IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EQUAL RIGHTS CENTER, Plaintiff, v. POST PROPERTIES, INC., POST GP HOLDINGS, INC., and POST APARTMENT HOMES, L.P., Defendants.	Case No. 1:06-CV-01991 Judge Richard J. Leon

BRIEF OF AMICUS CURIAE UNITED STATES OF AMERICA

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I. INTEREST OF THE UNITED STATES

In 1988, Congress amended the Fair Housing Act to, inter alia, make it unlawful to discriminate against any person in housing on the basis of disability and defined "discrimination" to include the failure to design and construct certain multi-family dwellings so that they would be accessible to and usable by persons with disabilities. See 42 U.S.C. §§ 3604(f)(3)(C). The United States has important enforcement responsibilities under the Act. For example, the Attorney General may initiate civil proceedings on behalf of the United States in cases alleging a "pattern or practice" of housing discrimination. 42 U.S.C. § 3614(a). Additionally, the Attorney General "shall commence and maintain a civil action" on behalf of an aggrieved person who has filed a complaint of housing discrimination with the Department of Housing and Urban Development ("HUD"), where HUD has made a determination of reasonable cause and the complainant or respondent has elected to proceed in federal court. See 42 U.S.C. § 3612(o). Furthermore, private litigation under the Act is an important supplement to government enforcement. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); 42 U.S.C. § 3616a (authorizing the Secretary of HUD to contract with private, non-profit fair housing organizations to conduct testing, investigation, and litigation under the FHA).

II. BACKGROUND AND PROCEDURAL POSTURE

On November 21, 2006, following on-site tests of 27 multifamily properties, Plaintiff Equal Rights Center filed this action alleging that Defendants Post Properties, Inc. and related companies ("Defendants") designed and constructed these properties pursuant to a "continuous pattern and practice of discrimination against people with disabilities" in violation of the Fair Housing Act and the Americans with Disabilities Act. Dkt. No. 1-3, Compl. ¶ 3. Defendants

continue to own and operate these properties. Dkt. No. 126, Pl.'s Statement of Undisputed Material Facts ("Pl.'s SMF") ¶ 14.

During discovery, Plaintiff's experts inspected a sample of representative unit types at Defendants' properties. Pl.'s SMF ¶ 44.[1] Following this review, Plaintiff identified 50 properties, located in six states and the District of Columbia, with similar accessibility barriers that violate the Fair Housing Act. Id. ¶ 20. For example, of the 50 subject properties, 47 were found to lack public and common use areas that are "readily accessible to and usable by" persons with disabilities, see 42 U.S.C. § 3604(f)(3)(C)(i), due to barriers that include steps or level changes without ramps, excessively steep slopes, and lack of curb ramps. Pl.'s SMF ¶ 78. Forty-six of the 50 properties were found to have doors that are not "sufficiently wide to allow passage by handicapped persons in wheelchairs," 42 U.S.C. § 3604(f)(3)(C)(ii), or that contain thresholds, slopes, insufficient clearances and other barriers rendering them inaccessible to persons with disabilities. Pl.'s SMF ¶ 88. Forty-four properties were found to have inaccessible bathrooms. Id. ¶ 92. Forty-seven properties were found to lack "an accessible route into and through the dwelling." 42 U.S.C. § 3604(f)(3)(C)(iii)(I); Pl.'s SMF ¶ 102.

On December 17, 2008, Defendants filed a motion for full or partial summary judgment. Dkt. No. 121. Defendants did not dispute Plaintiff's findings or measurements with regard to the 50 properties, but instead claimed that the HUD Fair Housing Amendments Act Guidelines, 56 Fed. Reg. 9472-9515 (Mar. 6, 1991), against which Plaintiff measured the properties'

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[1] This approach is consistent with that taken by experts retained by the Department of Justice in similar cases. See e.g. United States v. Tanski, No. 04-CV-714 (N.D.N.Y.), Dkt. No. 123-28, Pl.'s Motion for Summary Judgment Ex. O, Decl. of William Hecker ¶ 7 (filed Jan. 24, 2006) (attached as Exhibit A).

accessibility, are not relevant in determining whether the Act has been violated. Dkt. No. 121, Defendants' Brief ("Def.'s Br.") pp. 5-14. Defendants further argued that Plaintiff lacked standing to pursue this action. Id. pp. 17-29. Finally, Defendants argued that any claims involving properties completed over two years before the filing of Plaintiff's complaint (i.e. November 21, 2004) should be dismissed as time-barred. Id. pp. 29-41. Defendants conceded that one property was completed within the limitations period. Id. p. 30. Plaintiff also filed a motion for partial summary judgment on liability. See Dkt. No. 126.

III. ARGUMENT

A. Liability Attaches When Defendants Have Failed to Follow One of the Act's "Safe Harbors" and Have Not Demonstrated Compliance with Any Other Comparable Objective Accessibility Standard

1. The Act's Design and Construction Requirements

In 1988, Congress amended the Fair Housing Act to prohibit discrimination on the basis of disability. P.L. No. 100-430, 102 Stat. 1619, codified at 42 U.S.C. § 3604(f). The Act defines "discrimination" as including the failure to "design and construct" covered multifamily dwellings[2] built for first occupancy after March 13, 1991 without basic accessibility and usability features for persons with disabilities. 42 U.S.C. § 3604(f)(3)(C). The Act's requirements for accessible design and construction are as follows:

> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

[2] "Covered multifamily dwellings" are units in "buildings consisting of 4 or more units if such buildings have one or more elevators" or "ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7).

> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> > (I) an accessible route into and through the dwelling;
> >
> > (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
> >
> > (III) reinforcements in bathroom walls to allow later installation of grab bars; and
> >
> > (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Id. Designers and builders may demonstrate compliance with these provisions by following the appropriate requirements of the American National Standards Institute ("ANSI") A117.1 (1986). 42 U.S.C. § 3604(f)(4).

These provisions reflect "a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream . . ." H.R. Rep. No. 100-711 at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186. They also reflect Congress' recognition that unintended barriers may be just as exclusionary as intentional discrimination: "A person using a wheelchair is just as excluded from the opportunity to live in a particular dwelling by the lack of access into the unit and too narrow doorways as by a sign posted saying 'No Handicapped People Allowed.'" Id. at 25.[3] As one court has observed:

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[3] Throughout this brief, the United States uses the term "disability" instead of "handicap." For purposes of the Act, the terms have the same meaning. See Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (definition of "disability" under Americans with Disabilities Act taken almost verbatim from definition of "handicap" under Fair Housing Act); Helen L. v. DiDario, 46 F.3d

(continued...)

