FILED

OCT 0 3 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 06-15042
(Consolidated for decision with No. 05-35647)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMARA THOMPSON;
and DISABLED RIGHTS ACTION COMMITTEE,

Plaintiffs-Appellants,

v.

MICHARL E. TURK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

D.C. No. CV-05-00156-ECR

**APPELLANTS' PETITION FOR REHEARING
AND REHEARING EN BANC**

RICHARD F. ARMKNECHT, III
Nevada Bar Number 5205
364 West 120 South
Lindon, Utah 84042
(801) 796-0901
Attorney for Plaintiff-Appellants

APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

RULE 35(b)(1) STATEMENT

I express a belief, based on reasoned and studied professional judgment, that the panel decision conflicts with the decisions of the United States Supreme Court in *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995); *Reiter v. Cooper*, 507 U.S. 258 (1993); and *Meyer v. Holley*, 537 U.S. 280 (2003); and that the panel decision also conflicts with the decisions of this Court in *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004); and *Underwood Cotton Co., Inc. v. Hyundai Merchant Marine (American), Inc.*, 288 F.3d 405 (9th Cir. 2002).

RICHARD F. ARMKNECHT, III, ESQ.
ATTORNEY OF RECORD FOR
THE PLAINTIFFS-APPELLANTS

QUESTIONS PRESENTED FOR REVIEW

Where a district court has held that the systemic "continuing violation doctrine" does not apply to violations of the Fair Housing Act and has further held that "the statute of limitations provided by Congress in § 3613[1] should be construed

---

[1] The District Court's section reference was to a section in Title 42 of the United States Code. Similarly, section references in this Petition are to sections in Title 42 of the United States Code.

[as] a statute of repose for Defendants." (ER 79):

(1) Was it proper for the panel to diverge from the precedent of both the Supreme Court and of this Court to apply the subparts of § 3604(f)(3) as *definitions* of discrimination rather than actionable "discriminatory housing practices" specified in subsections § 3604(f)(1) and (2)?

(2) Was it proper for the panel to diverge from the precedent of both the Supreme Court and of this Court with regard to the characterization of Fair Housing Act claims as "tort actions" and the construction of statutes of repose?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The salient facts[2] of this case are undisputed and straightforward: Michael E. Turk was the "Vice President/Partner of Ranch[o] Del Norte Villas, Inc." (ER 11) which corporation built "The Villas at Rancho del Norte" in 1997. ER 3, 12. Mr. Turk is the most recent owner of the Villas. *Garcia v. Brockway*, No. 05-35647 and *Thompson v. Turk*, No. 06-15042 (collectively and hereinafter "*Garcia*"), slip op. at 12715 (9th Cir. Sept. 20, 2007). The Disabled Rights Action Committee filed an administrative complaint with HUD in 1997. Although HUD's investigation identified extensive "accessibility deficiencies" (i.e. failures to meet the design and

---

[2] Contrary to the Majority's assertion, however, the case below was decided on a motion to dismiss under Rule 12(b)(6), not "at summary judgment."

construction requirements of the Fair Housing Act) at the Villas (ER 12-24), DRAC's complaint was dismissed by HUD based upon an erroneously narrow[3] construction of the standing requirements applicable to claims under 3604(f)(2).

In 2004, plaintiff Tamara Thompson (acting as a "tester" for DRAC) encountered discriminatory conditions at the Villas and, within a year of Ms. Thompson's inspection, DRAC and Ms. Thompson filed a lawsuit against Mr. Turk (as well as others who were party to the design and construction of the Villas). The district court dismissed the complaint as time-barred and *expressly* held that "the statute of limitations provided by Congress in § 3613 should be construed [as] a *statute of repose* for Defendants." (ER 79) (emphasis added).

DRAC and Ms. Thompson filed a timely appeal and (after briefing and oral argument), the panel assigned to the case affirmed the district court's dismissal by a 2-1 majority. The dissenting judge was Judge Fisher.

ARGUMENT AND AUTHORITIES

As Judge Fisher's dissent correctly notes, the majority opinion "commits a crucial error" that underlies both the majority's rejection of the "systemic violation" application of the continuing violation doctrine and the majority's judicial amendment of the FHA to create a statute of repose for the benefit of builders: "The

---

[3] The proper scope of standing under 3604(f)(2) was subsequently set forth in *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 2004).

problem with the majority's analysis is that a 'failure to design and construct' is not *itself* an event that can trigger the FHA's statute of limitations." *Garcia* at 12728 (Fisher, dissenting). Moreover, the panel majority completely fails to address the standard for statutory construction that must be applied where a statute of repose is asserted. Rather, the majority *assumes* that § 3613 *must* be a statute of repose so that *unless* it is considered to be a statute of repose, it would be "meaningless."

I. Section 3604(f)(3) Sets Forth Disabled-Specific Forms of Discrimination, Not Three Independently Actionable "Discriminatory Housing Practices," a Function Accomplished by Sections 3604(f)(1) and (2).

Essential to majority's opinion is that belief that "3604(f)(3)(C) . . . operate[s] as an independent prohibition" instead of "defin[ing] the meaning of 'discriminate' under (f)(1) or (f)(2)." *Garcia* at 12717, fn 1. As Judge Fisher's dissent sets forth with great clarity, the majority's treatment of 3604(f)(3)(C) runs counter to "both the statute's language itself and . . . non-textual considerations." *Garcia* at 12744 (Judge Fisher, dissenting). An additional flaw in the majority opinion – as it concerns the structure of the Fair Housing Act – is that the majority opinion is contrary to controlling precedent.

The majority opinion states that "treating (f)(3)(C) as subordinate [to (f)(1) and (f)(2)] makes no structural sense." *Garcia*, at 12717 (fn 1). The majority

opinion, however, fails to reconcile its holding with the "structural sense" that has repeatedly[4] been noted by this Court, other Circuit Courts of Appeals,[5] and by the Supreme Court with regard to 3604(f)(3)(B).

In *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994), this Court described the "*Plain Language of FHAA*" as follows:

> Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81. It initially prohibited discrimination on the basis of race, color religion, or national origin. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619.
>
> The FHAA makes it unlawful
>
> to 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.
>
> 42 U.S.C. § 3604(f)(2).

---

[4] In addition *to City of Edmonds v. Wash. State Bldg. Code Council*, see, e.g., *Giebeler v. M&B Associates*, 343 F.3d 1143, 1146 (9th Cir. 2003); and *Sanghvi v. City of Claremont*, 328 F.3d 532, 536, 538 (9th Cir. 2003).

[5] See, e.g., *Reg'l Econ. Cmty. Action Program v. City of Middleton*, 29 F.3d 35, 45 (2nd Cir. 2002); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102-03 (3rd Cir. 1996); *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 602 (4th Cir. 1997); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996); *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996); *United States v. City of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498, 1501 (10th Cir. 1995).

It defines discrimination to include

> 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.
>
> 42 U.S.C. § 3604(f)(3)(B).

City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994).

Similarly, the meaning of the plain language of the FHAA did not escape the Supreme Court, which noted that:

> Oxford House asserted reliance on the Fair Housing Act, 102 Stat. 1619, 42 U.S.C. § 3601 *et seq.*, which declares it unlawful 'to 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.' § 3604(f)(1)(A). The parties have stipulated, for purposes of this litigation, that the residents of Oxford House-Edmonds 'are recovering alcoholics and drug addicts and are handicapped persons within the meaning' of the Act. App. 106.
>
> Discrimination covered by the FHA includes 'a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling.' § 3604(f)(3)(B).

City of Edmonds v. Oxford House, 514 U.S. 725, 729 (1995).

Moreover, if the majority opinion were to address the "structural sense" of treating § 3604(f)(3)(B) as a definition of discrimination and treating § 3604(f)(3)

(C) as a "discriminatory housing practice" (in and of itself), then the majority would *still* have to distinguish *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004) where a disabled person "encountered 'various architectural barriers in the common areas'" (*id.* at 1099-1100) and where:

> Smith and DRAC initiated the . . . litigation in district court, claiming that conditions in all five Pacific Properties developments violated § 3604(f)(2)'s prohibition of discrimination '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 – [*inter alios*] that person.'

Smith, 358 F.3d at 1100.

And where this Court concluded that:

> The history and language of the FHA and the FHAA make clear that testers fall within the protected group of 'any person[s]' that may enforce rights created by § 3604(f)(2) when they are violated by discriminatory housing conditions.

Smith, 358 F.3d at 1106.

Thus, this Court has (in a case repeatedly cited by the majority) clearly treated § 3604(f)(2) as the operative violation in a case involving design and construction discrimination.

II. The Majority's Counter-Arguments to the Dissent Demonstrate a Misunderstanding of the Dissent and Present Hypothetical Situations Having No Practical Basis.

The majority asserts that "the dissent . . . insists that the practice at issue

is the sale or rental of an FHA-noncompliant unit, rather than the design and construction of the building." *Garcia*, at 12717 (fn 1) (citing *id.* at 12728-29). Judge Fisher, however, simply quotes the plain language of the statute which makes it unlawful "[t]o discriminate in the sale or rental . . ." § 3604(f)(1) or "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental . . ." § 3604(f)(1). The statue's language plainly extends liability beyond those taking part *directly* in certain "sales or rentals" and extends to those contributing to *discrimination in* sales or rentals. As set forth in (f)(3), certain actions (which actions would not ordinarily be considered "discrimination" because they would be "treating everyone the same") are deemed to constitute "discrimination" for the purpose of establishing liability under (f)(1) and (f)(2).

Judge Fisher's dissent is further misunderstood by the majority's odd conclusion that "under the dissent's interpretation, only the party that actually does the selling or renting would be liable, not the party that designed or constructed an FHA-noncompliant unit." *Garcia*, at 12717 (fn 1). A treatise repeatedly cited by the majority points out that "a nonconforming building amounts to an ongoing discriminatory denial of 'privileges' or 'facilities' to disabled tenants and homeseekers . . ." Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" cases Under the Fair Housing Act*,

40 U. Rich. L. Rev. 753, 848 (2006). Moreover, as Judge Fisher noted, "[A]ll participants in the process as a whole are bound to follow the FHAA . . . [A]ny entity who contributes to a violation of the FHAA [is] liable" *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F.Supp. 2d 661, 665 (D.Md. 1998). *Garcia*, at 12744 (Fisher, dissenting). The limitation on liability imagined by the majority is just that – the product of imagination.

