neb. v. City of Lincoln, 504 F. Supp. 2d 714, 723 (D. Neb. 2007); Trovato v. City of Manchester, 992 F. Supp. 493, 497 (D.N.H. 1997); Martin v. Constance, 843 F. Supp. 1321, 1326 (E.D. Mo. 1994).

[11] Final Rule Implementing the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232 (Jan. 23, 1989).

[12] 24 C.F.R. § 100.204(b).

the Rehabilitation Act of 1973 (RA)[13] to define the term rather than HUD's regulation.[14] This includes the eight circuit courts that have decided the issue.[15] According to these courts, the FHA's legislative history indicates that Congress intended for courts to borrow the definition of "reasonable" from case law interpreting the RA's regulations.[16]

This reasoning is flawed, however. It would be erroneous for any federal court to find a clear statement on what makes an accommodation "reasonable" in the FHA's legislative history. First, the law is unsettled as to whether legislative history can even be consulted when a court is deciding whether to defer to an agency's interpretation,[17] as the Supreme Court has never issued a definitive statement on the matter.[18] The circuits are currently split on the issue, with one court taking a decidedly textualist stance, holding that it is impermissible for a court to consult a statute's legislative history when determining whether to grant deference to an agency interpretation.[19] This approach makes it impossible to locate any statement from Congress on how to define "reasonable" in the FHA's legislative history, clear or otherwise. Moreover, even if the question of whether to defer to HUD's regulation is viewed from an intentionalist perspective, the approach taken by the remaining courts, an examination of the FHA's legislative history does not reveal an unambiguous statement from Congress on how to define what makes an accommodation reasonable under the statute.[20]

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[13] 29 U.S.C. § 794 (2012).

[14] *Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1154; *Bryant Woods*, 124 F.3d at 604; *Hovsons*, 89 F.3d at 1104; *Elderhaven*, 98 F.3d at 178; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334–35; *Trovato*, 992 F. Supp. at 497. Although the Seventh Circuit's definition of "reasonable" appears to be derived from ADA case law, the court ultimately does use RA case law to define the term. *See Oconomowoc*, 300 F.3d at 784. For more explanation, *see infra* text accompanying notes 50, 54. Along those same lines, the District Courts in the Eighth Circuit that interpreted "reasonable" borrowed their definition from the body of law that developed under the RA because they derived their definition from the Seventh Circuit, which uses the RA define the term. *See Fair Hous. of the Dakotas*, 778 F. Supp. 2d at 1039; *Dev. Servs. of Neb.*, 504 F. Supp. 2d at 723; *Martin*, 843 F. Supp. at 1326; *Groteboer*, 724 F. Supp. 2d at 1024.

[15] *Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1154; *Oconomowoc*, 300 F.3d at 784; *Bryant Woods*, 124 F.3d at 604; *Hovsons* 89 F.3d at 1104; *Elderhaven*, 98 F.3d at 178; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334–35.

[16] *Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1149; *Bryant Woods*, 124 F.3d at 603; *Hovsons*, 89 F.3d at 1101; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334.

[17] Melina Forte, *Third Circuit Dances the Chevron Two-Step in* United States v. Geiser, 54 VILL. L. REV. 727, 736 (2009).

[18] *Id.*

[19] United States v. Geiser, 527 F.3d 288 (3d Cir. 2008).

[20] The report of the House Judiciary Committee accompanying the FHA states that the concept of reasonable accommodation is to be borrowed from the RA's body of law, but nowhere in the document does the Judiciary Committee specifically state that the definition of reasonable accommodation is to be borrowed from the RA's body of law. *See generally*

Because there is no clear statement from Congress on the matter, this Article argues that federal courts should defer to HUD's interpretation of what makes an accommodation "reasonable" under the FHA. Part I outlines the FHA's reasonable accommodation provision and shows how courts have chosen to interpret it. Part II describes the two-part test that the Supreme Court developed in *Chevron* to determine whether and when deference to an agency interpretation is appropriate. This Part also highlights the lack of clarity that exists in the law as to whether a court should adopt a textualist or an intentionalist approach when applying the *Chevron* test. Part III contends that even though the law on how to apply *Chevron* is unsettled, it is still clear that courts should grant deference to HUD's interpretation of what makes an accommodation reasonable. Finally, Part IV explains how a court should define "reasonable" under the FHA's provision and why applying this definition would be relatively easy in practice.

As a whole, this Article builds upon previous scholarship, which has overlooked HUD's regulation when defining what makes accommodations reasonable.[21] Other scholars have adopted the same approach as the federal courts, accepting the RA's body of law as the source of the FHA's definition[22] and ultimately arriving at a mistaken construction of the term. This Article fills a gap in the literature by providing the correct definition.

II. REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT (FHA)

The FHA's reasonable accommodation provision, passed by Congress in 1988, has its conceptual roots in the RA.[23] Although a regulation promulgated by HUD specifically defines what the term "reasonable" means under the pro-

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H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173. For more discussion of this issue, *see infra* Part III.B.

[21] *See generally* Daniel Barkley, *The Meaning of Reasonable Accommodation*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 249 (1997); Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. SCH. J. HUM. RTS. 435 (1997); Kellyann Everly, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims*, 29 U. DAYTON L. REV. 37 (2003); Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925 (1994); Robert L. Schonfeld, *"Reasonable Accommodation" Under the Federal Fair Housing Amendments Act*, 25 FORDHAM URB. L.J. 413 (1998).

[22] *See* Barkley, *supra* note 21, at 250; Eisner, *supra* note 21, at 445–47; Everly, *supra* note 21, at 47; Kanter, *supra* note 21, at 951; Schonfeld, *supra* note 21, at 420. The scholarly debate has not centered on what makes an accommodation reasonable, but on who must bear the burden of proving whether the accommodation was reasonable. *Compare* Everly, *supra* note 21, at 39, *with* Schonfeld, *supra* note 21, at 430.

[23] H.R. REP. NO. 100-711.

vision,[24] federal courts have neglected to follow this definition when the issue of how to construe the term has come before them.[25] Eight circuit courts have chosen instead to borrow the FHA's definition of "reasonable" from the body of law that developed under the RA.[26] These courts assert that they are carrying out the express will of Congress by using the RA to help define reasonable accommodation under the FHA.[27]

A. *The Conceptual Origins of Reasonable Accommodations in Disability Law*

The RA was the first federal law to address disability discrimination,[28] making it illegal for federally funded programs to discriminate on the basis of what was then referred to as "handicap."[29] Although the RA initially failed to define "discrimination," regulations elucidated the law's broad statutory language.[30] These rules introduced the idea that it was discriminatory for a recipient of federal funds to fail to make "reasonable accommodation to the known physical or mental limitations" of individuals with disabilities.[31] Examples of reasonable accommodations listed in the regulations included altering facilities to make them accessible, modifying people's work schedules, or providing readers or interpreters.[32] After the passage of the RA regulations, if HUD determined that reasonable accommodations were necessary to provide individuals with disabil-

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[24] *See* 24 C.F.R. § 100.204(b) (2013).

[25] *See* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008); Giebler v. M & B Assocs., 343 F.3d 1143, 1154 (9th Cir. 2003); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 604 (4th Cir. 1997); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d, 781, 795 (6th Cir. 1996); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995); Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011); Groteboer v. Eyota Econ. Dev. Auth., 724 F. Supp. 2d 1018, 1024 (D. Minn. 2010); Dev. Servs. of Neb. v. City of Lincoln, 504 F. Supp. 2d 714, 723 (D. Neb. 2007); Trovato v. City of Manchester, 992 F. Supp. 493, 497 (D.N.H. 1997); Martin v. Constance, 843 F. Supp. 1321, 1326 (E.D. Mo. 1994).