> The purpose of the accessibility requirements in the FHAA was to prevent discrimination against persons with disabilities. Unlike some other forms of discrimination, the built environment itself creates a barrier to equal access for persons with mobility impairments, which may be difficult or costly to fix down the road. The only way to prevent such discrimination, therefore, is through careful consideration – during the early stages of design – of accessibility concerns.

United States v. Shanrie Co., No. 05-CV-306-DRH, 2007 U.S. Dist. LEXIS 23587, *20 (S.D. Ill. Mar. 30, 2007).

2. The HUD Fair Housing Amendments Act Guidelines

The Fair Housing Act delegates to the Secretary of HUD "[t]he authority and responsibility for administering" the Act. 42 U.S.C. § 3608. The Act further delegates rulemaking authority to HUD, 42 U.S.C. § 3614a, and states that HUD "shall provide technical assistance" to implement the Act's accessibility requirements. 42 U.S.C. § 3604(f)(5)(C).

Pursuant to this authority, HUD, after notice and comment, issued the Fair Housing Amendments Act Guidelines ("Guidelines"). 56 Fed. Reg. 9472-9515 (Mar. 6, 1991), codified at 24 C.F.R. Ch. I, Subch. A, App. II (Apr. 1, 1995). The Guidelines "provide technical guidance on designing dwelling units as required by the Fair Housing Amendments Act of 1988." 56 Fed. Reg. 9499. Although they were not intended to be the sole means of compliance, the Guidelines nevertheless constitute HUD's "recommended specifications for each design feature" required under the Act, id., and set forth "minimum standards of compliance with the specific accessibility requirements of the Fair Housing Amendments Act." Id. at 9476. HUD has stated that it

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[3](...continued)
325, 330 n. 8 (3d Cir.) ("The change in nomenclature from 'handicap' to 'disability' reflects Congress' awareness that individuals with disabilities find the term 'handicapped' objectionable."), cert. denied sub nom, Pa. Sec'y of Pub. Welf. v. Idell S., 516 U.S. 813 (1995).

"believes that the final Guidelines . . . are consistent with the level of accessibility envisioned by Congress . . ." Id. at 9472. However, HUD has also stated that compliance with a "comparable standard," i.e., one that "affords handicapped persons access essentially equivalent to or greater than that required by ANSI A117.1," would also satisfy the Act's requirements. 54 Fed. Reg. 3243 (Jan. 23, 1989). Accordingly, since 1991 HUD has recognized nine other "safe harbors" for compliance: HUD's Fair Housing Act Design Manual (1998); the 1986, 1992, 1998 and 2003 versions of ANSI A117.1; the International Code Council's 2000 Code Requirements for Housing Accessibility; the International Building Code as supplemented in July 2001 and March 2003; and the 2006 International Building Code. See 73 Fed. Reg. 63,613-14 (Oct. 24, 2008) (to be codified at 24 C.F.R. pt. 100).

3. Judicial Deference Accorded to the Guidelines

Because HUD promulgated the Guidelines pursuant to express Congressional regulatory authority, see supra Section III.A.2, HUD's determination that the Guidelines set forth "minimum standards of compliance" with the Act's accessibility requirements, 56 Fed. Reg. 9476, is entitled to deference. Meyer v. Holley, 537 U.S. 280, 287 (2003) (HUD is "the federal agency primarily charged with the implementation and administration of the [Fair Housing Act]" and the Court "ordinarily defer[s] to an administrating agency's reasonable interpretation of a statute."); Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984); see also United States v. Edward Rose & Sons, 246 F. Supp. 2d 744, 750-51 (E.D. Mich. 2003) (deferring to Guidelines in interpreting Fair Housing Act), aff'd, 384 F.3d 258, 263 n. 4 (6th Cir. 2004) (affording Chevron deference to HUD regulatory definitions). HUD's interpretation of the Act

must therefore be followed unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.[4]

4. Failure to Follow the Guidelines or "Safe Harbors" Establishes a Prima Facie Case Under the Fair Housing Act, Which May Be Overcome Only by Showing Compliance with a Comparable Objective Accessibility Standard

Courts have relied on the Guidelines to determine whether the Act has been violated, and have granted summary judgment to plaintiffs when "a covered dwelling does not comply with the ANSI standards or the HUD Guidelines, and defendants fail to submit evidence that the property complies with any other accessibility standard." United States v. Tanski, No. 1:04-CV-714, 2007 U.S. Dist. LEXIS 23606, *32 (N.D.N.Y. Mar. 30, 2007); see also United States v. Taigen & Sons, 303 F. Supp. 2d 1129, 1154 (D. Idaho 2003) (summary judgment granted where units did not conform with Guidelines and defendants "failed to submit evidence in the record that [the subject housing] complies with any other accessibility standard.");[5] United States v. Quality Built

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[4] HUD's interpretation of its own regulations is entitled to similar deference and "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).

[5] Defendants extract a fragment of a sentence from this decision to suggest that Taigen supports their position here. Def.'s Br. p. 10 ("[A] designer or builder is not required to follow the [safe harbors] in order to comply with the Fair Housing Act") (quoting Taigen, 303 F. Supp. 2d at 1151). In fact, the quoted sentence, in its entirety, states as follows:

> Although the Court recognizes that a designer or builder is not required to follow ANSI or the Guidelines in order to comply with the Fair Housing Act, the Taigen Defendants have not demonstrated that they followed a comparable set of accessibility guidelines in constructing Centennial Trail.

Taigen, 303 F. Supp. 2d at 1151 (emphasis added). Defendants here have likewise not "demonstrated that they followed a comparable set of accessibility guidelines," and deny they are (continued...)