The panel majority also raises the concern that adopting Judge Fisher's interpretation of the statute:

> would make it impossible, or at least more difficult, for the Attorney General to bring a design and construction claim against builders under 42 U.S.C. § 3614(a), because design and construction of an FHA-noncompliant building alone would not, under the dissent's interpretation, be actionable under the FHA. The dissent's interpretation therefore may help a few FHA plaintiffs today, but it could harm many more people living in FHA-noncompliant units in the future.
>
> *Garcia,* at 12717 (fn 1).

A plain reading of 42 U.S.C. § 3614(a), however, shows that the Attorney General's authority to bring suit is not limited to situations where there is an "alleged discriminatory housing practice" (as is required of private litigants under § 3613(a)(1)(A)). Rather, the Attorney General may commence a civil action based upon a "reasonable cause to believe that any person or persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Fair

Housing Act]." While the construction of inaccessible housing is (in and of itself) not a "completed" violation of the Fair Housing Act until someone is injured by it, such construction certainly constitutes "resistance to the full enjoyment of" rights granted by the Fair Housing Act. Moreover, the Attorney General (again, with "reasonable cause to believe") may commence a civil action under § 3614(a) where "any group of persons has been denied any of the rights granted by [the Fair Housing Act] and such denial raises an issue of general public importance." In the hypothetical situation presented in the majority opinion, the "people living in FHA-noncompliant units" would be the "group of persons" that are required[6] before the Attorney General can bring a suit to address issues of general public importance.

Finally, even if the language of § 3614(a) (together with the interpretation of § 3613 enunciated by Judge Fisher) could be read to support a limitation on the ability of the Attorney General to enforce the FHA, the majority overlooks the relative importance of private enforcement of the FHA. Indeed, in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (a case that was discussed at oral argument of this appeal), the Supreme Court noted that "the enormity of the task makes the role of the Attorney General minimal, [so] the main generating force must be private suits." *Id.* at 209, 211. Quite simply, the judicial amendment of the FHA

---

[6] Whether the panel majority is correct or Judge Fisher is correct.

to create a statute of repose for the benefit of builders cannot be considered to be in .the best interests of the greater part of the disabled community.

III. The Panel Majority Reverses the Burden for Asserting a Statute of Repose.

The District Court judge held that "the statute of limitations provided by Congress in § 3613 should be construed [as] a statute of repose for Defendants." [7] (ER 79). A "statute of repose" will begin to run prior to the time that a potential plaintiff has a complete and present cause of action. This Court has clearly described the distinction between a statute of limitations and a statute of repose:

> in theory, a statute of limitations does not take away rights, as such. Rather, it merely precludes the plaintiff from proceeding, if the statute of limitations defense is raised. It can be said that, although the plaintiff was not diligent enough, the right (moral or legal) goes on, but the plaintiff simply cannot go to court in order to enforce it. See, e.g., *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313-16 (1945); *Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 181 F.3d 1142, 1145-46 (9th Cir. 1999). A statute of repose, however, has a more substantive effect because it can bar a suit even before the cause of action could have accrued, or, for that matter, retroactively after the cause of action has accrued. See *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084-85 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002). In proper circumstances, it can be said to destroy the right itself. See *William Danzer & Co. v.*

---

[7] No such forthright pronouncement is made in the majority opinion. Indeed, as Judge Fisher notes, "the majority... never utters the term 'statute of repose.'" *Garcia*, at 12738 (Fisher, dissenting). The reason that the majority so carefully avoids the term "statute of repose" is obvious enough – the relevant standard of statutory construction presents a hurdle that is too high a leap for the majority.

> *Gulf & S.I.R. Co.*, 268 U.S. 633, 637 (1925). It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace. See *Lyon*, 252 F.3d at 1084. In other words, a statute of repose can be said to have a greater theoretical effect upon rights affected by it.

Underwood Cotton Co., Inc. v. Hyundai Merchant Marine (American), Inc., 288 F.3d 405, 408-409 (9th Cir. 2002).

The majority is plainly "not concerned with the plaintiff's diligence [but] with the defendant's peace." Thus, a recently-disabled person (for example a stroke victim or a wounded soldier) is (under the majority's opinion) deprived of the right to bring suit to secure accessible housing so that the builders and architects of inaccessible housing can be free from private (but not from the Attorney General's) lawsuits that are brought a mere two years and one day after a housing project is completed.

The "odd result" of a statute of repose will not be inferred "in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). The panel majority does not identify any such indication in the statute. Rather, the majority appears to simply *assume* that Congress intended a statute of repose. The analysis that is provided by the majority in this regard is focused on an assertion that private claims arising under the FHA are not "torts." The majority describes the Supreme Court's long-standing pronouncement that the FHA "sounds basically in tort" (*Curtis v. Loether*, 415 U.S. 189, 195 (1974)) as a mere "passing

reference to tort law" having the narrow application to FHA plaintiffs' entitlement to a jury trial. *Garcia*, at 12723.

The majority is correct that the Supreme Court, in *Curtis v. Loether*, "was not dealing with the statute of limitations." *Garcia*, at 12723. There is, however, no reason to be so dismissive of the Supreme Court's pronouncement in *Curtis v. Loether*. This Court has done so in the past[8] – and has been reversed by the Supreme Court which held that:

> This Court has noted that an action brought for compensation by a victim of housing discrimination is, in effect, a tort action. See *Curtis v. Loether*, 415 U.S. 189, 195-196 (1974). And the Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (listing this Court's precedents that interpret Rev. Stat. § 1979, 42 U.S.C. § 1983, in which Congress created "a species of tort liability," "in light of the background of tort liability" (internal quotation marks omitted)). Cf. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles"); *United States* v. *Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law").

Meyer v. Holley, 537 U.S. 280, 285 (2003).

---

[8] See *Holley v. Crank*, 258 F.3d 1127, 1129 (9th Cir. 2001), where this Court held that "[a]lthough under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different . . ."

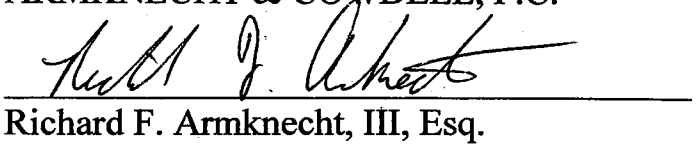
The majority opinion completely ignores *Meyer v. Holley*.

CONCLUSION

"A three-judge panel may not overrule [the binding precedent of the Ninth Circuit] absent intervening Supreme Court or *en banc* authority." *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005). Appellants respectfully request that the panel rehear this case so as to render an opinion that is consistent with Ninth Circuit precedent and with Supreme Court precedent as discussed, *supra*. Alternatively, Appellants request that the Court – sitting *en banc* – rehear this case to either (1) render an opinion that is consistent with circuit precedent and with Supreme Court precedent or (2) overturn circuit precedent by an *en banc* decision instead of by a panel decision.

RESPECTFULLY SUBMITTED this 2nd day of October, 2007.

ARMKNECHT & COWDELL, P.C.

By: 

Richard F. Armknecht, III, Esq.

Attorneys for Appellants Disabled Rights Action Committee
And Tamara Thompson

FILED
OCT - 4 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 05-35647
D.C. No. CV-03-00193-MHW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOLL GARCIA, Plaintiff-Appellant,

STATE FARM FIRE AND CASUALTY COMPANY, Intervenor-Appellee,

v.

DENNIS BROCKWAY; ROBERT STEWART; STEWART-MILES & ASSOCIATES, Defendants-Appellees,

and

ZAVOSHY REV. INTER VIVOS TRUST; J.J. ZAVOSHY; Y.W. ZAVOSHY; H & H PROPERTIES, Defendants.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PETITIONER FOR REHEARING EN BANC

Attorneys for Appellant:

KEN NAGY (I.S.B. No. 6176)
KEETON AND TAIT
312 Miller Street
P.O. Drawer E
Lewiston, Idaho 83501
Telephone: (208) 743-6231
Facsimile: (208) 746-0962
E-mail: knagy@lewiston.com

MARIA E. ANDRADE (I.S.B. No. 6445)
HUNTLEY PARK
250 South 5th Street, Suite 660
P.O. Box 2188
Boise, Idaho 83701
Telephone: (208) 345-7800
Facsimile: (208) 345-7894
E-mail: maria@andradelegal.com

COMES NOW the Plaintiff-Appellant Noll Garcia, by and through his attorneys of record, Ken Nagy of Keeton and Tait, and Maria Andrade of Huntley Park, and hereby moves and suggests that this Court rehear this case *en banc* pursuant to Federal Rules of Appellate Procedure Rule 35 and Circuit Rule 35-1.

A. F.R.A.P. 35(b)(1) STATEMENT

In counsel's judgment, one or more of the situations described in F.R.A.P. 35(b)(1) exist, warranting a rehearing en banc. This petition is filed for the following reasons:

1. The panel decision conflicts with decisions of the United States Supreme Court;

2. The panel decision conflicts with decisions of this Court; and

3. This proceeding involves questions of exceptional importance and the panel decision conflicts with the authoritative decision of another United States Court of Appeals that has addressed the same issue.

B. ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court recently entered its decision in a Title VII employment discrimination case which addressed the issue of whether a statute of limitations is tolled. *Ledbetter v. Goodyear Tire & Rubber Co.*, ___ U.S. ___, 127 S.Ct. 2162, (2007). In that decision, the Court held that:

> [T]here may be instances where the elements forming a cause of action span more than 180 days [the filing deadline for Title VII complaints]. Say, for instance, an employer forms an illegal discriminatory intent towards an employee but does not act on it until 181 days later. The charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action. The act and intent had not yet been joined.

Id. at 2171 n.3.

In its opinion, the majority in this proceeding relied heavily on the *Ledbetter* decision in holding that the statute of limitations in Fair Housing Act design and construction cases begins to run at the time of completion of the building. Majority Op. at 12720. However, it wholly ignored this portion of the Ledbetter decision, which in fact supports the Appellant's contentions.

As the dissent in this proceeding correctly points out, the majority misconstrues the *Ledbetter* decision and that *Ledbetter* in fact supports the Appellant's contention that the statute of limitations did not begin to run until, at the earliest, when he was injured and he accrued a cause of action. Dissenting Op. at 12735-36.

Furthermore, the United States Supreme Court has held that in interpreting the Fair Housing Act, courts are to consider the "broad remedial intent of congress embodied in the Act" and warned against a "wooden application" of the Fair Housing Act's statute of limitations provisions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 102 S.Ct. 1114 (1982). The majority has ignored the Court's

requirements and the intent of the United States Congress while the dissent has paid heed to this requirement. Dissenting Op. at 12739-40.