[26] *Schwarz*, 544 F.3d at 1201; *Giebler*, 343 F.3d at 1143; *Oconomowoc*, 300 F.3d at 775; *Bryant Woods*, 124 F.3d at 597; *Hovsons*, 89 F.3d at 1096; *Elderhaven*, 98 F.3d at 175; *Smith & Lee*, 102 F.3d at 781; *Shapiro*, 51 F.3d at 328.

[27] *See Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1149; *Bryant Woods*, 124 F.3d at 603; *Hovsons*, 89 F.3d at 1101; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334.

[28] Christina Kubiak, *Everyone Deserves a Decent Place to Live: Why the Disabled Are Systematically Denied Fair Housing Despite Federal Legislation*, 5 RUTGERS J. L. & PUB. POL'Y 561, 566 (2008).

[29] Pub. L. 93-112, 87 Stat. 355 (current version at 29 U.S.C. § 794 (2012)).

[30] Everly, *supra* note 21, at 41; *see* 45 C.F.R. § 84 (2013).

[31] *Id.* § 84.12(a).

[32] *Id.* § 84.12(b).

ities the opportunity to participate in programs or activities that received federal financial assistance, then HUD would require recipients of those federal funds to make those alterations.[33]

B. *When an Accommodation Is "Reasonable" Under the FHA*

Even though Congress enacted the RA after the FHA, the RA still influenced the FHA's evolution. When Congress originally passed the FHA in 1968, the FHA outlawed discrimination only on the basis of race, color, religion, and national origin.[34] Federal prohibitions against housing discrimination on the basis of disability did not exist until 1988, when Congress amended the FHA to include individuals with disabilities.[35] With these amendments, Congress ratified a provision in the FHA that made a failure to grant a reasonable housing accommodation a form of disability discrimination.[36] As a result, it became illegal to "refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [an individual with a disability] equal opportunity to use and enjoy a dwelling."[37] An example of a reasonable accommodation under the FHA would be a landlord making an exception to a building-wide "no pets" policy to allow a blind individual to live in an apartment with a Seeing Eye dog.[38] Another illustration would be a municipality allowing a group home for individuals with disabilities to operate in a residential neighborhood zoned for single-family homes.[39]

According to the report of the Judiciary Committee of the House of Representatives (the Report) that accompanied the FHA, the Committee modeled the statute's reasonable accommodation provision after the RA's rule.[40] The Report states that "[t]he concept of 'reasonable accommodation' has a long history in regulations and case law on the basis of handicap"[41] and that the Judiciary Committee looked to this history in drafting the FHA amendments.[42] According to the Committee, the FHA "uses the same definitions and concepts from the [RA]."[43]

Even though the Report included a clear statement about the derivation of the FHA's reasonable accommodation provision, the Judiciary Committee did not

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[33] *See* Everly, *supra* note 21, at 42.

[34] Pub. L. 90-284, 82 Stat. 73 (current version at 42 U.S.C. §§ 3601–19 (2012)).

[35] Pub. L. 100-430, 102 Stat. 1620 (current version at 42 U.S.C. §§ 3601–19).

[36] *Id.* § 6(a)–(b).

[37] 42 U.S.C. § 3604(f)(3)(B).

[38] 24 C.F.R. § 100.204(b) (2013).

[39] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 11D:5 (2012).

[40] *See id.* § 11D:8.

[41] H.R. REP. NO. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

[42] *Id.* at 28.

[43] *Id.* at 18.

explain what made an accommodation reasonable under the statute.[44] Neither the Report nor the FHA itself offers a specific definition.[45] Instead, HUD, the agency authorized to interpret the FHA, was left responsible for defining the term.[46] Pursuant to its authority, HUD issued a regulation stating that an accommodation is "reasonable" if "it is feasible and practical under the circumstances."[47]

C. *When an Accommodation Is "Reasonable" According to the Courts*

Although HUD regulations directly addressed what makes an accommodation "reasonable" under the FHA, federal courts failed to defer to this interpretation. The Fourth Circuit in *Bryant Woods Inn, Inc. v. Howard County, Maryland*, spells out the definition of "reasonable" used at the federal appellate level.[48] In this case, the court stated that an accommodation is reasonable if it does not "impose undue financial and administrative burdens . . . or changes, adjustments, or modifications to existing programs that would be substantial, or that would constitute fundamental alterations of the nature of the program."[49] The Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have adopted a definition of "reasonable" that is nearly identical to the one elucidated in *Bryant Woods*.[50]

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[44] *Id.* at 25 (1988) ("New Subsection 804(f)(3)(B) makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling.").

[45] Compare the definition provided in the Report with the definition included in the statute, 42 U.S.C. § 3604(f)(3)(B) (2012) ("[D]iscrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.").

[46] *Id.* § 3614(a).

[47] 24 C.F.R. § 100.204(b) (2013).

[48] 124 F.3d 597 (4th Cir. 1997).

[49] *Id.* at 604.

[50] Giebler v. M & B Assocs., 343 F.3d 1143, 1154 (9th Cir. 2003) ("Under the FHA, as under the RA and the ADA, only reasonable accommodations do not cause undue hardships or mandate fundamental changes in a program are required."); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) (noting that an accommodation is reasonable if it does not "impos[e] undue financial and administrative burdens[,] . . . impose[ ] an undue hardship[,] . . . or require[ ] a fundamental alteration in the nature of the program."); Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996) ("[A] reasonable accommodation is one that does not place an undue burden upon the targeted government entity."); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d, 781, 795 (6th Cir. 1996) ("[A]n accommodation is reasonable unless it requires a fundamental alteration in the nature of a program or imposes undue financial or administrative burdens."); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995) (observing that an accommodation is reasonable if it does not require "those changes, adjustments, or modifications to existing programs that would be substantial or that would constitute fundamental alterations in the nature of a

The roots of this definition are found in the body of law that developed under the RA, not HUD's interpretation of the FHA. The Fourth Circuit's definition, for example, is derived from two Supreme Court cases interpreting the RA's reasonable accommodation regulation:[51] *Southeastern Community College v. Davis*[52] and *Alexander v. Choate*.[53] Other circuits using a similar definition have also followed the RA to arrive at their definitions of reasonableness.[54] For instance, in addition to citing *Davis* and *Alexander*,[55] the Eleventh Circuit drew upon another famous RA Supreme Court case, *School Board of Nassau County v. Arline*,[56] as well as an RA case decided in its own circuit, *Harris v. Thigpen*.[57]

These circuits argue that the definition of reasonable must be borrowed from the RA's body of law because Congress directed courts to follow the RA when interpreting the FHA's reasonable accommodation provision. The Sixth Circuit uses the RA to interpret the FHA, and points to the FHA's legislative history, which "indicate[s] that Congress intended courts to apply the line of decisions interpreting 'reasonable accommodations' in [RA] cases when applying the FHA[ ]."[58] The Ninth Circuit seconded this notion, stating that it uses RA regulations and case law to interpret the FHA's reasonable accommodation provi-

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program"). The Seventh Circuit, at least explicitly, defines reasonable as "efficacious and proportional to the costs to implement it." Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002). And at first glance, this seems at odds with the definitions used by the other circuits. However, the Seventh Circuit also states that an accommodation is deemed to be "unreasonable" if "it imposes undue financial and administrative burdens or requires a fundamental alteration in the nature of the program." *Id.* According to this circuit, then, an accommodation will be defined as reasonable if it does not impose an undue financial and administrative burden or require a fundamental alteration in the nature of the program. *Id.* Thus, the definition of reasonable used in the Seventh Circuit is effectively identical to the definition used by the other circuits.