Constr., 309 F. Supp. 2d 756, 763 (E.D.N.C. 2003) (summary judgment granted where defendants did not "come forward with alternative measurements or any other evidence to show that a triable issue of fact exists."); Baltimore Neighborhoods, Inc. v. Rommel Builders, 40 F. Supp. 2d 700, 713-14 (D. Md. 1999); Shanrie Co., 2007 U.S. Dist. LEXIS 23587 at *37 n. 3 & **39-41; Memphis Ctr. for Indep. Living v. Richard and Milton Grant Co., No. 2:01-CV-2069, slip op. at 8 (W.D. Tenn. Apr. 27, 2004) ("If a construction feature does not comply with the Guidelines, then the housing provider defending an FHA violation has the burden of showing that the feature is nonetheless accessible . . . by meeting a 'comparable standard' – i.e., one that provides 'access essentially equivalent to or greater than required by ANSI A117.1.'") (citation omitted).[6]

Defendants, who do not claim to have followed the Guidelines or any of the other nine HUD-recognized "safe harbor" standards in constructing the 50 properties at issue in this case, conclude that because these standards are not "mandatory," they have no bearing on whether the Act was violated. This is incorrect. As the above decisions demonstrate, and as HUD itself has held, a plaintiff "may establish a prima facie case by proving a violation of the Guidelines," which Defendants may overcome only by demonstrating compliance with "some comparable objective accessibility standard." Sec'y v. Nelson, HUD ALJ 05-068FH, 2006 WL 4540542, *5, 7 (Sept. 21, 2006) (Order on Secretarial Review) (emphasis in original); see also 73 Fed. Reg. 63,614 ("In enforcing the design and construction requirements of the Fair Housing Act, a prima

[5](...continued)
required to do so, in direct contravention of the very authority upon which they rely.

[6] A copy of this decision is attached as Exhibit B.

facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines . . . [and] may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility.").[7]

There is no inconsistency between using violations of the Guidelines to presume non-compliance with the Act and the fact that the Guidelines are not mandatory. Although they do not establish an absolute standard for compliance, the Guidelines nevertheless provide an important benchmark for determining whether the housing in question may be accessed and used by a broad range of persons with disabilities, as contemplated by the Act. See Tanski, 2007 U.S. Dist. LEXIS 23606, at *41 ("[A] plain reading of section 3604(f)(3)(C) demonstrates that it requires compliance with an objective accessibility standard broadly applicable to handicapped people."). Thus, "designers and builders that choose to depart from the provisions of a specific safe harbor bear the burden of demonstrating that their actions result in compliance with the Act's design and construction requirements." 73 Fed. Reg. 63,614; see also id. at 63,612 ("[D]esigners and builders may continue to use alternative methods of complying, with the following caveat . . . If a designer or builder does not rely on one of the HUD-recognized safe harbors, that designer or builder has the burden of demonstrating how its efforts comply with the accessibility requirements of the Fair Housing Act.").

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[7] Defendants also claim that this Court, in denying Plaintiff's motion for a preliminary injunction, "determined that non-compliance with the safe harbors is inadequate to satisfy ERC's burden of proof." Def.'s Br. p. 9. This Court made no such determination. See Equal Rights Ctr. v. Post Properties, 522 F. Supp. 2d 1 (D.D.C. 2007). In fact, this Court held that "plaintiff has demonstrated some likelihood that its claims will be successful" and that plaintiff "may ultimately be successful on the merits of some of these alleged violations. . ." Id. at 6. However, because "the facts at issue are very much in dispute," this Court concluded that Plaintiff "has not yet shown that the likelihood of success is great enough to overcome its failure to establish the requisite irreparable harm required for this extraordinary relief." Id.

Furthermore, dismissing the Guidelines and "safe harbors" as irrelevant to establishing liability would contravene "the broad remedial intent of Congress embodied in the Act," Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982), by depriving courts and persons with disabilities of any clear, objective guidance for establishing non-compliance with the Act. Conversely, builders would be able to raise almost any evidence to escape liability, no matter how subjective or individualized. In addition, the incentive for builders and architects to comply with the Guidelines and safe harbors would be severely diminished if non-compliance raised no risk of liability. With such minimal consequences for non-compliance, few developers and architects could be expected to drop anchor in these "safe harbors," thus defeating the very purpose of these standards.

Finally, in developing the Guidelines, "HUD solicited and considered comments by 'several national, State and local organizations and agencies, private firms, and individuals that have been involved in the development of State and local accessibility codes,' as well as 'a number of disability organizations.'" Tanski, 2007 U.S. Dist. LEXIS 23606, at *42-43 (quoting 56 Fed. Reg. 9475).[8] In light of this "detailed discussion," id. at *43, it would be inequitable to dismiss the Guidelines as essentially hortatory. While the Guidelines do not establish a strict liability standard for compliance, the opposite conclusion – that ignoring the Guidelines has no bearing at all on liability – runs equally contrary to the Act and the intent of Congress and HUD.

[8] These disability organizations included the Disability Rights Education and Defense Fund, the Association for Education and Rehabilitation of the Blind and Visually Impaired, the National Head Injury Association, United Cerebral Palsy Associations, International Association of Psychological Rehabilitation Facilities, the National Mental Health Association, the American Paralysis Association, the Association for Retarded Citizens, the National Alliance for the Mentally Ill, Paralyzed Veterans of America, and the National Organization on Disability. See 56 Fed. Reg. 9475.

5. Defendants May Not Demonstrate Compliance with the Fair Housing Act by Showing That Certain Individuals Are Able to Access the Properties or by Promising to Create Accessible Features on Request

Defendants present no evidence demonstrating that they complied with the Guidelines, another recognized safe harbor, or a "comparable objective accessibility standard." See Nelson, 2006 WL 4540542, at *6. Indeed, by dismissing the Guidelines and safe harbors outright, Defendants all but concede they did not adhere to any of these standards.[9] Instead, Defendants submitted the opinions of three individuals whom Defendants have designated as experts. These individuals have opined that, notwithstanding Defendants' violations of the Guidelines, Defendants complied with the Act because, first, some persons with disabilities are able to access Defendants' properties, and, second, Defendants have promised to correct any accessibility barriers if requested. See Def.'s SMF Ex. 30 Tab A; Ex. 32 Tab A, pp. 8-9; Ex. 14 Tab A, pp. 8-11. Such assertions misstate the law and do not overcome the prima facie case that flows from Defendants' failure to adhere to the Guidelines.

Paul Sheriff, a wheelchair athlete,[10] stated that he was able to access certain units and, on that basis, concluded that Defendants had complied with the Act. Mr. Sheriff did not rely upon any accessibility standards or take any measurements. See Def.'s SMF Ex. 30-A, Report of Paul Sheriff ("I do not rely on a tape measure for my assessment . . . I believe this is a much more effective means of gauging actual accessibility than simply comparing measurements with the

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[9] See, e.g., Def.'s Br. pp. 36-37 ("ERC has, at best, demonstrated that Post diverged from some of the non-mandatory safe harbors . . ."), 10 ("ERC spent nearly a year with its measuring tape at dozens of Post properties simply looking for inconsistencies with the recommendations of the safe harbors.").