The majority's decision and reasoning in this proceeding is therefore clearly at odds with the dictates of the United States Supreme Court and rehearing is warranted.

II. THE PANEL DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

This Court has repeatedly held that the commencement of a statute of limitations period occurs when a cause of action accrues. *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003); *United Insurance Management, Inc. v. Matsumoto*, 14 F.3d 1380 (9th Cir. 1994). Furthermore, this Court has repeatedly held that "the equitable tolling doctrine is read into *every* federal statute of limitation." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1188 (9th Cir. 2001) (internal quotations omitted) (emphasis in the original); *see also, Matsumoto* at 1384-85.

The majority in this proceeding has wholly ignored such dictates, even though this issue was fully briefed by the Appellant and was extensively discussed by the dissent in this proceeding. *See,* Dissenting Op. at 12734-79.

Given such clear and firm dictates of this Court in numerous prior decisions, the majority's decision is therefore clearly at odds with the decisions of this Court and rehearing is warranted.

III. THIS PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS.

There can be little doubt that the questions before the Court are of exceptional importance, given that the United States Congress expressly added the disability protections at issue in this proceeding in a separate statute, the Fair Housing Amendments Act of 1988. Furthermore, the issue of when the statute of limitations commences in such cases is of exceptional importance, given that the ultimate holding of this Court may either deprive a significant number of disabled tenants of a cause of action, if the majority opinion stands, or may require the provision of a largely increased pool of accessible housing, if the majority opinion is modified.

The Sixth Circuit Court of Appeals has recently entered a decision regarding the identical issues before this Court and reached a different result. *Fair Housing Council, Inc. v. Village of Olde St. Andrews*, 210 F. App'x 469, 2006 WL 3724128 (6th Cir. 2006) (unpublished).

The Majority in this proceeding has failed to acknowledge that conflicting opinion of a sister circuit and has made no attempt to distinguish it, either legally or factually. In contrast, the dissent has analyzed and extensively referenced that opinion. Dissenting Op. at 12730-32, 12735, 12743.

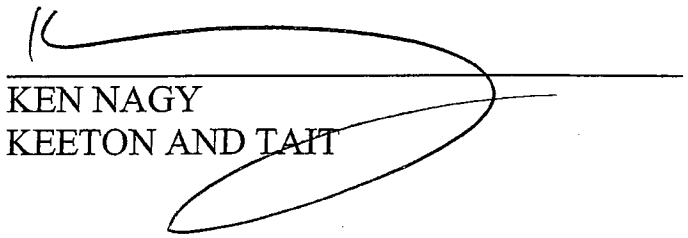
Given this disagreement in the circuits and the majority's complete failure to address such disagreement, a rehearing en banc is warranted.

C. CONCLUSION

Given the authorities referenced above, which have not been adequately addressed or have been wholly overlooked by the majority in this proceeding, the Appellant respectfully suggests that this Court review this case and the decision of the majority *en banc*.

RESPECTFULLY SUBMITTED this 3rd day of October, 2007.

Attorneys for Appellant Noll Garcia



MARIA ANDRADE
ANDRADE LAW OFFICE

KEN NAGY
KEETON AND TAIT

CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated _____

_____ Proportionally spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words)

or

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text)

or

X In compliance with Fed. R. App. 32(c)and does not exceed 15 pages

_____
KEN NAGY
Attorney for Plaintiff-Appellant

Dated: October 3, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2007, I caused to be served a full, true and accurate copy of the foregoing Petition for Rehearing En Banc by the method indicated below, and addressed to the following:

Candy Dale
Hall, Farley, Oberrecht & Blanton
702 West Idaho
Suite 700
Boise, Idaho 83701

__X__ U.S. mail
_____ Hand delivered
_____ Overnight mail
_____ Facsimile transmission to # _____

Kirtlan G. Naylor
Naylor & Hales
P.O. Box 9496
Boise, Idaho 83707

__X__ U.S. mail
_____ Hand delivered
_____ Overnight mail
_____ Facsimile transmission to # _____

Ken Nagy

Consolidated Case Nos. 05-35647 and 06-15042

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

OCT 12 2007

FILED
DOCKETED
DATE INITIAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOLL GARCIA,
Plaintiff-Appellant,

v.

DENNIS BROCKWAY, et al.,
Defendants-Appellees,

Appeal from the United States District Court for the District of Idaho
Honorable Mikel H. Williams, Magistrate Judge,
District Court Case No. CV-03-00193-MHW

BRIEF OF AMICI CURIAE SILVER STATE FAIR HOUSING COUNCIL, INC., NEVADA DISABILITY ADVOCACY AND LAW CENTER, AND LAW PROFESSORS ROBERT G. SCHWEMM, MICHAEL P. SENG, AND MICHAEL EVANS IN SUPPORT OF APPELLANTS' PETITIONS FOR PANEL REHEARING AND FOR REHEARING EN BANC

Date of Decision: September 20, 2007
Judges: Kozinski, Fisher and Tallman

Michael Evans, SBN 208917
DEPAUL U. COLLEGE OF LAW
c/o Brancart & Brancart
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

BRANCART & BRANCART
Christopher Brancart, SBN 128475
Elizabeth Brancart SBN 122092
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CORPORATE DISCLOSURE STATEMENT v

STATEMENT OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE TEXT OF THE FAIR HOUSING ACT IS SUSCEPTIBLE TO MORE THAN ONE REASONABLE INTERPRETATION 3

II. THE PANEL MAJORITY'S INTERPRETATION CONFLICTS WITH THE STRUCTURE AND PURPOSES OF THE STATUTE, AND WITH OTHER INTERPRETATIVE AIDS 11

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

CASES

Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.,
210 Fed. Appx. 469 (6th Cir. 2006) 18, 19

Follett v. Davis,
636 N.E.2d 1282 (Ind. App. 1994) 10

Meyer v. Holley,
537 U.S. 280 (2003) 17, 18

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 17

Trafficante v. Metropolitan Life Ins. Co.,
409 U.S. 205 (1972) 15

United States v. Lopez,
484 F.3d 1186 (9th Cir. 2007) (en banc) 11

Wallace v. Kato,
127 S. Ct. 1091 (2007) 17

STATUTES

29 U.S.C. §794e 1

42 U.S.C. §3602(f) 4

42 U.S.C. §3602(i) 4, 12

42 U.S.C. §3604(f)(1) 4, 5, 12

42 U.S.C. §3604(f)(2) 4

42 U.S.C. §3604(f)(3)(C) 5, 12

42 U.S.C. §3610(a)(1)(A)(i) 4, 12

42 U.S.C. §3613(a)(1)(A) 4, 11, 12

42 U.S.C. §10801 1

42 U.S.C. §15041 1

REGULATIONS

24 C.F.R. §125.103 1

OTHER AUTHORITIES

Eunice Kennedy Shriver, Forward, *Priced Out in 2006: The Housing Crisis for Persons with Disabilities*, Technical Assistance Collaborative, Inc Consortium for Citizens with Disabilities, Housing Task Force (2007) 19, 20

House Report to the Fair Housing Amendments Act of 1988, H.R. Rep. 100-711 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173 14

Office of Fair Hous. and Equal Opportunity, U.S. Dep't of Hous. and Urban Dev., Fair Housing Act Design Manual (1998) 17

Restatement (Second) of Torts §899 cmt. c (1979) 17

Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design And Construction" Cases under the Fair Housing Act*, 40 U. Rich. L. Rev. 753 (2006) 14, 15

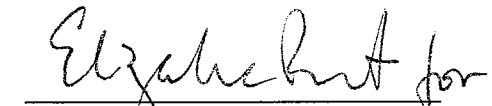
CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amicus Silver State Fair Housing Council (SSFHC), a private, non-profit organization, discloses that it is not a publicly held corporation or other publicly held entity and it has no parent corporations. No publicly held corporation or other publicly held entity owns 10% or more of SSFHC.

Amicus Nevada Disability Advocacy & Law Center (NDALC), a private, non-profit organization, discloses that it is not a publicly held corporation or other publicly held entity and it has no parent corporations. No publicly held corporation or other publicly held entity owns 10% or more of Amicus NDALC.

DATED: October 9, 2007

Respectfully submitted,



Michael Evans, SBN 208917
DEPAUL U. COLLEGE OF LAW
c/o Brancart & Brancart
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

BRANCART & BRANCART
Christopher Brancart, SBN 128475
Elizabeth Brancart, SBN 122092
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

Counsel for Amici Curiae

STATEMENT OF AMICI CURIAE

Amicus Silver State Fair Housing Council (SSFHC) is a private non-profit agency advocating for equal access to housing in Nevada since 1989. SSFHC provides education and outreach about fair housing rights; processes discrimination complaints, investigations, and referrals; and assesses barriers to fair housing in the community. SSFHC offers services to ensure equal housing opportunity regardless of disability. SSFHC is a fair housing enforcement organization under the Fair Housing Initiatives Program. 24 C.F.R. §125.103 *et seq.*

Amicus Nevada Disability Advocacy & Law Center (NDALC) is a private, nonprofit organization and serves as Nevada's federally-mandated protection and advocacy system for the human, legal, and service rights of individuals with disabilities.[1] NDALC was designated as Nevada's protection and advocacy system by the Governor in March 1995. NDALC's mission includes protecting and advocating for the human and legal rights, interests, and welfare of Nevadans with disabilities and increasing the opportunities available to Nevadans with disabilities to live their lives as fully, independently, and productively as possible.

---

[1] *See* 42 U.S.C. §§15041 *et. seq.*, 10801 *et. seq.*; 29 U.S.C. §794e.

Amici Robert G. Schwemm, Ashland Professor of Law at the University of Kentucky College of Law, Michael P. Seng, Professor of Law at The John Marshall Law School and co-executive director of The John Marshall Law School Fair Housing Legal Support Center and Fair Housing Legal Clinic, and Michael Evans, Visiting Assistant Professor of Law at DePaul University College of Law, are professors and scholars who teach and write about the meaning, purposes, and enforcement of the Fair Housing Act.

Collectively, Amici believe that effective enforcement of the Fair Housing Act is needed to realize the Fair Housing Act's objectives of integrating persons with disabilities into the American mainstream and making it possible for persons with disabilities to live dignified and independent lives. Amici believe that enforcement actions filed by private individuals who are the victims of discrimination are the key to effective enforcement of the Act's accessible housing requirements. Amici therefore believe that the decision of the panel, by making it impossible for most victims of discrimination to enforce the Act's accessibility requirements, should be reheard by the panel or en banc.