[51] *Bryant Woods*, 124 F.3d at 604.

[52] 442 U.S. 397 (1979).

[53] 469 U.S. 287 (1985).

[54] *Giebler*, 343 F.3d at 1149 ("We have applied RA regulations and case law when interpreting the FHA's reasonable accommodation provision."); *Hovsons*, 89 F.3d at 1103 ("[C]ourts must look to the body of law developed under . . . the Rehabilitation Act as an interpretive guide to the 'reasonable accommodation' provision of the FHA."); *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334. Although the Seventh Circuit does not appear to be using the RA to define reasonable, in reality it does so. *See Oconomowoc*, 300 F.3d at 784. The Seventh Circuit at first glance appears to be using a different definition than other circuits, however, it is actually using the same definition. The definition of "reasonable" the court does use is drawn from a case interpreting RA regulations. *Oconomowoc*, 300 F.3d at 784 (citing Erdman v. City of Ft. Atkinson, 84 F.3d 960, 962 (1996)).

[55] *Schwarz*, 544 F.3d at 1220.

[56] 480 U.S. 273 (1987).

[57] 941 F.2d 1495 (11th Cir. 1991).

[58] *Smith & Lee*, 102 F.3d at 795.

sion because this is "[c]onsistent with the [Judiciary Committee] Report's recommendation."[59] Other circuit courts agree with this rationale.[60]

III. Considering Legislative History Under *Chevron*

The federal courts that choose to follow the RA when interpreting "reasonable" under the FHA demonstrate that they operate under the assumption that it is permissible to consider a statute's legislative history when determining congressional intent.[61] It is unclear whether this assumption is correct, and it does not have universal application. The Supreme Court has been decidedly indecisive on whether it is proper to consider a statute's legislative history when applying the test it outlined in *Chevron*.[62] As a result, there is a circuit split on the matter.[63] One circuit takes a textualist approach, arguing that it is impermissible for a court to use a statute's legislative history to determine whether Congress has expressed a clear intent.[64] Another circuit takes an intentionalist approach, arguing that to determine what Congress intended, it is necessary for a court to consider the legislative history that preceded a statute's enactment.[65] As a result of the lack of clarity in the law, it is thus possible for courts using different approaches to come to divergent decisions about whether Congress has clearly expressed its intent in a particular situation.[66]

A. *The* Chevron *Two Step*

In the modern administrative state, it is commonplace for Congress to delegate to agencies the authority to specify the meaning of certain statutes.[67] Frequently, courts must decide whether to afford agency interpretations the force

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[59] *Giebler*, 343 F.3d at 1149.

[60] *Schwarz*, 544 F.3d at 1220 ("Nevertheless, we do not paint on a completely blank canvas because Congress imported the reasonable accommodation concept from case law interpreting the Rehabilitation Act."); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 60 (4th Cir. 1997) ("Congress adopted the concept of 'reasonable accommodation' . . . as developed in Rehabilitation Act cases."); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) ("[I]n enacting the anti-discrimination provisions of the FHA, Congress relied on the standard of reasonable accommodation developed under . . . the Rehabilitation Act of 1973."); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334 (2d Cir. 1995) ("The legislative history of [the FHA's reasonable accommodation provision] plainly indicates that its drafters intended to draw on case law developed under [the RA].").

[61] *See Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1149; *Bryant Woods*, 124 F.3d at 603; *Hovsons*, 89 F.3d at 1101; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334.

[62] Forte, *supra* note 17.

[63] *Id.* at 740.

[64] United States v. Geiser, 527 F.3d 288 (3d Cir. 2008).

[65] Succar v. Ashcroft, 394 F.3d 8, 31 (1st Cir. 2005).

[66] *See* Forte, *supra* note 17, at 740.

[67] Lisa Schultz Bressman, *Chevron's* Mistake, 58 Duke L.J. 549, 550–51 (2009).

of law.[68] The Supreme Court spoke to these issues in *Chevron*, where it devised its test for determining when a court should defer to agency interpretations.[69]

In *Chevron*, the Court created a two-step procedure to decide when an agency regulation should be granted deference as an interpretation of a statute.[70] At *Chevron* step one, the Court said it must first be determined whether "Congress has spoken to the precise question at issue."[71] This first inquiry goes to whether the statutory language in question is "silent or ambiguous with respect to the specific issue."[72] To make this determination about whether Congress exhibited a clear intent, courts can apply the "traditional tools of statutory construction."[73]

If a court finds that a statute is unclear with regard to an issue, it then proceeds to *Chevron* step two: a determination of whether the agency's interpretation is "based on a permissible construction of the statute."[74] Courts have adopted different standards for permissibility at *Chevron* step two depending on whether the congressional delegation of interpretive authority is explicit or implicit.[75] If the statute is inadvertently ambiguous, then there is an implicit delegation of authority to an agency.[76] With implicit delegations, a court should deem an interpretation permissible if it is "a sufficiently rational one to preclude a court from substituting its judgment for that of the [agency]."[77] If a statute is intentionally ambiguous, then Congress has explicitly delegated interpretive authority to an agency.[78] With explicit delegations, agency interpretations are permissible unless they are "arbitrary, capricious, or manifestly contrary to the statute."[79]

In *Household Credit Services, Inc. v. Pfennig*,[80] the Supreme Court applied

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[68] *See* Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEM. ST. U. L. REV. 411, 419–25 (1992).

[69] 467 U.S. 837 (1984).

[70] *Id.* at 842–44.

[71] *Id.* at 842.

[72] *Id.* at 842–43; *see also* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010) ("Under Chevron, the concept of ambiguity is therefore central to whether an agency's interpretation of a statute that it is administers will receive judicial deference.").

[73] *Chevron*, 467 U.S. at 843 n.9.

[74] *Id.* at 843.

[75] J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations*, 36 J. LEGIS. 18, 46–47 (2010).

[76] Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts?*, 7 YALE J. ON REG. 1, 32 (1990).

[77] Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116, 126 (1985).

[78] Anthony, *supra* note 76, at 17.

[79] *Chevron*, 467 U.S. at 844.

[80] 541 U.S. 232 (2004).

Chevron's "arbitrary, capricious, or manifestly contrary to the statute" test.[81] The case involved a regulation promulgated by the Federal Reserve Board (the Board) to enforce the Truth in Lending Act (TILA).[82] At *Chevron* step one, the Court determined that the text at issue was unclear.[83] Next, at *Chevron* step two, the Court determined that there was an explicit delegation because Congress expressly delegated the authority to prescribe regulations to effectuate the purposes of TILA.[84] Accordingly, the Court proceeded to determine if the Board's interpretation was "arbitrary, capricious, or manifestly contrary to the statute."[85] To do this, the Court considered two things: 1) whether the agency's interpretation was rationally related to the statute's purpose; and 2) whether the agency considered competing perspectives before arriving at its decision.[86] Because both questions could be answered in the affirmative, the regulation was granted *Chevron* deference.[87]

B. *Interpretive Methodology at Chevron Step One*

Although *Chevron* attempted to create a straightforward procedure to help resolve issues related to agency deference, the application of this test has proven difficult in practice.[88] Scholars refer to the *Chevron* two-step as "inherently unstable" because it has raised as many legal issues as it has settled.[89] For example, one of the biggest problems with *Chevron* step one is that although the Court stated that the "traditional tools of statutory construction"[90] should be used to decide whether there is clear congressional intent, it did not specify which tools should be used in making this determination.[91] This has proven problematic because judges' own theories of statutory interpretation usually guide their decisions about which tools are appropriate for finding congressional intent.[92] Since a judge's choice of interpretive sources can impact whether a court finds a clear intent from Congress, the interpretive methodology of a

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[81] *Id.* at 242–45.