[10] Mr. Sheriff's website states that his favorite activities are scuba diving, skiing and white water rafting. See www.paulsheriff.com (last visited Jan. 27, 2008).

prescriptive criteria of the safe harbors.").[11] This is the very type of individualized, subjective evidence that courts have repeatedly rejected in determining whether a unit is accessible to persons with a broad range of disabilities and physical limitations, as the Act requires.[12] In Quality Built Constr., the court rejected an affidavit by a disabled person who stated he could navigate a unit, despite violations of the Guidelines:

> [T]he Court believes that his testimony would have little bearing on the ultimate issue in this case. Whether one disabled person may be able to maneuver through the complex and units does not indicate compliance with the Act. This is particularly true with respect to Mr. Curll [the disabled affiant]. As Plaintiff notes, Mr. Curll is a wheelchair athlete and a former paralympian which seriously undermines the position that his ability to maneuver through the units is representative of the accessibility to disabled persons in general.

309 F. Supp. 2d at 772 n. 1.

Likewise, in Tanski, defendants submitted declarations from disabled residents who claimed to be able to access the units. In rejecting these "wholly subjective declarations" as "not probative on the question of whether the apartments are designed and constructed such that they

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[11] Mr. Sheriff's report also makes certain representations concerning the Department of Justice that warrant clarification. First, Mr. Sheriff states that the Department has accepted a device called "Wing Its" in lieu of "reinforcements in bathroom walls to allow later installation of grab bars." See 42 U.S.C. § 3604(f)(3)(C)(iii)(III). While the Department has, under certain circumstances, accepted this device as a substitute remedy as part of a negotiated settlement, this does not absolve any defendant of liability for failing to install reinforcements during construction, as the Act explicitly requires. Id.

Second, Mr. Sheriff states, "I am recognized by the Civil Rights Section [sic] of the Department of Justice . . . as a qualified expert and consultant." The Civil Rights Division has not, to the best of its knowledge, retained Mr. Sheriff as an expert or consultant or taken the position in litigation that he is qualified as an expert.

[12] Similarly, the study described by Alison Vredenbergh, see Def.'s Br. Ex. 14-A, of a group of individuals with disabilities, none of whom attempted to live in or use the properties at issue, does not demonstrate Defendants' compliance with a "comparable, objective measure of accessibility." See 73 Fed. Reg. 63,314.

comply with [the Act]," the court held:

> Neither the Fair Housing Act nor the HUD Guidelines support the view that compliance may properly be evaluated by considering whether a particular dwelling meets the needs of a particular handicapped tenant. Thus, the anecdotal experiences of individual handicapped people residing in McGregor Village Apartments do not raise a material question of fact regarding whether the apartments were designed and constructed in compliance with the Fair Housing Act. Moreover, none of the declarants has any expertise relevant to whether the dwellings comply with objective accessibility requirements recognized by an individual or organization with expertise in the field, and their submissions cannot amount to an alternative way of demonstrating compliance with the requirements of the Fair Housing Act.

2007 U.S. Dist. LEXIS 23606, at **43-44. See also Nelson, 2006 WL 4540542, at *7 ("[T]he issue is not whether a specific person with a disability could access the property, but rather, whether most persons with wheelchairs or other disabilities can utilize the property.") (emphasis in original).[13]

It is also well-settled that builders may not satisfy the Act's design and construction requirements by agreeing to modify or correct otherwise non-accessible features upon request.[14]

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[13] In Long v. Coast Hotels, 267 F.3d 918 (9th Cir. 2001), brought under the Americans with Disabilities Act, the district court refused to order the defendant to widen a bathroom door because, the court believed, the violation was "technical," posed "minimal inconvenience" to persons with disabilities, and did not contravene "the spirit of the law." The Ninth Circuit reversed, holding that the district court had no discretion to deny relief for accessibility violations in newly-constructed buildings based on the perceived extent of the violation or the defendant's intent. This is because the ADA contains "two distinct systems for building accessibility: one to apply to existing facilities [constructed before the ADA's effective date] . . . and another to apply to later-constructed facilities." Id. at 923. Unlike existing buildings, newly-constructed buildings must be "readily accessible to and usable by individuals with disabilities." This ruling applies with equal force to the disability provisions of the Fair Housing Act, which similarly distinguish between existing and newly-constructed housing. See 42 U.S.C. § 3604(f)(3)(C); Shanrie, 2007 U.S. Dist. LEXIS 23587, at *39 n. 17 ("While [defendant] may feel as though the violation is minor, it is a violation nonetheless.").

[14] Each of Defendants' designated experts recommended providing individual

(continued...)

United States v. Shanrie Co., No. 05-CV-306-DRH, 2007 U.S. Dist. LEXIS 96763, *11 (S.D. Ill. Apr. 10, 2007) ("[T]his Court, like other courts, rejects Defendants' proposal that certain repairs be made only if requested."); Baltimore Neighborhoods, Inc., 40 F. Supp. 2d at 707 (rejecting argument that "adaptive design," as used in the Act, means that "defendants are required only to provide accessible features upon request."); Mont. Fair Hous. v. Am. Capital Dev., 81 F. Supp. 2d 1057, 1065 (D. Mont. 1999) ("adaptable design" is a "term of art, meaning design appropriate for use by persons of all abilities without modification"). Indeed, HUD considered and rejected a proposal that would require provision of accessible features "to people with handicaps on a case-by-case basis." See 56 Fed. Reg. 9474-76. Furthermore, the Act already contains provisions requiring, upon request, reasonable accommodations and modifications, which are separate and distinct from the Act's affirmative design and construction provisions. Compare 42 U.S.C. §§ 3604(f)(3)(A) & (B) with § 3604(f)(3)(C).