SUMMARY OF ARGUMENT

Where the text of a statute admits of no plain meaning and is subject to more than one reasonable interpretation, courts should adopt the interpretation that is most reasonable in light of the structure and purposes of the statute and other interpretative tools. In this case, however, the panel majority has adopted the interpretation that is *least reasonable* in light of the text, structure and purposes of the Fair Housing Act (FHA) and that disregards the reasonable interpretation of the statute rendered by the federal agency charged with administration of the Act. Under the majority's interpretation, the vast majority of victims of discrimination are denied any legal remedy whatsoever and effective enforcement of the FHA's accessibility requirements is precluded. Adopting the least reasonable interpretation cannot be squared with the rules of statutory interpretation.

ARGUMENT

I. THE TEXT OF THE FAIR HOUSING ACT IS SUSCEPTIBLE TO MORE THAN ONE REASONABLE INTERPRETATION.

The statutes of limitations under the FHA run from the occurrence or termination of a "discriminatory housing practice." A person injured by a discriminatory housing practice can file a civil action (or administrative complaint) within two years (or one year, in the case of an administrative

complaint) of the occurrence or termination of the "discriminatory housing practice." 42 U.S.C. §§3602(i) (defining an "aggrieved person" as "any person ... who claims to have been injured by a discriminatory housing practice"); 3613(a)(1)(A) (authorizing an aggrieved person to file a civil lawsuit within two years of the occurrence or termination of a discriminatory housing practice); 3610(a)(1)(A)(i) (authorizing an aggrieved person to file an administrative complaint within one year of the occurrence or termination of a discriminatory housing practice). Ascertaining when the statute of limitations runs, therefore, requires the court to identify the "discriminatory housing practice."

The statute defines a "discriminatory housing practice" as "an act that is unlawful under section 3604" of the Act. *Id.* §3602(f). Section 3604 states that "it shall be unlawful—

> (f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of [] handicap ... [or]
>
> (2) To 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 [] handicap ....

(3) For purposes of this subsection, discrimination includes—...

(C) ... a failure to design and construct [covered multifamily] dwellings in such a manner that [they are accessible].

Id. §3604(f)(1), (f)(2), (f)(3)(C).

In a typical case, a prospective renter seeking housing encounters an apartment that should have been made accessible, but which is inaccessible. This renter has suffered "discriminat[ion] in the sale or rental [of] a dwelling ... because of [] handicap" because of "a failure to design and construct those dwellings in [an accessible] manner." *Id.* §3604(f)(1), (f)(3)(C). But what, precisely, was the "discriminatory housing practice" from which the statute of limitations runs? The text is susceptible to at least three reasonable interpretations. The discriminatory housing practice reasonably can be defined as either:

1. The commission of affirmative acts of inaccessible design and inaccessible construction of covered housing, such that the discriminatory practice terminates and the statute of limitations begins to run upon completion of construction.
2. The denial of housing to a renter, tenant, or homebuyer who encounters housing that is inaccessible, but which the law requires to be accessible, such that the discriminatory practice occurs and the

statute of limitations begins to run when an individual renter, tenant, or homebuyer first encounters and is injured by the discriminatory conditions, irrespective of when construction was completed.

Or,

3. The ongoing failure to design and construct covered housing in an accessible manner, such that the discriminatory practice terminates and the statute of limitations begins to run when a potential defendant either ceases to have control over accessibility of the housing or brings the housing into compliance with the law. Under this interpretation, the "*failure* to design and construct" refers to an ongoing *omission* rather than a series of affirmative acts. The omissions are the ongoing failures, by those in a position to do so, to take whatever acts of design and construction are necessary to make covered housing accessible.

The first interpretation, adopted by the panel majority here, embodies the most restrictive rule of the three interpretations. It makes it impossible for the overwhelming majority of the victims of discrimination to address their injuries and precludes effective enforcement of the FHA's accessibility requirements.

The second interpretation, followed by the panel dissent here, adopts the least restrictive statute of limitations. Under the second interpretation, the victims of discrimination have a legal remedy. Architects, builders, developers and owners remain liable for the commission of a discriminatory housing practice until the housing is brought into compliance with the Act's accessibility requirements.

The third interpretation is less restrictive than the panel majority's interpretation but less expansive than the position adopted by the dissent. Under this interpretation, the diligent victim of discrimination has a right to address her injuries against the current owner. Liability for architects, builders, developers, and former owners, however, terminates two years after they cease to have control over accessibility of the housing.

Attempts to support one of these interpretations over the others based on the text alone are futile. The text is unavoidably ambiguous, for two reasons.

First, the text refers to two different events occurring at two different times without saying which event constitutes the "occurrence" of the discriminatory housing practice from which the statute of limitations runs: (1) the time defined by subsection (f)(1) when the prospective renter encounters the discriminatory conditions and is denied housing, and (2) the

somewhat earlier time defined by subsection (f)(3)(C) when the failure to design and construct (whether defined as affirmative acts of inaccessible design and construction or as ongoing omissions of failing to make the housing accessible) takes place. Both the (f)(1) and (f)(3)(C) events are necessary for a discriminatory housing practice to exist, but, because the (f)(1) events and the (f)(3)(C) events take place at different times, there is no objective way to determine from an examination of the text alone which is the triggering event for the statute of limitations. The text is ambiguous.

Second, the text is ambiguous because "a failure to design and construct" can be understood as either (1) affirmative acts of inaccessible design and construction or (2) an ongoing failure to make covered housing accessible. On its face, this language appears to define an omission – a failure to act. It is also possible, however, to treat this language as referring to affirmative acts of inaccessible design and construction.

The choice of an interpretation has enormous implications for both potential defendants and victims of discrimination. Under the first interpretation, the statute of limitations runs from the completion of construction of the housing in question. Architects, builders, developers and owners (i.e., landlords) can avoid liability as long as no potential plaintiff encounters the discriminatory conditions – and decides to pursue a legal

action – within two years of the completion of construction. This rule is extremely generous to potential defendants, but profoundly hard on victims. Under this rule, the vast majority of individuals with disabilities who suffer injury as a result of the discrimination will have no legal recourse whatsoever. Only those prospective renters who happen to encounter the housing within a year or two of the completion of construction will have a right to file an administrative complaint or civil action. Assuming an apartment complex becomes available for rental one year after construction is completed and has a rental life of 50 years, only 2% of individuals with disabilities who will suffer discrimination as a result of the violation will be able to obtain any legal remedy. Ninety-eight percent of victims will be precluded from any relief whatsoever.

Under the second interpretation, the statute of limitations runs from the denial of housing to the prospective renter who encounters the discrimination. Those involved in the design, construction, or in the ongoing operation of the housing remain subject to liability until the violations are remedied and the housing is made accessible. This interpretation assures victims of discrimination a legal remedy as long as they bring an enforcement action diligently after first encountering discrimination and suffering injury. The panel majority objected to this

interpretation, however, because it holds potential defendants – architects, builders and developers – responsible long after they cease having any control over the housing in question.

Finally, under the third interpretation, the statute of limitations runs from the ongoing failure to take whatever acts of design and construction are necessary to make the housing accessible. A potential defendant remains liable only so long as it engages in a failure to design and construct covered housing in an accessible manner – i.e., only so long as it retains control of accessibility of the housing but fails to take the steps of design and construction necessary to make the housing accessible.[2] Under this approach, discrimination by architects, builders and former owners terminates once they cease control over the housing. Current owners, however, engage in discrimination until they either relinquish ownership or bring the housing into compliance with the law. This interpretation, like the second interpretation, assures the victims of discrimination a legal remedy as long as they bring an enforcement action diligently after first encountering

[2] These are ordinary tort principles, which govern interpretation of the FHA. *See* pp. 17-18. Where a cause of action is based on a failure to act, the tort is ongoing, but only so long as the tortfeasor remains in a position to act. In a cause of action for a failure to diagnose a medical condition, for example, the tort is ongoing, but ceases once the patient is no longer under the doctor's care and the doctor no longer has the opportunity to make a correct diagnosis. *E.g.*, *Follett v. Davis*, 636 N.E.2d 1282, 1284 (Ind. App. 1994).

discrimination and suffering injury. Like the first interpretation, it avoids imposing liability on potential defendants – architects, builders, developers and former owners – who have long since ceased having any control over the accessibility of the housing.[3]

II. THE PANEL MAJORITY'S INTERPRETATION CONFLICTS WITH THE STRUCTURE AND PURPOSES OF THE STATUTE, AND WITH OTHER INTERPRETATIVE AIDS.

Given that the text alone is susceptible to more than one reasonable interpretation, the court should adopt the interpretation that is most reasonable in light of the structure and purposes of the statute and other relevant considerations. *E.g.*, *United States v. Lopez*, 484 F.3d 1186, 1194 (9th Cir. 2007) (en banc) (holding that interpreting a statute requires the court to "adopt[] a view .... that is most consistent with its text, structure, history, and purpose"). Unfortunately, the panel majority has adopted the interpretation that is *least reasonable* in light of these interpretative rules.

Structure. The panel majority's interpretation conflicts with the FHA's statute of limitations provisions – §§3613(a)(1)(A) and

[3] The third interpretation addresses the panel majority's concern about "leav[ing] developers on the hook years after they cease having any association with a building." Slip Op. 12721. Exposure for developers terminates once they cease having control over the accessibility of the housing, just as it does under the panel majority's own interpretation.

3610(a)(1)(A)(i). Because an aggrieved person is a person injured *by* a discriminatory housing practice (§3602(i)), and the statute of limitations runs *from* a discriminatory housing practice (§§3613(a)(1)(A), 3610(a)(1)(A)(i)), these provisions clearly contemplate that the statute of limitations will not expire before the injury occurs and that the individual suffering injury will have a reasonable opportunity after injury occurs to bring suit.

Under the panel majority's interpretation, however, the statute of limitations begins to run and ordinarily expires before injury is suffered. Under the alternative interpretations, by contrast, the statute of limitations expires *after* the injury occurs, so the statute as a whole makes sense.

The panel majority's interpretation also conflicts with the structure of §3604(f). Section 3604(f) makes a "failure to design and construct" (§3604(f)(3)(C)) actionable only through subsections (f)(1) or (f)(2). The (f)(3)(C) violation is nothing more than a species of discrimination made actionable by (f)(1) and (f)(2). The structure therefore indicates Congress's intent that (f)(3)(C) violations be actionable by the individual renters and buyers who, under (f)(1) and (f)(2), suffer injury caused by the failure to design and construct housing in an accessible manner.