[82] *Id.* at 235.

[83] *Id.* at 241 ("That term, standing alone, is ambiguous.")

[84] *Id.* at 238.

[85] *Id.* at 242.

[86] *Id.* at 242–45.

[87] *Id.* at 245.

[88] Gifford, *supra* note 1, at 798.

[89] Gifford, *supra* note 1, at 798.

[90] *Chevron*, 467 U.S. at 843 n.9.

[91] Forte, *supra* note 17, at 735.

[92] Bressman, *supra* note 67, at 551–52 (2009); for an explanation of what an interpretive methodology is, see Jennifer M. Brandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 654 n.12 (2011) ("I use 'methods of interpretation' or 'interpretive methodologies' to refer to broader theories of interpretation such as textualism, originalism, or purposivism.").

court could be outcome determinative in *Chevron* cases.[93]

Because *Chevron* did not prescribe a particular interpretive methodology at step one, questions remain about whether an interpretive source like legislative history—which includes committee reports, committee hearings, and floor debate by individual members[94]—can be considered when determining whether Congress's intent was clear. The two major schools of judicial interpretation, textualism and intentionalism,[95] each have their own opinion on the matter.[96]

While both textualists and intentionalists believe that determining the intent of the legislature is an important goal in statutory interpretation,[97] they disagree about where to locate intent and the tools applicable to uncover that intent.[98] As an interpretive methodology, textualism claims that "Congress has no purpose or intent distinct from those explicitly stated in the statutory text."[99] Thus, textualists reject legislative history as a permissible interpretive source at *Chevron* step one because they do not believe examining it would shed any light on the intent of Congress.[100] An intentionalist, on the other hand, would allow the use of legislative history at step one to determine congressional intent.[101] Intention-

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[93] Slocum, *supra* note 72, at 794; *see* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 107 (1997) ("Interpretive methodology is important because it determines interpretive outcomes."); Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 727 (2007).

[94] Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300–01 (1990).

[95] Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (noting that textualism is intentionalism's "principal judicial rival."); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 82–83 (2000).

[96] Nelson, *supra* note 95, at 353 ("Textualists and intentionalists have a well-known disagreement about the proper use of internal legislative history.").

[97] *Id.* ("Textualists and intentionalists alike give every indication of caring . . . about the meaning intended by the enacting legislature.").

[98] Linda D. Jellum, *The Art of Statutory Interpretation: Identifying the Interpretive Theory of the Judges of the United States Court of Appeals for Veterans' Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59, 66 (2010) ("Adherents of [textualism and intentionalism] disagree about which sources show the intent of the enacting legislature and, thus, provide the best evidence of meaning.").

[99] Bressman, *supra* note 67, at 552.

[100] *Id.*; *see* John J. Dichello, Jr., *Crossing Textualist Paths: An Analysis of the Proper Textualist Interpretation of "Use" Under Section 3B1.4 of the United States Sentencing Guidelines for "Using" a Minor to Commit a Crime*, 107 DICK. L. REV. 359, 370 (2002) ("A strict textualist approach to statutory interpretation does not involve legislative history"); Nelson, *supra* note 95, at 361 ("[T]extualist judges are famous for ignoring or deemphasizing legislative history under circumstances in which other interpreters would invoke it."); Zeppos, *supra* note 94, at 1300.

[101] Bressman, *supra* note 67, at 551–52; Earl M. Maltz, *Statutory Interpretation and Leg-*

alism holds that when Congress writes a statute, it "intend[s] a meaning, [but] express[es] it imperfectly in the chosen text."[102] According to an intentionalist, a court could use legislative history at *Chevron* step one because ambiguous statutory language does not necessarily preclude clear congressional intent. Instead, an intentionalist believes that Congress may have intended a text to have a specific meaning, but their intent did not come across clearly in the statutory language.[103] Thus, intentionalists believe it may be possible to glean congressional intent from statutory history.[104]

C. *A Chevron Circuit Split*

In the years since *Chevron* was decided, the Supreme Court has never spoken decisively on the issue of whether it is permissible to consider a statute's legislative history at *Chevron* step one.[105] Indeed, the Court's own application of *Chevron* has been rather splintered.[106] The Court has taken three divergent approaches: 1) that it is permissible to consider a statute's legislative history to determine congressional intent at step one;[107] 2) that the use of legislative history is only permissible if the statutory text is unclear[108]; and 3) that it unnecessary to reference legislative history.[109]

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islative Power: The Case for a Modified Intentionalist Approach, 63 TUL. L. REV. 1, 27 (1988); *see generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[102] Bressman, *supra* note 67, at 551.

[103] *See* Aleinikoff, *supra* note 95, at 23–24 ("The actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law. It is this perspective that allows us to make sense of the claim that 'a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'").

[104] *See* Aleinikoff, *supra* note 95, at 24 ("Some intentionalists are heady archeologists. They would scrutinize the legislative materials to see if the legislature actually considered and expressed an opinion on the question under review."); Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of* Pepper v. Hart, 35 STAN. J. INT'L L. 231, 233 (1999); Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 614 (2005).

[105] Forte, *supra* note 17, at 736–37.

[106] *Id.* at 736.

[107] *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587–600 (2004); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000); Dole v. United Steelworkers, 494 U.S. 26, 35–42 (1990); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 214 (1988); INS v. Cardoza-Fonseca, 480 U.S. 421, 427–50 (1987).

[108] Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89–100 (2007); Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–401 (1996); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 648–50 (1990).

[109] Barnhardt v. Walton, 535 U.S. 212, 218–19 (2002); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417–18 (1992); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291–94 (1988).

The Court's methodological divide was on full display in *Zuni Public School District No. 89 v. Department of Education*,[110] a case that decided whether the Secretary of Education's approach to calculating a state's per-pupil expenditures was valid under the Impact Aid Act.[111] At *Chevron* step one, the Court looked to the statute's legislative history to determine congressional intent, even before considering the text of the law itself.[112] In his concurrence, Justice John Paul Stevens wrote in support of this intentionalist approach, stating that *Chevron* instructs courts to use the traditional tools of statutory interpretation when determining congressional intent, and that legislative history is clearly one of these tools.[113] He said there is "no reason we must confine ourselves to . . . statutory text if other tools of statutory construction provide better evidence of congressional intent."[114] Justice Antonin Scalia disagreed. In his dissent, he offered a textualist critique of the Court's intentionalist approach, calling it the "elevation of judge-supposed legislative intent over clear statutory text."[115] Justice Scalia wrote that "[l]egislative history can never produce a 'pellucidly clear' picture of what a law was 'intended' to mean."[116]

With no clear guidance from the Supreme Court on how to handle legislative history at *Chevron* step one, it should come as no surprise that the federal circuit courts are in disagreement on the issue. The First Circuit, for example, has held that a consideration of legislative history at this first step is permissible.[117] Indeed, the court went as far as to say that looking to a statute's legislative history at *Chevron* step one "may be required."[118] By contrast, the Third Circuit has rejected the use of legislative history at *Chevron* step one.[119] Although it recognized the uncertainty surrounding this issue,[120] the court decided that prohibiting the use of legislative history was proper based on Third Circuit and Supreme Court jurisprudence.[121] As a result, the Third Circuit categorically excludes the use of legislative history when determining congressional intent.[122]

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[110] 550 U.S. 81 (2007).