A rule that allowed a builder effectively to ignore the Act's affirmative accessibility requirements, as long as the builder promised to make modifications on request, would contradict the Act's plain language and undermine its goal of expanding the availability of housing for persons with disabilities. Nowhere does the Act provide that builders may disregard any or all of the Act's requirements by promising to make units accessible when requested. The purpose of these requirements is to create "[t]ruly adaptable units" that "can be adjusted or adapted without

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[14](...continued)
modifications on request instead of correcting the accessibility violations identified by Plaintiff. Def.'s Br. Ex. 14-A, Report of Alison Vredenburgh pp. 10-11; Ex. 32-A, Report of Mark Wales pp. 8-9; Ex. 30-A, Report of Paul Sheriff p. 10. Mr. Wales further stated that "merely showing that features found in a particular dwelling unit are inconsistent with a safe harbor does not in fact show non-compliance with the modest requirements of the FHA." Def's Br. Ex. 32-A p. 6. As explained in Section III.A, supra, this is also an incorrect statement of law.

renovation or structural change because the basic accessible features like door widths and ground level entrance are already part of the unit." Phillips v. Downtown Affordables LLC, No. CV 06-00402, 2007 U.S. Dist. LEXIS 65603, *18 (D. Haw. Sept. 5, 2007) (emphasis in original) (quoting Barrier Free Environments, Inc., HUD Office of Policy Dev. and Research, Adaptable Housing 8 (1987) & H.R. Rep. 100-711, at 27). Because disabled residents must bear the expense of any modifications, 42 U.S.C. § 3604(f)(3)(A), it is vital that modifications to newly-constructed housing not involve costly "structural changes" such as widening doors, removing thresholds or moving environmental controls.[15] Furthermore, such a rule would typically not assist aftermarket buyers or renters with disabilities, who may not be able even to enter the premises if the original occupant did not ask for modifications. This hardly comports with the Act's goal to "eliminate the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities."[16] H.R. Rep. 100-711, at 27-28.

B. Plaintiff's Claims Are Not Time Barred

1. The Statute of Limitations for the Properties at Issue Built Before November 21, 2004, Has Not Expired

Under the Fair Housing Act, "[a]n aggrieved person may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

[15] Of course, when such features are incorporated into a unit's original design and construction, the costs are minimal. See H.R. Rep. 100-711, at 27 (requirements are "easy to incorporate in housing design and construction.").

[16] Defendants' claim that they have complied with the Act by promising to make modifications if requested is also difficult to reconcile with their argument that they cannot be compelled to provide any relief at all for persons with disabilities who live in buildings completed more than two years ago, based on the Act's statute of limitations. See Def.'s Br. pp. 29-41. In any event, as explained in Section III.B, infra, this argument is also without merit.

practice." 42 U.S.C. § 3613(a)(1)(A).[17] An "aggrieved person" includes any person who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). "Discriminatory housing practice" is defined as "an act that is unlawful under [42 U.S.C.] § 3604, 3605, 3606, or 3617." 42 U.S.C. § 3602(f).

Design and construction claims arise under Section 3604(f), which makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter," or someone associated therewith, 42 U.S.C. § 3604(f)(1) (emphasis added); and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . that person," or someone associated therewith. 42 U.S.C. § 3604(f)(2) (emphasis added). "Discrimination" under Section 3604(f) includes, inter alia, "a failure to design and construct [covered] dwellings" in compliance with the Act's accessibility requirements. 42 U.S.C. § 3604(f)(3)(C).

Accordingly, the Act is violated, and the two-year statute of limitations begins to run, when an "aggrieved person," see 42 U.S.C. § 3602(i), is injured as a result of the failure to design

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[17] Actions brought by the United States for injunctive relief under the Act are not bound by any statute of limitations. 42 U.S.C. § 3614(a) (no limitations period specified); Tanski, 2007 U.S. Dist. LEXIS 23606, at *19 ("[U]nless Congress expressly provides otherwise, the United States is not bound by statutes of limitations."). For money damages, see 42 U.S.C. § 3614(d)(1)(B), the United States is subject to a three year limitations period, 28 U.S.C. § 2415(b), excluding "all periods during which . . . facts material to the right of action are not known and reasonably could not be known" by the Attorney General. 28 U.S.C. § 2416(c); see also Taigen & Sons, 303 F. Supp. 2d at 1144. For civil penalties, see 42 U.S.C. § 3614(d)(1)(C), the United States is subject to a five year limitations period. 28 U.S.C. § 2462.

and construct housing to be accessible as required by the Act.[18] As the Sixth Circuit has observed, "from a purely textual standpoint a violation of the relevant Fair Housing Act provision here requires more than the mere design and construction of a noncompliant housing unit. Recall, the text of the Fair Housing Act itself focuses on housing discrimination in the sale or rental of housing units." Fair Hous. Council v. Vill. of Olde St. Andrews, 210 Fed. Appx. 469, 480 (6th Cir. 2006) (emphasis in original), cert. denied sub nom., WKB Assocs. v. Fair Hous. Council, __ U.S. __, 128 S. Ct. 880 (2008); see also Kuchmas v. Towson Univ., 553 F. Supp. 2d 556, 563 (D. Md. 2008) ("[T]he statute of limitations with respect to a design and construction claim began when Plaintiff . . . leased a unit . . ."). [19]

In Garcia v. Brockway, 526 F.3d 456 (9th Cir.) (en banc), cert. denied sub nom., Thompson v. Turk, __ U.S. __, 129 S. Ct. 724 (2008), the Ninth Circuit held that the Act's statute of limitations triggers upon the completion of the covered dwelling, regardless of when the dwelling is actually sold, rented or occupied by a person with a disability. Under the Ninth Circuit's reasoning, the limitations period may expire before a person with a disability could "claim[] to have been injured" pursuant to 42 U.S.C. § 3602(i) and be eligible to file suit. This view misreads the statutory language described above and is plainly at odds with the Supreme Court's admonition that the Act should be construed broadly to effect its remedial purpose. See Trafficante, 409 U.S. at 208; Garcia, 526 F.3d at 475 (Fisher, J., dissenting) ("Congress intended

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[18] This does not foreclose actions to challenge imminent or impending violations of the Act. See Edward Rose & Sons, 246 F. Supp. 2d at 757-58 (where defendants had a practice of constructing properties in violation of the Act, court halted construction of other covered properties that had not been completed).

[19] In this case, Plaintiff sent testers to Post properties alleged to be inaccessible within two years of the suit. See Dkt. No. 1-3, Compl. ¶ 18.

to . . . facilitate private enforcement when it amended the FHA. This intent, however, cannot be reconciled with the majority's interpretation of the statute, which forever immunizes developers and landlords of FHA-noncompliant buildings from disabled persons' private enforcement actions once two years have passed since the buildings' construction.").