Under the panel majority's decision, however, the vast majority of individual buyers and renters who suffer injuries defined by (f)(1) and (f)(2) and caused by a failure to design and construct housing in an accessible manner are precluded from pursuing any legal remedy. Even though Congress defined the failure to design and construct as a species of discrimination actionable by individual renters and buyers under (f)(1) and (f)(2), the panel majority holds that these renters and buyers are – in the vast majority of cases – precluded from enforcing the statute. The alternative interpretations, by contrast, authorize enforcement by these renters and buyers and therefore make sense of the statute as a whole.

Purpose. The panel majority's decision conflicts with the purposes of the statute in two respects.

First, it absolutely deprives the vast majority of individual victims of discrimination of any the means to vindicate their rights, receive compensation for their injuries, or enjoin violations of the law. Under the panel's interpretation, only those who happen to encounter inaccessible housing during the first two years after construction have any legal remedy. Relief for all others is precluded. The second and third interpretations, by contrast, are consistent with the FHA's goal of making individual victims of discrimination whole.

The panel majority's interpretation also precludes effective enforcement of the FHA's accessibility requirements. Congress enacted the accessibility provisions of the FHA to allow persons with disabilities to join the American mainstream and live independently.[4] Because architectural barriers – the absence of an adequate supply of accessible housing – constitute the greatest obstacle to achieving these goals, Congress required new, multifamily housing to be made accessible.[5] Compliance with the Act's accessibility requirements has been exceedingly low.[6] Achieving

---

[4] As the House Report to the Fair Housing Amendments Act of 1988 explains, Congress enacted these provisions to provide "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream," and to establish the "goal of independent living" for persons with disabilities. H.R. Rep. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

[5] As Congress explained, "[a] person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by" architectural barriers "as by a posted sign saying 'No Handicapped People Allowed.'" H.R. Rep. 100-711, at 25 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2186.

[6] The degree of noncompliance with the FHA's accessibility requirements is substantial. In the 1990s, a Baltimore fair housing organization found noncompliance of 44 out of 57 multi-family developments; in 1996, the Department of Justice found noncompliance at 48 out of 49 multifamily housing developments in the Chicago area; a 1998 investigation found that none out of 50 multifamily developments in Idaho were compliant; in June of 1999, a disabled minister in Denver looked at the nine apartment complexes in her area that claimed to have accessible units in her price range and found that none met the FHA's accessibility requirements. Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design*

Congress's purposes therefore requires effective enforcement, and the primary method of enforcing the FHA has always been the filing of civil actions and administrative complaints by individual victims of housing discrimination – private attorneys general.[7] The panel majority's decision,

---

And Construction" Cases under the Fair Housing Act, 40 U. Rich. L. Rev. 753, 768-69 (2006). Recent studies continue to find a "high degree of noncompliance" with the Act's accessibility requirements. *Id.* at 769. A 2005 HUD study found that over one-third of advertised rental dwellings in the Chicago area were not accessible for wheelchair users to visit. *Id.* at 769 n.89 (citing Office of Policy Dev. And Research, U.S. Dep't of Hous. And Urban Dev., Discrimination Against Persons with Disabilities: Barriers at Every Step 3, 42, 51 (2005)). A 2005 study in Cedar Rapids, Iowa, found that none of 65 multifamily complexes investigated complied. *Id.* A 1999 audit by Amicus SSFHC found that none of 14 apartment complexes in Reno, Sparks, and Washoe County, Nevada, complied. (Declaration of Katherine Knister, attached hereto, at ¶ 3.) Experience has shown that compliance cannot be realized without effective enforcement. Although education and outreach can play a role in achieving the goals of the FHA, effective enforcement is indispensable to achieving meaningful compliance. (Declaration of Katherine Knister ¶¶ 4-5.)

[7] As the Supreme Court has explained:

> [S]ince the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits [and administrative complaints] in which, the Solicitor General says, the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972). Although enforcement remains theoretically possible after two years because the Attorney General has authority to initiate its own enforcement action (Slip Op. 12718 n.2), A.G.-initiated suits alone cannot bring about effective enforcement of the FHA. The A.G. has the resources to bring only a handful of enforcement actions, giving the overwhelming majority of developers – especially smaller developers – the ability to violate the law with impunity.

however, renders this form of enforcement a virtual nullity. Only where a victim of discrimination happens to encounter the unlawfully inaccessible conditions within two years of the termination of construction, and that victim elects to initiate an enforcement action, will noncompliance with the accessibility requirements be subject to legal review. Most violations will go un-remedied and developers will continue to disregard the FHA's accessibility requirements with impunity. Accessible housing will remain in exceedingly short supply and the FHA's promise of dignified and independent living will go unfulfilled.[8]

Indeed, the majority's holding creates a strong incentive for developers to "pay off" victims who happen to encounter discrimination within two years after construction by offering them monetary settlements in exchange for dropping claims for injunctive relief. By doing so, developers can "run the clock" on meaningful enforcement. If they can get past the two-year mark, they will never face the prospect of a court injunction

---

[8] "One out of every five persons in the nation has some type of moderate or severe physical disability. Yet, many of the nation's communities suffer a critical shortage of accessible housing." *HUD Launches Design and Construction Education Program*, U.S. Dep't of Hous. & Urban Dev., available at http://www.hud.gov/offices/fheo/disabilities/accessibility1st.cfm/.

requiring them to remedy their violations by bringing their housing into compliance with the law.

Reasonable Agency Interpretation. The panel majority's decision also conflicts with the reasonable interpretation given to the statute by HUD, the federal agency charged with administration of the FHA. Consistent with the second and third interpretations of the discriminatory housing practice, HUD states that complaints may be filed "at any time that the building continues to be in noncompliance, because the discriminatory housing practice – failure to design and construct the building in compliance – does not terminate." Office of Fair Hous. and Equal Opportunity, U.S. Dep't of Hous. and Urban Dev., Fair Housing Act Design Manual (1998), at 22. HUD's interpretation is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003).

Other Considerations. The panel majority's opinion also conflicts with background tort principles governing accrual of a cause of action and the running of a statute of limitations. Under these principles, a cause of action does not accrue, and a statute of limitations does not begin to run, until the plaintiff suffers injury. Restatement (Second) of Torts §899 cmt. c (1979); *Wallace v. Kato*, 127 S. Ct. 1091, 1097 (2007). Courts are supposed to interpret the FHA in light of these tort principles. *Meyer*, 537 U.S. at 285

("[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related ... rules and consequently intends its legislation to incorporate those rules."). Under the panel majority's interpretation, the statute of limitations expires before the injury occurs and before the cause of action accrues.

The panel majority's interpretation also conflicts with the primary purpose of the Fair Housing Amendments Act of 1988 (the law adopting the Act's accessibility requirements), which was to *remove* barriers to robust enforcement of the FHA. Slip Op. 12739 (Fisher, J., dissenting). The panel majority's decision – by adopting the most restrictive enforcement rule possible – runs precisely counter to this purpose.

In addition, the panel majority's decision conflicts with the longstanding requirement that courts interpret FHA in light of its broad remedial purposes. Slip Op. 12739-40 (Fisher, J., dissenting).

Finally, the panel majority's decision creates a conflict with the only other Circuit to address this question. In *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 480-81 (6th Cir. 2006), the Sixth Circuit concluded that the position embraced by the panel majority here could not be reconciled with the "overwhelming majority of the federal courts that have addressed this issue," lacked support "from a

purely textual standpoint," and "makes little practice sense" in light of the purposes of the FHA. The court concluded that the statute of limitations does not begin to run until an individual homeseeker encounters the inaccessible conditions and suffers injury. *Id.* at 481.

CONCLUSION

The FHA's text is susceptible to more than one reasonable interpretation. Accordingly, the Court should adopt the interpretation that is most reasonable in light of the structure and purposes of the statute, the reasonable interpretation of the statute by the federal agency charged with interpretation, and other rules of interpretation. The panel majority here has adopted the interpretation that is least reasonable in light of these considerations. The two alternative interpretations of the statute, by contrast, are reasonable in light of the text, structure, and purposes of the Act and defer to the agency's reasonable interpretation and principles of tort law.

This case is enormously important. In this appeal, the Ninth Circuit will become the first federal circuit court to issue a published decision addressing an issue that profoundly affects the lives of tens of millions of persons with disabilities throughout the United States.

Housing is the key for individuals with disabilities. It is the necessary foundation piece that leads to education, employment, and active

> participation in communities. It is where families are nourished, strengthened, and loved.

Eunice Kennedy Shriver, Forward, *Priced Out in 2006: The Housing Crisis for Persons with Disabilities*, Technical Assistance Collaborative, Inc Consortium for Citizens with Disabilities, Housing Task Force (2007), at iii. It is of the utmost importance that the Court decide this case correctly.

For the foregoing reasons, this appeal should be reheard by the panel or reheard en banc.

DATED: October 9, 2007

Respectfully submitted,

Michael Evans, SBN 208917
DEPAUL U. COLLEGE OF LAW
c/o Brancart & Brancart
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

BRANCART & BRANCART
Christopher Brancart, SBN 128475
Elizabeth Brancart, SBN 122092
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 40-1 and 29-2(c)(2), the attached brief is proportionally spaced, has a typeface of 14 points, and contains 4,200 words or fewer.

DATED: October 9, 2007

Respectfully submitted,

BRANCART & BRANCART
Christopher Brancart, SBN 128475
Elizabeth Brancart, SBN 122092
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

Michael Evans, SBN 208917
DEPAUL U. COLLEGE OF LAW
c/o Brancart & Brancart
P.O. Box 686
Pescadero, CA 94060
Telephone: (650) 879-0141
Facsimile: (650) 879-1103

Counsel for Amici Curiae

DECLARATION OF KATHERINE KNISTER

I, Katherine Knister, declare as follows:

1. I am the Executive Director of the Silver State Fair Housing Council (SSFHC).

2. SSFHC is a nonprofit Nevada corporation, with its principal place of business located in Reno, NV. The mission of SSFHC is to ensure equal housing opportunity for all residents of Nevada. To this end, SSFHC engages in activities including, but not limited to: (1) investigating allegations of discrimination; (2) conducting investigations of housing facilities to determine whether equal housing opportunity in housing is provided; (3) taking such steps as it deems necessary to assure equal housing opportunity and to counteract and eliminate discriminatory housing practices; (4) providing outreach and education to the community, including housing providers and consumers; and (5) monitoring and training housing providers who have previously engaged in discriminatory housing practices.