[111] *Id.* at 84–86.

[112] *See id.* at 84–100.

[113] *Id.* at 106 (Stevens, J., concurring) ("[L]egislative history is, of course, a traditional tool of statutory construction.").

[114] *Id.*

[115] *Id.* at 108 (Scalia, J., dissenting).

[116] *Id.* at 117.

[117] Succar v. Ashcroft, 394 F.3d 8, 31 (1st Cir. 2005).

[118] *Id.*

[119] United States v. Geiser, 527 F.3d 288, 292 (3d Cir. 2008).

[120] *Id.* at 292–94.

[121] *Id.* at 294.

[122] *See id.* at 293 ("[W]e no longer find it necessary to consider legislative history at Chevron step one."); Forte, *supra* note 17, at 748.

III. WHY HUD'S DEFINITION OF "REASONABLE" DESERVES *CHEVRON* DEFERENCE

With little guidance from the Supreme Court as to what interpretive methodology should be used when the *Chevron* two-step is applied, it is difficult to say whether it is proper to consider legislative history at *Chevron* step one.[123] In many cases involving issues of deference to agency interpretation, whether a statute's legislative history can be consulted may be outcome determinative.[124] However, this is not the case with the FHA's reasonable accommodation provision. Regardless of the interpretive methodology employed when applying *Chevron*'s test, a court should defer to HUD's interpretation of what makes an accommodation "reasonable." Federal courts failing to grant this deference are in error. If *Chevron* is applied correctly, judges should find HUD's definition controlling, irrespective of whether they are textualists or intentionalists.

A. *Textualism at Chevron Step One: Why The FHA's Reasonable Accommodation Provision is Unclear*

A court would find no clear statement from Congress as to what makes an accommodation "reasonable" under the FHA if it took a textualist approach at *Chevron* step one. Textualists contend that a court should only look to the text of the statute when determining the intent of Congress.[125] They would consider it improper to look to the FHA's legislative history to determine congressional intent.[126] From a textualist perspective, if the FHA does not define what makes an accommodation "reasonable," it cannot be concluded that Congress has spoken directly to the precise question at issue.[127] In the instant case, since the statute provides no guidance as to what "reasonable" means, a textualist court must conclude that Congress's unambiguous intent cannot be determined at *Chevron* step one.

The starting point for this conclusion is a plain text reading of the FHA's reasonable accommodation provision, which reveals that the word "reasonable" is not defined. The statute reads as follows: "[D]iscrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[128] The text does not indicate what the word "reasonable" means. All the reader is told is that a refusal to

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[123] *See supra* Part II.C.

[124] Slocum, *supra* note 72, at 794; *see also* Bell, *supra* note 93, at 107 ("Interpretive methodology is important because it determines interpretive outcomes.").

[125] Quincy M. Crawford, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 978 (1994).

[126] *See, e.g.*, Bressman, *supra* note 67, at 552; Crawford, *supra* note 125, at 683; Dichello, Jr., *supra* note 100; Nelson, *supra* note 95, at 361; Zeppos, *supra* note 94, at 1300.

[127] *See* Bressman, *supra* note 67, at 552.

[128] 42 U.S.C. § 3604(3)(B) (2012).

make a reasonable accommodation is a form of discrimination, and that reasonable accommodations involve changes to "rules, policies, practices, or services."[129] The statute offers no clue as to what would make an accommodation reasonable under the circumstances.

Supporting the argument that the FHA's text provides no help when deciphering the intent of Congress is the fact that the term "reasonable" is not defined anywhere else in the statute. While textualists would consider the reasonable accommodation provision itself to be the most important interpretive source,[130] they would also reference parts of the statute not in dispute to help them determine what makes an accommodation "reasonable."[131] In the instant case, the only other possible place that Congress could have defined the word is in the FHA's reasonable modification provision,[132] yet this text sheds no light on what the term means. According to this provision, discrimination includes "a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises."[133] Like the reasonable accommodation provision, the reasonable modification provision does not define "reasonable." Reasonable modifications involve physical changes to "existing premises"[134]; however, there is no indication when a modification would be considered reasonable. Even after a consideration of the surrounding text, it remains unclear as to what Congress intended the word "reasonable" to mean.

Federal courts generally agree with the opinion that the text of the FHA sheds little light on how to interpret the term "reasonable." According to the Ninth Circuit, "[t]he plain language of the [FHA] provides scant guidance concerning the reach of the accommodation requirement."[135] No other circuit court has found that the FHA clearly defines the term, either.[136] The definition of "reasonable" used by these courts is instead derived from the body of law that

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[129] *Id.*

[130] *See* Jellum, *supra* note 98, at 63.

[131] *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 396 (1996); Zeppos, *supra* note 94, at 1299–1300 (noting that textualists claim that "the only legitimate source for statutory interpretation is the text of the statute. This may include parts of the statute other than the one in dispute, since the textualist believes that meaning may be derived from the whole structure of the enacted law.").

[132] 42 U.S.C. § 3604(f)(3)(A).

[133] *Id.*

[134] *Id.*

[135] Giebler v. M & B Assocs., 343 F.3d 1143, 1148 (9th Cir. 2003).

[136] *See* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 604 (4th Cir. 1997); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); Elderhaven, Inc. v. City of Lubbock,

developed under the RA.[137] Federal circuit courts have based this decision on a consideration of the statute's legislative history, not the FHA's text.[138] They rely on statements included in the Report—that "[t]he concept of 'reasonable accommodation' has a long history in [RA] regulations and case law,"[139] and that the FHA "uses the same definitions and concepts from the [RA]"[140]—to arrive at their interpretation of "reasonable."[141] From a textualist perspective, the fact that these courts have needed to reference a source outside the statute to find the meaning of the word "reasonable" implies that the text's meaning is unclear.[142]

If courts cannot consider the FHA's legislative history, and the statute itself does not define the term, then there is no evidence that Congress spoke to the precise question of what "reasonable" means under the FHA's provision. Because there are no other sources outside the legislative history that courts could use to help them determine what Congress intended the word "reasonable" to mean,[143] Courts applying *Chevron* in a textualist manner would be forced to conclude that the term is unclear. Accordingly, a textualist court would proceed to *Chevron* step two in order to determine whether HUD's construction of the term "reasonable" is permissible.

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98 F.3d 175, 178 (5th Cir. 1996); Smith & Lee Assoc., Inc. v. City of Taylor, 102 F.3d, 781, 795 (6th Cir. 1996); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995).

[137] *Schwarz*, 544 F.3d at 1220; *Giebler*, 343 F.3d at 1154; *Oconomowoc*, 300 F.3d at 784; *Bryant Woods*, 124 F.3d at 604; *Hovsons*, 89 F.3d at 1104; *Elderhaven*, 98 F.3d at 178; *Smith & Lee*, 102 F.3d at 795; *Shapiro*, 51 F.3d at 334–35.

[138] *See supra* Part I.C.

[139] H.R. REP. No. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

[140] *Id.* at 17.

[141] *See supra* Part I.C.