Garcia reached this result by erroneously identifying the relevant discriminatory practice as simply the design and construction of an inaccessible unit, without regard to when the unit is sold to, rented by or occupied by a person with a disability. This reading is at odds with the language, structure and intent of the Act. As stated above, the Act's statute of limitations for private actions begins to run after the occurrence or termination of the "discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). Sections 3602(f) and 3604(f)(1) and (2) of the Act define the relevant "discriminatory housing practice" broadly to include actions related to the sale, rental or availability of a dwelling; the terms, conditions or privileges of such sale or rental; or the provision of services or facilities in connection with a dwelling. Section 3604(f)(3), in turn, clarifies that "discrimination," as used in Sections 3604(f)(1) and (2), includes certain specific practices, one of which is the failure to design and construct accessible "covered" dwellings. Given this structure, Section 3604(f)(3)(C) must be read in conjunction with, and subordinate to, Sections 3604(f)(1) and (2).[20] See H.R. Rep. 100-711, at 24 ("New subsection 804(f)(3) sets out

[20] Garcia also erroneously relied on Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 618, 127 S. Ct. 2162 (2007), an employment discrimination case brought under Title VII of the 1964 Civil Rights Act. For two reasons, Ledbetter is inapplicable. First, Ledbetter held that Title VII's statute of limitations "is triggered when a discrete unlawful practice takes place," 127 S. Ct. at 2164, which in a compensation discrimination case is when the employer decides the employee's rate of pay. In Ledbetter, the employee/plaintiff was subject to and harmed by the employer's illegal act when it occurred. In Garcia, by contrast, the plaintiff did not move into his unit until after it was constructed and was not contemporaneously subject to and affected by

(continued...)

specific requirements to augment the general prohibitions under (f)(1) and (2).”). Accordingly, the “discriminatory housing practice” at issue is not the design and construction of housing in isolation, but rather the inaccessible design and construction as it relates to the sale, rental, or availability of housing, or the provision of services or facilities in connection with such housing.

Contrary to the reasoning in Garcia, 526 F.3d at 461 n. 1, reading the Act in this manner would not exempt developers and architects from liability when they do not directly sell or rent the housing in question. Nothing in Sections 3604(f)(1) and (2) limits liability to those who sell or rent housing. To the contrary, anyone who “otherwise make[s] unavailable or den[ies]” housing, or discriminates in the “provision of services or facilities in connection with” housing, is liable under the Act. For example, the D.C. Circuit has read Section 3604(f)(1) to cover municipalities, even when they are not engaged in the sale or rental of housing. Samaritan Inns v. Dist. of Columbia, 114 F.3d 1227, 1231-32 (D.C. Cir. 1997); see also Bangerter v. Orem City Corp., 46 F.3d 1491, 1498 (10th Cir. 1995); Larkin v. Mich. Dep’t of Social Servs., 89 F.3d 285, 289-90 (6th Cir. 1996); Marbrunak v. City of Stow, 974 F.2d 43, 47 (6th Cir. 1992); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1294-95 (D. Md. 1993); Horizon House Dev. Servs. v. Township of Upper Southampton, 804 F. Supp. 683, 693 (E.D. Pa. 1992). Likewise, there can be no question that the failure to design or construct accessible housing makes unavailable or denies such housing to persons with disabilities and operates to discriminate against them in the “provision of services and facilities in connection with” such

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[20](...continued)
defendants’ actions. Thus, in Garcia, the plaintiff was not injured by the relevant “unlawful practice” until he attempted to live in the unit. Second, in determining the “unlawful practice,” the Garcia court misinterpreted the specific statutory framework of the Fair Housing Act, which is significantly different from the statute at issue in Ledbetter.

housing.

Because Garcia incorrectly defined the discriminatory practice at issue under the Act, it was wrongly decided. Accordingly, Garcia's holding that the statute of limitations for private entities runs from the completion of an inaccessible dwelling unit should not be followed by this Court.

2. Alternatively, Even If the Limitations Period Begins to Run Upon Completion of Construction, Properties Completed More than Two Years Before Plaintiff's Complaint Are Properly Before this Court Because Plaintiff Has Shown an Unlawful Practice of Discrimination Extending into the Limitations Period

Even if the Act's limitations period were to run from the date construction of inaccessible housing is completed, this would not bar the relief sought by Plaintiff here. This is because Plaintiff has presented evidence that Defendants engaged in a pattern or practice of discrimination by repeatedly designing and constructing inaccessible multifamily housing that continued into the limitations period.

The Fair Housing Act recognizes a continuing violation theory of liability. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982). The Supreme Court has held that continuing violations "should be treated differently from one discrete act of discrimination" because "[w]here the challenged violation is a continuing one, the staleness concern disappears." Id. Congress re-affirmed Havens when it amended the Act in 1988 to allow suits no later than two years "after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A) (emphasis added); see also H.R. Rep. 100-711, at 33 ("The latter term is intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice."); Moseke v.

Miller & Smith, 202 F. Supp. 2d 492, 503 (E.D. Va. 2002) ("It is this latter phrase, that is 'the termination of a discriminatory housing practice,' that supports the continuing violation doctrine."); Wallace v. Chi. Hous. Auth., 321 F. Supp. 2d 968, 972-73 (N.D. Ill. 2004) ("Congress, by adding language to clarify that a party may bring a claim within two years after the end of an allegedly on-going discriminatory housing practice, clarified its intent to allow parties to recover for earlier acts under the FHA that constitute part of an on-going pattern or practice.").[21]

In Havens, plaintiffs alleged five different and specific discriminatory acts, four of which occurred outside the limitations period. 455 U.S. at 380. The acts – providing different information about the availability of housing to persons on account of their race – were "based not solely on isolated incidents involving the two respondents, but a continuing violation

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[21] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162 (2007), and Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), do not affect the applicability of the continuing violations doctrine in design and construction cases under the Fair Housing Act. Both cases interpreted the term "employment practice" under Title VII of the 1964 Civil Rights Act to mean "'a discrete act or single "occurrence" that takes place at a particular point in time.'" Ledbetter, 127 S. Ct. at 2169 (quoting Morgan, 536 U.S. at 110-11). The Fair Housing Act's inclusion of the phrase "occurrence or termination" distinguishes the Act's limitations period from Title VII's. Compare 42 U.S.C. § 2000e-5(e)(1) with § 3613(a)(1)(A). Accordingly, nothing in Ledbetter or Morgan undermines the rule established in Havens, and later affirmed by Congress, that otherwise untimely "discrete acts" are nevertheless actionable if they collectively form a "pattern" of violations that "terminates" within the limitations period.