3. In 1999, SSFHC undertook an audit of local multifamily housing designed and constructed for first occupancy after March 13, 1991. The audit, conducted with management cooperation at 14 apartment complexes in Reno, Sparks, and Washoe County, NV, resulted in the finding that none of the complexes surveyed complied with all of the seven design

requirements incorporated into the Fair Housing Act (FHA). Surveys of 23 additional properties demonstrated significant noncompliance with FHA requirements for accessible routes and accessible public and common use areas. Based on these results, SSFHC has committed significant resources to promote compliance with FHA design requirements.

4. Since 1998, SSFHC has sponsored eight trainings for architects, builders, and developers in Nevada regarding FHA accessibility requirements. These trainings, conducted by a licensed architect who is a nationally recognized expert, are currently accredited for continuing education by the local chapter of the American Institute of Architects, the State Bar of Nevada, the Nevada Real Estate Division, and the local chapter of the International Code Council. In addition, SSFHC has developed a HUD-recognized program of sending notification letters to recipients of multifamily building permits in numerous local jurisdictions. These letters include notice that the project may be covered by the FHA accessibility requirements, as well as information about the seven design requirements, and a list of FHA accessibility resources. Since 1999, SSFHC has sent literally hundreds of these letters to architects and developers designing and constructing new multifamily housing in Nevada. It should be noted that in

two design and construction cases filed by SSFHC against local developers, copies of SSFHC notification letters were found in the respondents' files.

5. SSFHC is committed to ensuring compliance with FHA design requirements for new multifamily housing throughout Nevada. While education is important, it is not enough. Effective enforcement, including retrofits for compliance, becomes a valuable teaching tool for developers who, through ignorance or by design, persist in designing and constructing inaccessible housing in violation of the FHA. It also sends a powerful message to persons with disabilities by increasing the availability of accessible housing in new multifamily developments.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

October 3, 2007

Katherine Knister

PROOF OF SERVICE

I, Elizabeth Brancart, declare as follows: I am a citizen of the United States and a resident of the State of California. I am over the age of 18 and not a party to the within action; my business address is 8205 Pescadero Road, Loma Mar, CA 94021. On October 10, 2007, I served the documents:

(1) Motion For Leave To File Brief Of Amici Curiae Silver State Fair Housing Council, Inc., Nevada Disability Advocacy And Law Center, And Law Professors Robert G. Schwemm, Michael P. Seng, And Michael Evans In Support Of Appellants' Petitions For Panel Rehearing And For Rehearing En Banc; and (2) Brief Of Amici Curiae Silver State Fair Housing Council, Inc., Nevada Disability Advocacy And Law Center, And Law Professors Robert G. Schwemm, Michael P. Seng, And Michael Evans In Support Of Appellants' Petitions For Panel Rehearing And For Rehearing En Banc

on the parties to this action by placing a true copy thereof enclosed in a sealed envelope or box with postage thereon fully prepaid, in the United States mail at Loma Mar, California, addressed to the persons on the attached Service List. I also sent those documents to the Clerk of Court by delivering the originals and copies thereof to a third-party commercial carrier, addressed to the Clerk of Court, for delivery within 2 calendar days.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 10, 2007, at Loma Mar, California.

Elizabeth Brancart

FILED

OCT 3 0 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Court of Appeals No. 05-35647

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOLL GARCIA, *Plaintiff-Appellant,*

STATE FARM FIRE AND CASUALTY COMPANY, *Intervenor-Appellee,*

vs.

DENNIS BROCKWAY; ROBERT STEWART; STEWART-MILES & ASSOCIATES, *Defendants-Appellees,*

and

ZAVOSHY REV. INTER VIVOS TRUST; J.J. ZAVOSHY; Y.W.ZAVOSHY; and H & H PROPERTIES, *Defendants.*

Appeal from the United States District Court
for the District of Idaho
D.C. No. CV-03-00193-MHW
The Honorable Mikel H. Williams
Magistrate Judge, Presiding

APPELLEES' JOINT ANSWER IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING *EN BANC*

Candy W. Dale, ISB #2909
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 W. Idaho, Suite 700
P.O. Box 1271
Boise, ID 83701
Telephone: (208) 395-8500
Facsimile (208) 395-8585
E-mail: cwd@hallfarley.com
Attorneys for Defendant-Appellee Dennis Brockway

Kirtlan G. Naylor, ISB #3569
NAYLOR & HALES, P.C.
950 W. Bannock St., Suite 610
Boise, ID 83702
Telephone: (208) 383-9511
Facsimile (208) 383-9516
E-mail: kgn@naylorhales.com
Attorneys for Defendants-Appellees Robert Stewart and Stewart-Miles & Associates

Defendant-Appellees Dennis Brockway and Robert Stewart, by and through their undersigned counsel of record, hereby submit, pursuant to this Court's order filed October 9, 2007, this Appellees Joint Answer in Opposition to Appellant's Petition for Rehearing *En Banc.*

According to Rule 35 of the Federal Rules of Appellate Procedure, an *en banc* rehearing is not favored and will not be ordered unless: 1) it is necessary to maintain the uniformity of the Court's decisions, or 2) it involves a question of exceptional importance as there is conflicting case law from other Courts of Appeal. As detailed below, Appellant has not demonstrated that the panel's opinion conflicts with any case law, and as such, Appellant has not provided sufficient justification for a rehearing *en banc*.

A. ARGUMENT

I. THE PANEL'S OPINION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OF THE UNITED STATES

In his petition for rehearing *en banc*, the Appellant cites to the U.S. Supreme Court's decision of *Ledbetter v. Goodyear Tire & Rubber Co.*, __ U.S. __, 127 S.Ct. 2162 (2007) to support his assertion that the panel's opinion in the instant case conflicts with decisions of the United States Supreme Court. However, the

portion of *Ledbetter* to which the appellant cites–footnote 3– does not contradict the panel's opinion and does not constitute a conflict of legal principle.

Footnote 3 states :

> There may be some instances where the elements forming a cause of action span more than 180 days. Say, for instance, an employer forms an illegal discriminatory intent towards an employee but does not act on it until 181 days later. The charging period would not begin to run until the employment practice was executed on day 181 because until that point, the employee had no cause of action. The act and the intent had not yet been joined.

Id. at 2171 n.3.

Preliminarily, footnote 3 in *Ledbetter* is merely *dicta*, establishing no hard and fast rule of law pertinent to this present case. A court of appeals is not bound to follow dictum, although it does accord it any respect earned through its persuasive value. *Young v. New Process Steel, LP*, 419 F.3d 1201, 1204 (11th Cir. 2005); *City of Aurora, Colorado v. Bechtel Corp.*, 599 F.2d 382, 386 (10th Cir. 1979). Additionally, footnote 3 is plainly applicable to Title VII cases and not to the FHA, which distinguishes it further from the present case.

In Appellant's Petition for Rehearing *en banc*, Appellant argues that the example in footnote three contradicts the panel's opinion. Instead, the legal principle in footnote three supports Appellees' and the panel's conclusion that the statute of limitations began to run on the day the final certificate of occupancy was

issued. As quoted above, footnote three indicates that the statute of limitations begins to run when the intent and the act of the person with that intent are joined, or as used in the example, when the discriminatory intent of the employer is joined with the employer's act of firing the employee.

Applying that reasoning to the current case, the intent to design and construct the building that allegedly is non-FHA compliant would become actionable only when it is joined with the acts of the architect and builder. In this case, under *Ledbetter* and as recognized by the panel in its opinion, it is arguable that Appellees Stewart and Brockway might have taken several acts between the time the intent to design and build the alleged non-FHA compliant building was formed until the day the certificate of occupancy was issued; however, the final act by Appellees Stewart and Brockway could have only occurred the day the certificate of occupancy was issued, more than ten years ago. Thus, this date would be the last time Appellees Brockway and Stewart's intent to design and build the building could join one of their acts. Accordingly, completion of construction and the issuance of the final certificate of occupancy ten years ago, according to the example in footnote 3, would start the statute of limitations running. Therefore, footnote 3 is consistent with the panel's opinion that the statute of limitations began to run on the day the final certificate of occupancy was issued.

In contrast, footnote 3 is not analogous to Appellant's argument that the statute of limitations should begin to run upon discovery of the alleged non-FHA compliant conditions. First, footnote three requires the act and the intent to meet, not the intent and then the discovery of that intent. Thus, for footnote 3 to be consistent with Appellant's argument, it would have to state that the statute of limitations would begin to run when the employee learns of the discriminatory motive for the employer's action, not the date that the employer takes that action.

Second, footnote 3 refers to an act completed by the same person who originally formed the intent. In that example, it is the employer who has the discriminatory intent and the employer who takes the action that triggers the statute of limitations. In contrast, Appellant is arguing that the intent can be discovered by a different party, the employee, rather than the person who formed the intent, the employer. This is inconsistent with the example in footnote 3. Thus, footnote 3 in *Ledbetter* fails as a legal analogy to Appellant's position. Instead, it is consistent with Appellees' argument and the panel's opinion.

As to any other conflict with the *Ledbetter* decision, the panel's opinion wholly comports with the case as a whole as discussed in the opinion. The panel's reliance upon *Ledbetter* for construction of the commencement of the statute of limitations under 42 U.S.C. § 3613(a)(1)(A) is fully supported by the *Ledbetter*

decision, which distinguishes between a continuing violation and the continual effects of a past violation, holding that continual effects of a past violation "have no present legal consequences." *Ledbetter*, 127 S.Ct. At 2169.

Furthermore, the Appellant's other arguments as to the United States Supreme Court's decisions on interpreting the statute of limitations of the FHA do not identify a valid conflict between the rulings of that Court and the panel's opinion. This is particularly true where, as demonstrated above, the panel's opinion with respect to the commencement of the FHA statute of limitations is concordant with the *Ledbetter* decision. Thus the original "wooden application" of the FHA statute of limitations provisions as alleged in Appellant's Petition was made by the United States Supreme Court's decision itself.

II. THE PANEL'S OPINION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

The Appellant cites to no actual conflict between the panel's opinion and prior decisions of this Court. The fact that the Ninth Circuit has previously held that the commencement of a statute of limitations occurs when a cause of action accrues is not in conflict with the panel's opinion, which holds that a cause of action for an FHA design-and-construction violation accrues upon the conclusion of the design-and-construction phase. Thus, there is no conflict between the panel's opinion and the cases cited to by the Appellant.