[142] *See* Michael L. Culotta, *The Use of Committee Reports in Statutory Interpretation: A Suggested Framework for the Federal Judiciary*, 60 ARK. L. REV. 687, 690 (2007) ("[T]extualists argue that a judge should not consult legislative history when interpreting an ambiguous statute."); Brad J. Lee, *Faircloth v. Raven Industries: A Departure from the South Dakota Case Law Precedent and Public Policy*, 47 S.D. L. REV. 612, 621 (2002) (noting that textualists reject the notion that courts should "consult[ ] legislative history to resolve statutory ambiguit[y].").

[143] Circuit courts that have defined "reasonable" with reference to the RA's body of law have failed to find other sources besides the statute's legislative history that would clarify the word's meaning. *See* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008) ("Neither the Supreme Court nor this Court has explained when it is reasonable to require a local government to alter or bend a zoning ordinance to accommodate the disabled. The FHA regulations also have nothing to say on the matter. Nevertheless, we do not paint on a completely blank canvas because Congress imported the reasonable-accommodation concept from case law interpreting the Rehabilitation Act.").

B. *Intentionalism at Chevron Step One: Why the FHA's Reasonable Accommodation Provision Is Unclear*

Although a textualist application of *Chevron* would prohibit a court from considering the FHA's legislative history when determining whether Congress has spoken clearly to an issue, a court could look to legislative history for help in determining congressional intent if it took an intentionalist approach.[144] Every federal court that has defined what makes an accommodation reasonable under the FHA has essentially adopted this latter approach, as they have all borrowed their definitions of "reasonable" from the RA's body of law.[145] The reasoning these courts use for why they should borrow the RA's definition is that the Report indicates that "the Fair Housing Act adopted the concept of 'reasonable accommodation' from . . . the Rehabilitation Act."[146] Thus, since these courts have all used the FHA's legislative history to help them define what makes an accommodation reasonable, they have all approached the question of what "reasonable" means from an intentionalist perspective.[147]

And while the interpretive methodology used by these courts is arguably permissible,[148] this does not mean the construction of "reasonable" they have arrived at is correct. Indeed, all eight circuits have misinterpreted the FHA's legislative history because it simply does not follow that the term "reasonable" under the two statutes should hold the same meaning merely because the FHA borrowed the concept of reasonable accommodation from the RA.[149] This argument conflates the terms "concept" and "definition." A concept is "an abstract

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[144] *See* Aleinikoff, *supra* note 95, at 23.

[145] *Schwarz*, 544 F.3d at 1220; Giebler v. M & B Assoc., 343 F.3d 1143, 1154 (9th Cir. 2003); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 604 (4th Cir. 1997); Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996); Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996); Smith & Lee Assoc., Inc. v. City of Taylor, 102 F.3d, 781, 795 (6th Cir. 1996); Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334–35 (2d Cir. 1995); Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt, Inc., 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011); Groteboer v. Eyota Econ. Dev. Auth., 724 F. Supp. 2d 1018, 1024 (D. Minn. 2010); Dev. Servs. of Neb. v. City of Lincoln, 504 F. Supp. 2d 714, 723 (D. Neb. 2007); Trovato v. City of Manchester, 992 F. Supp. 493, 497 (D.N.H. 1997); Martin v. Constance, 843 F. Supp. 1321, 1326 (E.D. Mo. 1994).

[146] Groner v. Golden Gate Apartments, 250 F.3d 1039, 1044 (6th Cir. 2001); *see Schwarz*, 544 F.3d at 1220.

[147] *See* Aleinikoff, *supra* note 95, at 23–24. For more discussion, *see supra* Parts II.B & II.C.

[148] *See supra* Part II.C.

[149] *Id. Schwarz*, 544 F.3d at 1201; *Giebler*, 343 F.3d at 1143; *Oconomowoc*, 300 F.3d at 775; *Bryant Woods*, 124 F.3d at 597; *Elderhaven*, 98 F.3d at 175; *Hovsons*, 89 F.3d at 1096; *Smith & Lee*, 102 F.3d at 781; *Shapiro*, 51 F.3d at 328.

or generic idea generalized from particular instances"[150]; by contrast, a definition is "a statement expressing the essential nature of something" or "a statement of the meaning of a word."[151] Thus, a concept may give meaning to a term by outlining it in very general terms, but it does not provide a word's specific meaning.

It is not just the dictionary that makes a distinction between these two terms; scholars have noted the difference as well.[152] One commentator has highlighted the distinction between concepts, otherwise known as conceptual classes, and specific illustrations of things that reside within a conceptual class, otherwise known as definitions.[153] Another scholar writes that "[w]hen a person forms a concept, he is mentally grouping together distinct existents as one on the basis of certain characteristics that distinguish them from different existents."[154] On the flip side, the process of forming a definition involves identifying "the nature of the units subsumed under a concept."[155]

Because it cannot be said that a concept and a definition are the same thing, courts would make an interpretive mistake by borrowing a definition when it is indicated that they should instead be borrowing a concept.[156] Circuit courts have thus erred in taking the specific meaning of the word "reasonable" from the RA's body of law, since there is no indication that the Report intended for courts to choose a specific definition over a referenced concept. The FHA's legislative history merely indicates that the general concept of reasonable accommodation should be borrowed from the RA's body of law.[157]

A possible counterargument to this assertion is that Congress may have used the words "concept" and "definition" interchangeably in the Report. According to this argument, any indication on behalf of Congress to borrow a concept from the RA could equal an intent to borrow a definition from the RA. However, a close reading of the Report clearly exposes the flaw in this line of reason-

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[150] MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/concept (last visited Feb. 22, 2013) (defining the word "concept").

[151] MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/definition (last visited Feb. 22, 2013) (defining the word "definition")

[152] Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 29 (2009); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069, 1072–80 (1995); *see also* Dannye Holley, *Mens Rea Evaluations by the United States Supreme Court: It Does Not Have the Tools and Only Occasionally Displays the Talent—A Sixty-Year Report Card—1950–2009*, 35 OKLA. CITY U. L. REV. 401, 419 (2010) ("When the text of the crime includes a mens rea concept, the Court should next determine if Congress defined the concept.").

[153] Solan, *supra* note 152.

[154] Smith, *supra* note 152.

[155] Smith, *supra* note 152.

[156] Smith, *supra* note 152.

[157] *See supra* Part I.B.

ing. The Report makes a distinction between the two words, as demonstrated in the statement that "[h]andicapped persons have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973, and the [FHA] uses the same definitions and concepts from that well-established law."[158]

Moreover, the Committee is clear when it is borrowing a definition from the RA as opposed to a concept, and vice versa. For example, when offering interpretive guidance on the word "handicap," the Report states that "[t]he Committee intends that the definition [of handicap] be interpreted consistent with regulations clarifying the meaning of the similar provision found in . . . the Rehabilitation Act."[159] When the Report intends for the FHA to borrow a concept from the RA, it displays a similar clarity.[160] The fact that the two words are not used interchangeably supports the contention that Congress did not intend for the FHA's definition of "reasonable" to be lifted from the RA. If it did, the Committee would have explicitly indicated this desire in the Report.

These insights should necessarily lead a court taking an intentionalist approach to the conclusion that Congress did not clearly indicate what the term "reasonable" should mean under the FHA. Neither the plain text of the statute, nor any other source to which a court could point, reveals a clear congressional intent as to what the term should mean.[161] Since the FHA's legislative history also provides little interpretive guidance, a court applying *Chevron* step one should conclude that Congress did not unambiguously express an intent as to what makes an accommodation reasonable under the FHA's provision. After reaching this conclusion, an intentionalist court would proceed to *Chevron* step two in order to determine whether HUD's interpretation of the term "reasonable" represents a permissible construction of the statute.