Indeed, even under Title VII's more restrictive language, the Morgan Court recognized that "hostile work environment" claims constitute a "continuing violation" based on the "cumulative affect of individual acts." 536 U.S. at 115. "It does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by the court for the purposes of determining liability." Id. at 117. On this basis, the court in Wallace, which Defendants cite as authoritative, see Def.'s Br. p. 40, found that Morgan is in accord with Havens, and on this basis applied the continuing violations doctrine to plaintiffs' claims under the Fair Housing Act. 321 F. Supp. 2d at 973-75.

manifested in a number of incidents . . ." Id. at 381. Repeated discriminatory acts are actionable even if some of the acts occur outside the limitations period, because the challenge is to "not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period." Id. Accordingly, a continuing "unlawful practice" does not "terminate," and the statute of limitations does not begin to run, until the last act of the "unlawful practice" occurs.

The Havens Court's observation that the "staleness concern disappears" when a violation is continuing, 455 U.S. at 380, applies with particular force to design and construction claims. The features of an inaccessible building do not fade with time. For example, an apartment that is made inaccessible to a person with a disability because of steps leading to the entrance remains inaccessible to that person until those steps are removed. Inaccessible features can be observed and measured, and proof of liability does not rely upon the memory of witnesses or the availability of documents.

Applying Havens, numerous courts have concluded that the Act's statute of limitations does not preclude claims involving a pattern of designing and constructing inaccessible dwellings that continues into the limitations period. In National Fair Hous. Alliance v. A.G. Spanos Constr., 542 F. Supp. 2d 1054 (N.D. Cal. 2008), the court rejected the very argument advanced by Defendants here: that Havens does not apply to design and construction claims because each property represents a "discrete" violation.

> This argument is unpersuasive: a single incident of "steering" constitutes an actionable violation of the FHA, just as the construction of each complex constitutes an actionable violation of the FHA. That more than one incident of steering occurred only demonstrates a pattern of such violations, not that each incident, standing on its own, is not a violation of the FHA. Defendants have offered no intelligible argument as to why the reasoning of Havens is not applicable to an alleged pattern or practice of construction-based violations of the

FHA.

Id. at 1061-62 (emphasis in original).

Similarly, in Silver State Fair Hous. Council v. ERGS, 362 F. Supp. 2d 1218 (D. Nev. 2005), the Court concluded that the two-year statute of limitations did not prevent plaintiff from obtaining relief for the inaccessible design and construction of an apartment complex completed more than two years before the complaint was filed. This was because Defendants had completed another complex within the limitations period that contained "the same alleged FHA violations . . ." Id. at 1222. The court so held even though construction of the two properties spanned nearly a decade. Id.

Finally, in Memphis Ctr. for Indep. Living v. Makowsky Constr. Co., No. 01-2069, slip op. (W.D. Tenn. Jul. 24, 2003),[22] plaintiff alleged violations at three different complexes, built by the same developer, and filed its complaint within two years of completion of the last phase of the newest complex. Id., slip op. at 2. In denying defendants' motion for summary judgment, the court held that plaintiff "sufficiently established that Defendants engaged in a pattern or practice of alleged discrimination" based on the similarity of the designs of the three complexes and the fact that the same entities designed and built each complex. Id. at 6.

In this case, Plaintiff has alleged that Defendants engaged in a "continuous pattern and practice of discrimination against persons with disabilities" by designing, constructing and operating covered multifamily dwellings that are inaccessible to persons with disabilities. Dkt. No. 1-3, Compl. ¶ 6. Plaintiff has further alleged specific "common elements of design" in the subject properties, including "virtually identical" floor plans replicated in hundreds, if not

[22] A copy of this decision is attached as Exhibit C.

thousands, of covered units. Id. ¶¶ 39-40. Defendants do not contest that one of the properties at issue in this case, Post Carlyle Square Apartments, was constructed within the limitations period. Def.'s Br. p. 30.[23]

The violations found at Carlyle Square – which implicate all seven of the Act's accessibility requirements – mirror those found in Defendants' other properties. See Pl.'s SMF ¶¶ 171-177. For example, Carlyle Square, in common with 45 other subject properties that Defendants designed, constructed and operate, lacks accessible doors. Id. ¶¶ 88, 175. Carlyle Square, in common with 46 other properties, lacks accessible routes due to excessive slopes. Id. ¶¶ 78, 174. Carlyle Square, in common with 32 other properties, contains access violations in the parking areas. Id. ¶¶ 80, 176. Carlyle Square, in common with 23 other properties, lacks sufficient clear floor space for wheelchair maneuvering in kitchens and bathrooms. Id. ¶¶ 90, 177.

Defendants' discriminatory actions were not isolated, sporadic or incidental. They were repeated, again and again, in some 50 properties constructed across six states and the District of Columbia. Without question, these similar and pervasive violations reflected Defendants' "regular procedure or policy," see United States v. Int'l Bhd. of Teamsters, 431 U.S. 324, 360 (1977), and are properly characterized as "continuing."

Defendants also wrongly claim that alleging a continuing pattern or practice of violations requires a heightened standard of proof than what is required in an individual claim. See Def.'s Br. p. 34 (arguing that Plaintiff must show that Defendants "selected or reaffirmed a pattern or

[23] Plaintiff has alleged that four other covered properties – Post Carlyle Square Condos, Mercer Square Condos, Post Alexander and Post Hyde Park – were completed after November 21, 2004. See Dkt. No. 126, Pl.'s Br. p. 34.

practice because of its adverse effect on members of the disabled community.") (emphasis in original). To the contrary, courts have recognized that "intent is not relevant to the Court's determination of whether a pattern or practice of discrimination exists." Quality Built Constr., 309 F. Supp. 2d at 760; see also Shanrie Co., 2007 U.S. Dist. LEXIS 23587, at *37 (with respect to an alleged pattern or practice of design and construction violations, "[t]he FHA holds parties liable regardless of their intent"); see also H.R. Rep. 100-711, at 25 ("[H]ousing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination."). Likewise, the fact that Defendants continued to commit these accessibility violations into the limitations period does not transform this case into one that requires a showing of animus against the disabled.

Finally, neither Garcia v. Brockway nor any of the other Fair Housing Act cases cited by Defendants, Def.'s Br. p. 41, applies here because none involved a situation where defendants continued to build inaccessible properties into the limitations period. Rather, these cases involved single buildings, completed outside the limitations period, and the plaintiffs alleged only that the continuing effect of the uncorrected accessibility barriers on persons with disabilities constituted a continuing violation. See Garcia, 526 F.3d at 459; Kuchmas v. Towson Univ., C.A. No. RDB 06-3281, 2007 WL 2694186, *5 (D. Md. Sept. 10, 2007).[24] But see E.