Further, the panel expressly addressed the Appellant's arguments regarding equitable tolling and declined to adopt the same. This does not constitute ignoring the dictates of legal precedent.

III. THE PANEL'S OPINION DOES NOT CONFLICT WITH AUTHORITATIVE DECISIONS OF ANY OTHER U.S. COURT OF APPEALS

The Appellant cites to the unpublished Sixth Circuit case of *Fair Housing Council, Inc., v. Village of Olde St. Andrews*, 210 F.Appx. 469, 2006 WL 3724128 (6th Cir. 2006) as a case of a U.S. Court of Appeals that conflicts with the panel's opinion. Although the pertinent holding of the *St. Andrews* case is in contradiction to the panel's opinion, this decision itself does not create precedential authority from the Sixth Circuit that constitutes a conflict.

The Sixth Circuit has continually stated that unpublished decisions have little or no precedential value to that court. *Manufacturer's Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204, 208 (6th Cir. 1995) (finding "[t]he district court based this distinction on language in *Johnson v. Detroit*, an unpublished decision of this court that, because it has no precedential value, cannot be given any weight in this case"); *United States v. Williams*, 15 F.3d 1356, 1363 n.6 (6th Cir. 1994), *cert. denied,* 513 U.S. 966, 115 S.Ct. 431, 130 L.Ed.2d 344 (1994) (finding "[i]nasmuch as this circuit's opinion in *Myers* is unpublished, however, it

is not precedent"); *Silverburg v. Evitts*, 993 F.2d 124, 127 (6th Cir. 1993) (holding "as an unpublished decision, *Taylor* is not binding precedent"); *Hall v. Shipley*, 932 F.2d 1147, 1152 (6th Cir. 1991) (ruling "[u]npublished opinions, however, are of little precedential value and thus of little, if any, import...").

Thus, because the case has little precedential value in the Sixth Circuit, it has little or no precedential value in the Ninth Circuit. Where the Appellant has not cited to a case with precedential authority in any other Court of Appeals (as appellant cites to no other decision of a U.S. Court of Appeals alleging a conflict), the panel's opinion does not conflict with those of any other court.

IV. THE *AMICUS CURIAE* BRIEF SUBMITTED BY SILVER STATE FAIR HOUSING DOES NOT PRESENT ANY ARGUMENT THAT NEEDS TO BE ADDRESSED IN A REHEARING *EN BANC*

Silver State Fair Housing's *Amicus Curiae* Brief takes issue with the panel's interpretation of the statute by arguing that the panel's interpretation of the statute was the least reasonable in light of text, purposes, and structure of the FHA. The arguments presented by Silver State were fully addressed, examined, and considered by the panel when reaching its opinion; thus there is no reason for the panel to re-address them in a rehearing *en banc*. Additionally, the *Amicus Curiae* Brief submitted by Idaho Realtors' Association supports the panel's opinion.

B. CONCLUSION

For the reasons stated above, Plaintiff-Appellant's Petition for Rehearing *en banc* should be denied and the panel's opinion filed September 20, 2007, allowed to stand.

RESPECTFULLY SUBMITTED this 29th day of October, 2007.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By _____
Candy W. Dale, Of the Firm
Attorneys for Defendant-Appellee
Dennis Brockway

NAYLOR & HALES, P.C.

By _____ for
Kirtlan G. Naylor, Of the Firm
Attorneys for Defendants-Appellees
Robert Stewart and Stewart-Miles & Associates

No. 06-15042
(Consolidated for decision with No. 05-35647)

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
NOV 15 2007
FILED 11/15/07
DOCKETED DATE
INITIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMARA THOMPSON;
and DISABLED RIGHTS ACTION COMMITTEE,

Plaintiffs-Appellants,

v.

MICHAEL E. TURK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

D.C. No. CV-05-00156-ECR

RESPONSE TO APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

JOSHUA H. REISMAN, ESQ.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
300 South Fourth Street, Suite 1201
Las Vegas, Nevada 89101
(702) 471-7000

Attorneys for Defendant-Appellee

I. ARGUMENT

A. Standard For Rehearing En Banc

FRAP 35(a) states, in pertinent part, that: "[a]n en banc ... rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." (emphasis added). The petition for rehearing en banc must begin with a statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeal that have addressed the issue.

FRAP 35(b)(1). An appropriate ground for suggesting a rehearing en banc exists "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity ...." Circuit Rule 35-1.

B. Neither Panel Rehearing nor En Banc Rehearing Is Warranted Because The Panel Decision Does Not Conflict With A Decision Of The Supreme Court Or Of The Ninth Circuit.

Appellants' "Rule 35(b)(1) Statement" asserts that the panel decision conflicts with decisions of the United States Supreme Court[1] and with decisions of the United States Court of Appeals for the Ninth Circuit.[2] (See Appellants' Pet.

---

[1] Appellants cite the following allegedly conflicting Supreme Court cases: Meyer v. Holley, 537 U.S. 280 (2003); City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995); and Reiter v. Cooper, 507 U.S. 258 (1993).

[2] Appellants cite the following allegedly conflicting Ninth Circuit cases: Smith v. Pacific Properties & Dev. Corp., 358 F.3d 1097 (9th Cir.), cert.

Reh'g at 1.) Appellants request "that the panel rehear this case so as to render an opinion that is consistent with Ninth Circuit precedent and with Supreme Court precedent. . . ." Id. at 14. In the alternative, Appellants request "that the Court – sitting en banc – rehear this case to either (1) render an opinion that is consistent with circuit precedent and with Supreme Court precedent or (2) overturn circuit precedent by an en banc decision instead of by a panel decision." Id.

En banc rehearing is not warranted, however, because en banc consideration is not necessary to secure or maintain uniformity of this Court's decisions. Contrary to Appellants' assertions, the panel decision does not conflict with decisions of this Court or of the United States Supreme Court. Accordingly, panel rehearing is also unnecessary.

1. *Washington State Bldg. Code Council*'s And *Oxford House*'s References To § 3604(f)(3)(B) In No Way Conflict With The Panel's Construction Of § 3604(f)(3)(C).

Appellants contend that the panel decision is contrary to controlling precedent because it construes 42 U.S.C. § 3604(f)(3)(C) as an independently-actionable "discriminatory housing practice" rather than as a definitional provision that merely defines the meaning of "discriminate" under 42 U.S.C. §§ 3604(f)(1) and (f)(2).[3] Appellants assert that this Court and the Supreme Court have

---

denied, Pacific Properties & Dev. Corp. v. Disabled Rights Action Comm., 543 U.S. 869 (2004); Underwood Cotton Co. v. Hyundai Merchant Marine (American), Inc., 288 F.3d 405 (9th Cir. 2002); and City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994), aff'd, City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995).

3 The panel decision construes § 3604(f)(3)(C) as follows: "The FHA prohibits the design and construction of multifamily dwellings that do not have certain listed accessibility features. 42 U.S.C. § 3604(f)(3)(C)." Garcia v. Brockway, No. 05-35647, and Thompson v. Turk, No. 06-15042 (collectively, "Garcia"), slip op. at 12716 (9th Cir. Sept. 20, 2007). "The FHA provides that '[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice.' 42 U.S.C. § 3613(a)(1)(A)." Id. at 12716-12717. In a design-and-construction claim under the FHA, "the [discriminatory housing] practice is the 'failure to design and construct' a multifamily dwelling

repeatedly construed 42 U.S.C. § 3604(f)(3)(B) as a definitional provision rather than as an independently-actionable discriminatory housing practice. They specifically cite City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994), and City of Edmonds v. Oxford House, 514 U.S. 725, 729 (1995),[4] for this proposition.

Neither of these cases, however, stand for the proposition that § (f)(3)(B) is merely a definitional provision rather than an independently-actionable discriminatory housing practice. Wash. State Bldg. Code Council did not address whether a failure to accommodate reasonably under § (f)(3)(B) constitutes an independently-actionable discriminatory housing practice. Rather, the case examined whether 42 U.S.C. § 3607(b)(1) exempted the City of Edmonds' single-family residential zoning ordinance from the FHAA. See Wash. State Bldg. Code Council, 18 F.3d at 803-04. Whether the City of Edmonds had complied with the substantive requirements of the FHAA, i.e., Sections (f)(2) and (f)(3)(B), "was not an issue" because the district court had found the zoning ordinance exempt from the FHAA and had not reached that question. See id. at 804.

The Court's references to § (f)(3)(B), however, do not indicate that it is merely a definitional provision. Indeed, the Court specifically cites § (f)(3)(B) for the proposition that "[t]he FHAA imposes an affirmative duty to reasonably accommodate handicapped persons. 42 U.S.C. § 3604(f)(3)(B)." Wash. State Bldg. Code Council, 18 F.3d at 806 (emphasis added); see also id. at 807 ("Many

---

according to FHA standards. Id. § 3604(f)(3)(C)." Garcia at 12717. "The statute of limitations is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." Id. at 12717-12718.

4 In City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995), the Supreme Court affirmed the Ninth Circuit's judgment in City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994).

factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved.").

Similarly, in City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995), "[t]he sole question before the Court [wa]s whether Edmonds' family composition rule qualifie[d] as a 'restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling' within the meaning of the FHA's absolute exemption." (quoting 42 U.S.C. § 3607(b)(1)). Like the Ninth Circuit, the Supreme Court "d[id] not decide whether Edmonds' zoning code provision defining 'family,' as the City would apply it against Oxford House, violate[d] the FHA's prohibitions against discrimination set out in 42 U.S.C. §§ 3604(f)(1)(A) and (f)(3)(B)." Id. at 732 n.4 (emphasis added).

The Supreme Court's references to § (f)(3)(B), however, do not indicate that it is merely a definitional provision rather than an independently-actionable discriminatory housing practice. Notably, in two instances in the opinion, the Supreme Court refers to § (f)(3)(B) as a "prohibition against discrimination." See Oxford House, Inc., 514 U.S. at 732 n.4; id. at 738 ("It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's prohibitions against discrimination set out in §§ 3604(f)(1)(A)) and (f)(3)(B).") (emphasis added).[5]

---

[5] In footnote 4 of their Petition, Appellants also cite Sanghvi v. City of Claremont, 328 F.3d 532, 536, 538 (9th Cir.), cert. denied, 540 U.S. 1075 (2003), and Giebeler v. M&B Assocs., 343 F.3d 1143, 1146 (9th Cir. 2003), for their proposition that the Ninth Circuit has repeatedly construed § (f)(3)(B) merely as a definitional provision rather than as an independently-actionable discriminatory housing practice. Sanghvi merely states, however, that "[u]nder the FHA, discrimination includes 'a refusal to make reasonable accommodations ... 42 U.S.C. § 3604(f)(3)(B) (2000)." 328 F.3d at 538. Sanghvi in no way opines that § (f)(3)(B) is merely definitional and cannot operate as an independent prohibition.