C. *Chevron Step Two: Why HUD's Definition of "Reasonable" Is Permissible*

If a court concludes, as it should, that the FHA does not clearly define what makes an accommodation reasonable, it must then decide whether to defer to HUD's interpretation of "reasonable" at *Chevron* step two.[162] This decision involves two steps: 1) determining whether the delegation of interpretive authority was explicit or implicit[163]; and 2) applying the proper test for permissi-

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[158] H.R. REP. No. 100-711, at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178 (emphasis added).

[159] *Id.* at 22 (emphasis added).

[160] *See supra* Part I.B.

[161] *See supra* Part III.A.

[162] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

[163] *See* Goering, *supra* note 75.

bility based on which type of delegation was created.[164] It is clear that any court applying this test should end up deferring to HUD's construction of what makes an accommodation reasonable at *Chevron* step two.

First, it is obvious that Congress explicitly delegated to HUD the authority to interpret what makes an accommodation reasonable. In *Household Credit Services*, an explicit delegation was found where Congress expressly authorized the Federal Reserve Board to issue regulations carrying out Truth in Lending Act.[165] If this same standard is applied to the instant case, a similar conclusion can be reached. According to the text of the FHA, HUD was given "authority and responsibility for administering [the statute],"[166] including the power to "make rules . . . to carry out" Sections 3601 to 3619 of the FHA.[167] Because the FHA's reasonable accommodation provision is located in Section 3604 of the FHA,[168] it is clear that Congress explicitly authorized HUD to interpret what "reasonable" meant within that provision. The text clearly gives HUD the power to issue regulations interpreting the term.

Because there is an explicit delegation of interpretive authority, a court should move on to determining whether HUD's interpretation is "arbitrary, capricious, or manifestly contrary to the statute."[169] Thus, the same step two standard used in *Household Credit Services* would be applied to HUD's reasonable accommodation regulation.[170] To determine whether HUD's construction is permissible under this standard, a court would have to decide: 1) whether HUD's interpretation was rationally related to the statute's purpose; and 2) whether HUD considered competing perspectives before arriving at its decision.[171] Applying this test would necessarily lead a court to defer to HUD's regulation interpreting what makes an accommodation "reasonable."

First, a rational relationship clearly exists between HUD's interpretation and the purpose of the FHA. One purpose of the FHA, as described in the Preamble to the final regulations, was to "add prohibitions against discrimination in housing on the basis of handicap."[172] The 1988 FHA amendments intended to extend to individuals with disabilities the same protections provided to other covered groups.[173] Congress resolved that a law mandating reasonable accommodations was essential to extending equal protection to all classes safe-

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[164] *See* Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 126 (1985); *Chevron*, 467 U.S. at 844.

[165] 541 U.S. 232, 242–45 (2004).

[166] 42 U.S.C. § 3608(a) (2012).

[167] *Id.* § 3614(a).

[168] *See id.* § 3604.

[169] *Chevron*, 467 U.S. at 844.

[170] 541 U.S. at 242–45.

[171] *Id.*

[172] Preamble to Final Rule Implementing the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3232 (Jan. 23, 1989).

[173] *Id.* ("The provisions in the Fair Housing Act describing the nature of conduct which

guarded under the statute, and HUD promulgated a regulation to specifically "effectuate the [reasonable accommodation] provision[ ]."[174] In this regulation, HUD stated that an accommodation was reasonable when it was "feasible and practical under the circumstances,"[175] concluding that if feasible and practical accommodations were provided to individuals with disabilities, they would be given an "equal opportunity to use and enjoy a dwelling."[176] Thus, HUD's regulation aimed to ensure that individuals with disabilities were protected in the same way as other covered classes. It specifically prevents individuals with disabilities from being denied housing choices as a result of their membership in a particular group. Since HUD's definition of "reasonable" is presented as one possible way of achieving the FHA's purpose, there is a rational connection between the goal of the statute and the standard chosen to effectuate it.[177]

HUD also studied alternate viewpoints before arriving at its definition of "reasonable."[178] Specifically, the agency considered whether it should change its definition based on the argument that its regulation could be interpreted as mandating housing providers to offer a "broad range of services to persons with handicaps that the housing provider does not normally provide as part of its housing."[179] Although HUD found this concern compelling enough to address, it ultimately determined that the argument was without merit.[180] The agency's definition of "reasonable" would not burden housing providers in the way they feared because, as HUD explained, its reasonable accommodation regulation did "not require[ ] a housing provider to provide supportive services, e.g., counseling, medical, or social services that fall outside the scope of the services that the housing provider offers to residents."[181] Because the interpretation would never force housing providers to "offer housing of a fundamentally different nature" than it already provides, HUD determined that housing providers' concerns about burdensome costs were ultimately unsubstantiated.[182] As such, there was no reason to define "reasonable" as anything but "feasible and practical under the circumstances."[183] HUD stated that this definition of "reasonable"

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constitutes a discriminatory housing practice have been revised to extend the protections of the Fair Housing Act to persons with handicaps and to families with children.").

174 *Id.* at 3243.

175 24 C.F.R. § 100.204(b) (2013).

176 Preamble to Final Rule Implementing the Fair Housing Amendments Act of 1988, 54 Fed. Reg. at 3249.

177 *See* Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 473 (2009).

178 Preamble to Final Rule Implementing the Fair Housing Amendments Act of 1988, 54 Fed. Reg. at 3249.

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 24 C.F.R. § 100.204(b) (2013).

"remain[ed] as . . . proposed."[184]

Because HUD studied competing considerations before arriving at this interpretation, HUD's regulation is not arbitrary, capricious, or manifestly contrary to the FHA.[185] Accordingly, it is a permissible construction of the statute at *Chevron* step two, and should be afforded controlling weight, or *Chevron* deference.[186] Ultimately, this means that any federal court interpreting the FHA's reasonable accommodation provision should define the word reasonable with reference to HUD's regulation.

IV. THE CORRECT DEFINITION OF "REASONABLE"

A. *Deriving the Correct Definition from HUD's Regulation*

Granting *Chevron* deference to HUD regulations is not a novel phenomenon.[187] Although federal courts have neglected to afford influence to HUD's interpretation of what makes an accommodation reasonable, they have granted this deference to other HUD regulations in the past.[188] Taking this into account, it is surprising that neither federal courts nor scholars have defined "reasonable" with reference to HUD regulations.[189] Scholarship has tended to follow the courts, assuming that the FHA's definition of "reasonable" should be lifted directly from the RA.[190] As this Article has demonstrated, however, this is a misguided choice. *Chevron* compels federal courts to give controlling weight to HUD's interpretation.[191]

Because a court must defer to the agency under these circumstances, the correct definition of "reasonable" is located in HUD's regulation, stating that an accommodation is reasonable when it is "feasible and practical under the circumstances."[192] Because "feasible" means "capable of being done"[193] and

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[184] Preamble to Final Rule Implementing the Fair Housing Amendments Act of 1988, 54 Fed. Reg. at 3249.

[185] *Id.*

[186] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)

[187] *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995) (deferring to HUD's regulation defining "other prohibited sale and rental conduct" under the FHA); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992) (granting deference to 24 C.F.R. § 100.70(d)(4), a regulation issued by HUD).

[188] *See Nationwide Mut. Ins.*, 52 F.3d at 1360; *Am. Family Mut. Ins. Co.*, 978 F.2d at 300.