[24] For the same reason, Defendants' reliance on Moseke is misplaced. See Def.'s Br. p. 33 n. 34. Indeed, Moseke recognized that a pattern of design and construction violations that continued into the limitations period would warrant application of the continuing violation doctrine: "Under the continuing violation doctrine, a plaintiff's complaint will not be time-barred if the defendant's related wrongful acts continue into the statute of limitations time frame. . . As a consequence, the statute of limitations only begins to run . . . upon the last act in a (continued...)

Paralyzed Veterans Ass'n v. Lazarus-Berman Assocs., 133 F. Supp. 2d 203, 213 (E.D.N.Y. 2001) (accessibility violations are "an unlawful practice that began on November 17, 1993, and has continued to the present day.").

Such facts clearly distinguish these cases from the instant matter. Plaintiff is not alleging that a single discriminatory act has ongoing effects, but, rather, that Defendants continued their pattern of unlawful acts – designing and constructing inaccessible housing – into the limitations period. Indeed, the A.G. Spanos court, in a later decision, squarely distinguished Garcia from cases that alleged a pattern of design and construction violations into the limitation period. "The Ninth Circuit distinguished [the Garcia plaintiffs'] claims as not presenting a true continuing violations issue because '[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.'" Nat'l Fair Hous. Alliance v. A.G. Spanos Constr., No. 07-3255-SBA, 2008 U.S. Dist. LEXIS 72425, *9 (N.D. Cal. Sept. 22, 2008) (quoting Garcia, 526 F.3d at 462).

Plaintiff has presented evidence that Defendants have engaged in a continuing unlawful practice of designing and constructing covered, multifamily buildings that violate the accessibility provisions of the Fair Housing Act. It is undisputed that at least one of the inaccessible properties was completed within the limitations period. Accordingly, Defendants' violations "terminated" within the limitations period, and all 50 properties are properly included in this case.

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[24](...continued)
series of related wrongful acts." 202 F. Supp. 2d at 500 n. 10.

C. Defendants Misstate the Law Regarding Organizational Standing

Defendants challenge Plaintiff's standing to bring this action. Def.'s Br. pp. 17-29. Contrary to Defendants' argument, Plaintiffs have standing under the Fair Housing Act if Defendants' systemic discriminatory actions have perceptibly impaired Plaintiff's mission, counseling and other programs.

The Supreme Court has held that Congress intended for fair housing organizations to be afforded the broadest possible standing, consistent with the constitutional limitations of Article III. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) ("Congress intended standing . . . to extend to the full limits of Art. III and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the Fair Housing Act]") (internal quotation marks and citation omitted). Thus, "the only requirement for standing to sue . . . is the Art. III requirement of injury in fact." Id. at 375-76.

Under the Fair Housing Act, "an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action." Spann v. Colonial Vill., 899 F.2d 24, 27 (D.C. Cir. 1990). "That the alleged harm affects the organization's noneconomic interests – for example, its interest in encouraging open housing – 'does not deprive the organization of standing.'" Id. (quoting Havens Realty Co., 455 U.S. at 379 n. 20).

In Spann, the D.C. Circuit upheld the standing of two fair housing organizations challenging a housing provider's discriminatory advertisements. "Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public

impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's injury-in-fact requirement." Id. at 29; see also Nat'l Fair Hous. Alliance v. Prudential Ins. Co., 208 F. Supp. 2d 46, 54 (D.C. Cir. 2002) (fair housing organizations "have sufficiently alleged an injury in fact" because they "have expended resources on counteracting Prudential's discrimination through their educational, counseling and referral programs."); Fair Employment Council v. BMC Mktg. Corp., 28 F.3d 1268, 1276 (D.C. Cir. 1994) ("Discrimination . . . might increase the number of people in need of counseling; similarly, to the extent that BMC's actions have made it harder for minorities to find jobs in greater Washington, they may have reduced the effectiveness of any given level of outreach efforts. If discriminatory actions taken by BMC have 'perceptibly impaired' the Council's programs, 'there can be no question that the organization has suffered injury in fact'.") (quoting Havens Realty Co., 455 U.S. at 379).

Plaintiff Equal Rights Center (formerly the Fair Housing Council of Greater Washington) works to eradicate discrimination in housing "through education, counseling, advocacy, enforcement and referral services to aid protected individuals by apprising them of their rights and preserving their rights." Dkt. No. 1-3, Compl. ¶ 7.[25] These are the very activities that the D.C. Circuit has held are independent of litigation and whose impairment may form the basis for Article III standing. See Nat'l Fair Hous. Alliance, 208 F.3d at 52. Accordingly, Plaintiff would have standing if, as a result of Defendants' systemic design and construction of thousands of inaccessible units, it will be required to expend resources to "monitor and to counteract

[25] See also www.equalrightscenter.org/rights/fairhousing.php (last visited Feb. 4, 2009) (Equal Rights Center "publishes information for distribution, offers training, writes or edits manuals, performs advocacy, counsels individuals, helps victims file complaints, conducts research and develops and executes investigations to stop illegal discrimination in housing.").

[Defendants' actions] on an ongoing basis," see Spann, 899 F.2d at 29, to ensure that persons with disabilities have an equal opportunity to live in Defendants' housing.[26] Furthermore, Plaintiffs would have standing if Defendants' actions "reduced the effectiveness" of Plaintiff's training, counseling and outreach programs for persons with disabilities. See BMC Mktg. Corp., 28 F.3d at 1276.

Defendants fundamentally misunderstand Article III standing in the context of the Fair Housing Act. Defendants' brief instead disputes the amount of, and the method used to calculate, Plaintiff's damages. While this may be an issue for trial, it is not determinative of Plaintiff's standing, particularly given the Supreme Court's and D.C. Circuit's recognition that Plaintiff's injury need not be economic in nature. Havens Realty Co., 455 U.S. at 379 n. 20; Spann, 899 F.2d at 27.[27]

[26] The effect that Defendants' discrimination has had on the rights of persons with disabilities determines whether Plaintiff's mission has been impaired, not whether "ERC employees . . . were able to go on with their normal activities . . ." Def.'s Br. p. 27.

[27] Additionally, to the extent Plaintiff will dispute these factual allegations in their opposition to Defendants' motion, such allegations could not form the basis for summary judgment. See Fed. R. Civ. P. 56(c).

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests this Court deny Defendants' motion for summary judgment.

Dated February 20, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009, I filed the foregoing document entitled **Brief of Amicus Curiae United States of America** via the Court's CM/ECF system, which shall send notice to the following counsel of record:

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