RELIGIOUS ACCOMMODATIONS IN HOUSING AFTER *BOSTOCK*

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The Supreme Court held in *Bostock v. Clayton County* that Title VII of the Civil Rights Act prohibits discrimination based on homosexuality or transgender status. Dozens of religious organizations, universities, and advocacy groups had warned the Court that a ruling for the employees would cast a cloud over religious freedom. The Court was thus careful to note that the Religious Freedom Restoration Act would offer a protective shield to those with sincerely held religious beliefs. Yet, Justice Alito's principal dissent still offered an ominous prediction: the majority's decision "will threaten freedom of religion."

In truth, Bostock's full implications for religious freedom have proven complex. Our firm recently litigated a case in which we argued—perhaps counter-intuitively, but correctly—that Bostock's textualist logic actually compels religious accommodations under the federal fair housing laws. Here is the backstory.

Our clients were a group of observant Jews—all elderly and many disabled—who live in a 32-story high-rise building in Fort Lee, New Jersey. None could travel down from their apartments easily on the Sabbath: their physical disabilities prevented them from descending the stairs, and their sincere religious beliefs barred them from pushing the elevator buttons. For a time, the building accommodated the disabled-faithful by placing certain elevators in "Sabbath mode." When activated, these "Sabbath elevators" stop automatically at preprogrammed floors, allowing Orthodox Jews to ride up and down on the Sabbath without compromising their faith. And when building later terminated the program, we filed a civil rights lawsuit on behalf of the residents to have it reinstated. *Kurlansky et al v. 1530 Owners Corp. et al*, 2:21-cv-12770 (D.N.J.). The suit included multiple allegations of religious discrimination, as well as a failure to accommodate disability, and it settled quickly after briefing on our preliminary injunction motion.

One of our various arguments in the case was that the Fair Housing Act compels accommodations for impairments that flow from the conjunction of faith and disability. On a cold read of the statute, one could argue the point either way. The FHA makes it unlawful "to discriminate … because of" religion or disability, 42 U.S.C. 3604(b), (f)(2)(A), and it specifically defines disability discrimination to "include[] … a refusal to make reasonable accommodations." 42 U.S.C. 3604(f)(3)(B). But there is no textual analogue for religion, and the statute says nothing explicit about a duty to accommodate religious practice. As Judge Easterbrook once explained, "The Fair Housing Act requires accommodation — but only of handicaps." *Bloch v. Frischholz*, 533 F.3d 562, 565 (7th Cir. 2008) (Easterbook, J.), *rev'd on rehearing*, 587 F.3d 771 (7th Cir. 2009) (en banc).

Our case thus raised a question of first impression in the federal courts: what happens when the impairment flows from a combination of religion and disability, as it did for our clients? Before *Bostock*, one could plausibly argue that, although the statutory text doesn't speak directly to that issue, Congress's primary goal was plainly to accommodate disability, not an admixture of disability and religion. (Unsurprisingly, "Sabbath elevators" make no appearances in the relevant legislative history.) But *Bostock* takes that argument off the table.

Bostock proceeded from the assumption that "Title VII's 'because of' [language] incorporates … but-for causation." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). That standard can be "sweeping," the Court explained, because many events "have multiple but-for causes." *Id.* For example, "[w]hen an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies)." *Id.* at 1742. But the Court was clear that "Title VII doesn't care." *Id.* "Often in life and law two but-for factors combine to yield a result" that neither condition could achieve on its own. *Id.* at 1748. But "so long as the plaintiff's sex was one but-for cause … , that is enough to trigger the law['s protections]." *Id.* at 1739. Because the FHA's text parallels Title VII in all of the ways that matter, *Bostock's* core insight compels accommodations for the disabled faithful:

1. *But-for causation*. The FHA mirrors Title VII's but-for standard, making it unlawful "to discriminate against any person … because of handicap." 42 U.S.C. 3604(f)(2)(A). The accommodation provision incorporates this "but-for" standard in at least two ways: first, by expanding the definition of the "discrimination" to "include … a refusal to make reasonable accommodations," 42 U.S.C. 3604(f)(3) (rather than setting out a freestanding duty to accommodate); and second, by requiring only those accommodations "that may be necessary" for equality. 42 U.S.C. 3604(f)(3)(B). The term "necessary" describes "a but-for causation requirement." *Vorchheimer v. Philadelphian Owners Association*, 903 F.3d 100, 110 (3d Cir. 2018). When it comes to housing accommodations, there is no reason to believe a standard other than the one articulated in *Bostock* should control.

2. *Statutory history*. Key textual distinctions between the FHA and its predecessor provisions further confirm that Congress intended a sweeping standard. In the Rehabilitation Act of 1973, an important predecessor statute to the FHA, Congress prohibited discrimination against applicants in federally funded programs "solely by reason of [their] handicap." 29 U.S.C. 794(a); H.R. Rep. No. 100–711, at 25 (1988) (explaining the link between the Rehabilitation Act and the accommodation provision of the FHA). Congress "could have taken a [similarly] parsimonious approach" in the FHA and "added 'solely' to indicate that [inequalities that arise] 'because of' the confluence of multiple factors do not [require accommodation]." *Bostock,* 140 S. Ct. at 1739. But Congress chose not to do that, signaling that the FHA (like Title VII) simply "doesn't care" if a plaintiff's disadvantages flowed from the combined effect of their faith and their disabilities.

3. *The focus on the individual*. One final point locks down the analogy to *Bostock*. The Court in *Bostock* explained that Title VII's focus "on individuals" means that discrimination against even a subset of men (gay men) or women (gay women) is still cognizable under the statute. *Bostock,* 140 S. Ct. at 1739. The FHA is no different. It identifies the disabled individual, and prohibits discrimination "because of a handicap of that person," including by denying accommodations "necessary to afford such person equal opportunity" to enjoy their home. 42 U.S.C. 3604(f)(2), (3) (emphases added). That laser focus on the disabled individual is "anything but academic." *Bostock*, 140 S. Ct. at 1741. It means that a failure to accommodate even a subset of handicapped residents—here, the religious ones—is still "discrimination" under the statute.

To some, it might come as a surprise that *Bostock* would compel religious accommodations. But *Bostock* warned that "major initiatives"—whether in Title VII or the FHA—will inevitably bear

some “unexpected” fruit. *Bostock*, 140 S. Ct. at 1749. The civil rights laws ensure that we all get to enjoy those unexpected fruit equally, and the disabled faithful are no exception. In the words of Professor Avi Helfand, “Religious citizens need protection against discrimination, some reasonable accommodation that takes religious needs into account, and some common decency.” The text of the FHA demands no less.