[189] *See generally* Barkley, *supra* note 21; Eisner, *supra* note 21; Everly, *supra* note 21; Kanter, *supra* note 21; Schonfeld, *supra* note 21.

[190] *See* Barkley, *supra* note 21, at 250; Eisner, *supra* note 21, at 445–47; Everly, *supra* note 21, at 47; Kanter, *supra* note 21, at 951; Schonfeld, *supra* note 21, at 420.

[191] *See supra* Part III.

[192] 24 C.F.R. § 100.204(b).

[193] MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/feasible (last visited Feb. 22, 2013) (defining the word "feasible").

"practical" means "capable of being put to use"[194] a reasonable accommodation is one that would be both: 1) effective at removing a barrier to fair housing; and 2) possible to provide. What makes an accommodation "reasonable," then, is whether it is possible and effective.

Perhaps one reason circuit courts have neglected to defer to HUD's interpretation is that they feel that HUD's language is imprecise and thus too difficult to apply. For example, when deciding how to interpret what makes an accommodation reasonable under the FHA, the Eleventh Circuit said that "[t]he FHA regulations . . . have nothing to say on the matter."[195] Admittedly, the Eleventh Circuit has a point: on their face, the terms "feasible" and "practical" do appear quite vague.

This ambiguity only exists, however, if these terms are stripped from their context. HUD's regulation details a scenario where an accommodation would be feasible and practical under the FHA.[196] The rule explains that if an individual with an ambulatory disability were living in a 300-unit apartment complex with 450 parking spaces, it would be reasonable for the landlord to provide him with a parking space near his unit.[197] The regulation states that it would be reasonable because it would be: 1) possible for this accommodation to be granted, as a multitude of spaces are available[198]; and 2) effective at allowing the individual to live in the housing of his choice, since he would be closer to his apartment.[199]

What this example demonstrates is that HUD's definition of "reasonable" is not unclear, it is merely very easy to prove. Plaintiffs can point to specific facts that show that a requested accommodation is both feasible and practical.[200] For example, by offering evidence that a housing provider or municipality has the power or available resources to grant an accommodation, plaintiffs can show that an accommodation is possible.[201] Additionally, by demonstrating that the accommodation would give plaintiffs access to the housing of their choice, they can prove that an accommodation would be effective.[202] These facts alone would allow them to prove that the requested accommodation is reasonable.[203]

The fact that this is an easy, rather than a vague standard, is supported by the FHA's policy context. Congress obviously intended the FHA to be given a

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[194] MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/practical (last visited Feb. 22, 2013) (defining the word "practical").

[195] Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008) (footnote omitted).

[196] 24 C.F.R. § 100.204(b).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *See id.*

broad construction.[204] The FHA amendments represented a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[205] As one scholar notes, "this policy suggests that the [FHA] be construed liberally in favor of housing for people with disabilities."[206] The Supreme Court agrees with this statement, noting that the FHA should be interpreted broadly.[207] An interpretation in favor of individuals with disabilities, therefore, would mean construing the language of the provision in a way that makes it easy for plaintiffs to prove that their accommodation was reasonable. Thus, HUD's interpretation of the term "reasonable" would align with the FHA's policy, because it would put a very light burden on the plaintiff. Plaintiffs would merely have to show only that their requested accommodations are possible and effective.

B. *Applying a Clear, Correct Standard*

More evidence that HUD provides courts with a clear standard can be found in an application of the definition to a real-life scenario. In practice, HUD's interpretation is anything but vague—indeed, it is relatively easy to employ. To demonstrate this, I will explore how HUD's definition could have been applied in an actual case: *Oxford House, Inc. v. City of Wilmington, N.C.*[208]

In the case, Oxford House, a non-profit organization, sued Wilmington, North Carolina, claiming that the city acted illegally by denying its request for a zoning variance.[209] Oxford House filed for a city permit to allow it to operate two group homes, categorized under the city's zoning codes as "group homes supportive large," in two of the municipality's single-family residential districts.[210] The City denied the permit request on the grounds that group homes "large" were not allowed to operate in these districts under any circumstances.[211] After the denial, Oxford House sued, claiming it had been denied a reasonable accommodation.[212]

To determine whether the requested accommodation was reasonable, a court applying the correct standard would ask whether the plaintiff provided enough evidence to show that the accommodation was "feasible and practical under the circumstances."[213] A court would therefore first look to whether the accommo-

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[204] *See* H.R. REP. NO. 100-711, at 18 (1988), *as* reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

[205] H.R. REP. NO. 100-711, at 18 (1988), *as* reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

[206] Schonfeld, *supra* note 21, at 417.

[207] City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995).

[208] 2010 WL 4484523 (E.D.N.C. 2010).

[209] *Id.* at *1.

[210] *Id.* at *4.

[211] *Id.* at *4.

[212] *Id.* at *1.

[213] 24 C.F.R. § 100.204(b) (2013).

dation was possible,[214] a question that is easily answered in the affirmative. Oxford House demonstrated that there is a provision in the City's zoning code that explicitly allows for accommodations for group homes.[215] Thus, even though the code prohibits group homes "large" from operating in single-family residential districts, the decision to grant a variance to the ordinance ultimately rests with the city itself.[216] The ability to make the accommodation is clearly within the City of Wilmington's power, so it is therefore possible.

Next, a court would have to determine whether the requested accommodation would be effective.[217] It would look to see if the plaintiff had presented enough evidence to prove that the accommodation would remove a barrier to fair housing.[218] Again, Oxford House could clearly meet this burden.[219] Effectiveness can be easily proven in this case, as the individuals living in the group homes would be given the opportunity to live in the neighborhood of their choice if the accommodation were granted. Because the accommodation would alleviate a barrier to fair housing, it would therefore be practical.

This application shows how light the plaintiff's burden would be under HUD's definition of "reasonable," and how easy it would be for a court to ascertain whether this burden was met. Indeed, this is quite a different standard than the one currently applied. In the actual *Oxford House* case, the court held that, as a matter of law, the plaintiff failed to establish that the accommodation was reasonable.[220] Because Oxford House offered no evidence to prove that its requested accommodation would not impose financial and administrative burdens on the City, or would not cause substantial or fundamental changes to the underlying zoning scheme,[221] it lost on summary judgment.[222]

V. CONCLUSION

This Article has argued that federal courts should adopt HUD's interpretation of what makes an accommodation reasonable under the FHA. Even though there is no clear standard as to what interpretive methodology should be used when applying the *Chevron* two-step, a court should defer to HUD's interpretation regardless of whether it takes a textualist or an intentionalist approach. An application of the Supreme Court's two-part *Chevron* test reveals that Congress did not clearly define what "reasonable" meant under the provision, and that HUD's construction of the term is permissible. As specified by HUD, the cor-

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214 *See id.*

215 Oxford House, Inc. v. City of Wilmington, 2010 WL 4484523, *6.

216 *Id.*

217 *See* 24 C.F.R. § 100.204(b).

218 *See id.*

219 *See id.*

220 *Oxford House*, 2010 WL 4484523, at *14.

221 *Id.* at *15.

222 *Id.* at *17.

rect interpretation of "reasonable" is "feasible and practical under the circumstances,"[223] a definition that places a light burden on individuals with disabilities seeking to establish this element in court. The adoption of this interpretation by the courts would go a long way toward effectuating one of the central purposes of the FHA, which is to ensure that individuals with disabilities are free to live in the housing of their choice.

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[223] 24 C.F.R. § 100.204(b).