Rather than supporting Appellants' proposition, Giebeler strongly suggests that § (f)(3)(B) is independently actionable. The Court states that "[t]he FHAA's definition of prohibited discrimination encompasses 'a refusal to

Accordingly, Wash. State Bldg. Code Council and Oxford House do not support the proposition that § (f)(3)(B) is merely a definitional provision rather than an independently-actionable discriminatory housing practice. Consequently, these cases in no way conflict with the panel's conclusion that a failure to design and construct in accordance with § (f)(3)(C) is an independently-actionable discriminatory housing practice.

2. In *Smith v. Pacific Properties & Dev. Corp.*, The Ninth Circuit Did Not Determine That § 3604(F)(2) Is The Operative Violation In A Case Involving Design-And-Construction Discrimination.

Appellants assert that the panel decision conflicts with Smith v. Pacific Properties & Dev. Corp., 358 F.3d 1097 (9th Cir. 2004), because in Smith, the Ninth Circuit "clearly treated §3604(f)(2) as the operative violation in a case involving design and construction discrimination." (Appellants' Pet. Reh'g at 7.) In Smith, however, the Court never considered whether design-and-construction discrimination constitutes a violation of § (f)(3)(C). The Court did not consider

---

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.' 42 U.S.C. § 3604(f)(3)(B)." 343 F.3d at 1146 (emphasis added). The Court further states that "the FHAA 'imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons ... not only with regard to the physical accommodations, see 42 U.S.C. § 3604(f)(3)(A) & (C), but also with regard to the administrative policies governing rentals." Id. at 1146-47 (citation omitted) (emphasis added). Giebeler also cites § (f)(3)(B) for the proposition that "only 'reasonable' accommodations are required by the FHAA. 42 U.S.C. § 3604(f)(3)(B)." Id. at 1148 (emphasis added). Finally, Giebeler quotes, in pertinent part, the following language from the House Committee Report on the FHAA: "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." Id. (quoting H.R. REP. NO. 100-711, at 25 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186) (emphasis added).

this issue because the plaintiffs had brought their design-and-construction claim under § (f)(2):

> Smith and DRAC initiated the instant litigation in district court, claiming that conditions in all five Pacific Properties developments violated § 3604(f)(2)'s prohibition of discrimination "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-[inter alios] that person."

Smith, 358 F.3d at 1100.

Contrary to Appellants' suggestion, the Court never determined that § (f)(2), rather than § (f)(3)(C), is the operative violation in a case involving design-and-construction discrimination. The Court merely addressed the alleged violation that had been raised by the plaintiffs—an (f)(2) violation. Smith leaves open the question of whether design-and-construction discrimination constitutes a violation of § (f)(3)(C).[6]

Accordingly, Smith in no way conflicts with the panel's determination that a failure to design and construct in accordance with § (f)(3)(C) is an independently-actionable discriminatory housing practice.

///

///

///

---

[6] Notably, the Smith Court states—without comment—that under a consent decree, the defendant had "agreed to make certain adjustments to the four housing developments in accordance with an injunction prohibiting discrimination on the basis of disability in violation of 42 U.S.C. § 3604(f)(3)(C)." 358 F.3d at 1099 (emphasis added). The Court's lack of comment suggests that it did not take issue with the notion that design-and-construction discrimination could constitute a violation of § (f)(3)(C).

3. *Underwood Cotton Co. v. Hyundai Merchant Marine (American), Inc.*'s Nonbinding Dicta, Regarding The Differences Between A Statute Of Limitations And A Statute Of Repose, Does Not Present A Conflict Necessitating Consideration By The Full Court.

Appellants assert that the panel decision conflicts with Underwood Cotton Co. v. Hyundai Merchant Marine (American), Inc., 288 F.3d 405, 408-09 (9th Cir. 2002), because Underwood indicates that the panel has construed 42 U.S.C. § 3613(a)(1)(A) as a "statute of repose," but the panel refers to § 3613(a)(1)(A) as a "statute of limitations." In other words, the panel's description of a statute of limitations conflicts with Underwood's description.

Underwood's statements regarding the differences between a statute of repose and a statute of limitations are merely dicta, however, because the Court in Underwood did not need to determine whether the time-bar provision at issue was a statute of repose or a statute of limitations: "We, however, see no need to resolve the question of whether COGSA § 1303(6) is a statute of limitations or a statute or repose because the sometimes arcane distinctions between the two make no difference in this case." 288 F.3d at 409.

A panel is not bound by dicta from prior cases. See, e.g., U.S. v. Hadley, 918 F.2d 848, 852 (9th Cir. 1990), cert. granted, 503 U.S. 905, cert. dismissed, 506 U.S. 19 (1992); Ruff v. Sullivan, 907 F.2d 915, 918 (9th Cir. 1990). Accordingly, while Underwood's nonbinding dicta arguably may conflict with the panel's description of a statute of limitations, this hardly presents a conflict necessitating consideration by the full Court to secure and maintain uniformity of the Court's decisions.

///

///

4. *Reiter v. Cooper* Does Not Stand For The Broad Proposition That A Statute Of Repose Will Not Be Inferred In The Absence Of Any Such Indication In The Statute.

Appellants assert that the panel decision conflicts with Reiter v. Cooper, 507 U.S. 258, 267 (1993), because under Reiter, "[t]he 'odd result' of a statute of repose will not be inferred 'in the absence of any such indication in the statute.'" (Appellants' Pet. Reh'g at 12 (quoting Reiter v. Cooper, 507 U.S. 258, 267 (1993)).) Appellants contend that the panel does not identify where in the FHA a statute of repose is indicated.

Reiter does not state, however, that a "statute of repose" will not be inferred in the absence of any such indication in the statute. Rather, Reiter states the following:

> While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.

507 U.S. at 267.

In Reiter, the Supreme Court addressed an unreasonable-rate claim under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10701 et seq. The ICA "gives shippers an express cause of action against carriers for damages ... in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC [Interstate Commerce Commission], § 11705(b)(3)." Reiter, 507 U.S. at 262-63. "Under 49 U.S.C. § 11706(c)(2), a shipper 'must begin a civil action to recover damages under [§ 11705(b)(3)] within two years after the claim accrues,' which occurs 'on delivery or tender of delivery by the carrier,' § 11706(g)." Reiter, 507 U.S. at 263.

The respondents argued that there existed a "'pay first' rule, whereby payment of the tariff rate is a 'prerequisite to litigating the rate reasonableness issue.'" Id. at 267. In light of the specific statutory language that the "claim accrues," for statute of limitations purposes, "on the delivery or tender of delivery by the carrier," the Supreme Court rejected the respondents' argument.

Accordingly, where the statute specifically said that the cause of action "accrues" at a certain time (upon delivery or tender of delivery) for the purpose of calculating when the statute of limitations begins to run, the Supreme Court would not infer, without any indication in the statute, that the cause of action "accrues" at a different time (payment of the tariff rate) for the purpose of bringing suit.

Reiter simply does not stand for the broad proposition that a statute of repose will not be inferred in the absence of any such indication in the statute. Indeed, nowhere in Reiter does the Supreme Court even use the term statute of repose. Rather, Reiter indicates that where a statute specifically states that a claim "accrues" at a certain time for statute of limitations purposes, the Supreme Court will not infer, without any indication in the statute, that the claim "accrues" at a different time for purposes of bringing suit.

Here, unlike the ICA in Reiter, the FHA's statute of limitations does not use "accrual" language at all. It uses "occurrence" language. As the panel explains, "[t]he FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by 'the occurrence or the termination of an alleged discriminatory housing practice.'" Garcia at 12723 (quoting 42 U.S.C. § 3613(a)(1)(A)). "Under the FHA, the ability to privately enforce the 'new legal duty' thus only lasts for two years from the time of the violation ...." Id.

Reiter's interpretation of the ICA's accrual language simply has no bearing on the panel's interpretation of the FHA's occurrence language.

5. The Panel Decision Is Perfectly Consistent With *Meyer v. Holley* Because The FHA Speaks Directly To The Issue Of The Statute Of Limitations And Deviates From Tort Law

Appellants assert that the panel decision conflicts with Meyer v. Holley, 537 U.S. 280, 285 (2003), by being too dismissive of the notion that the FHA sounds basically in tort. In Meyer, however, the Supreme Court indicated that common-law rules may be abrogated where Congress has specified that such was its intent in the statute's language or the legislative history. See id. ("'In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law.'" (quoting United States v. Texas, 507 U.S. 529, 534 (1993)); id. at 286 ("Congress said nothing in the statute or in the legislative history about extending vicarious liability in this matter); id. at 287 ("Where Congress, in other civil rights statutes, has not expressed a contrary intent, the Court has drawn the inference that it intended ordinary rules to apply."); id. ("This Court has applied unusually strict rules only where Congress has specified that such was its intent.").

The panel decision is perfectly consistent with Meyer because the FHA speaks directly to the issue of the statute of limitations, and it deviates from the tort-law principle that the limitations period commences when the plaintiff has a complete and present cause of action. As the panel points out, the "passing reference to tort law [in Curtis v. Loether, 415 U.S. 189, 195 (1974)] cannot be read to trump statutory provisions that deal expressly with the statute of limitations." Garcia at 12723. "The FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by 'the occurrence or the termination of an alleged discriminatory housing practice.'" Id. (quoting 42 U.S.C. § 3613(a)(1)(A)).

II. CONCLUSION

Neither panel rehearing nor en banc rehearing is warranted because the panel decision does not conflict with a decision of the Supreme Court or of the Ninth Circuit. Accordingly, this Court should deny Appellants' Petition for Rehearing and Rehearing En Banc.

Dated this 29th day of October, 2007.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

JOSHUA H. REISMAN, ESQ.
300 South Fourth Street, Suite 1201
Las Vegas, Nevada 89101

Attorneys for Defendant-Appellee

Cathy A. Catterson
Clerk of Court

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

(415) 355-8000

To: **Panel and all active judges and any interested senior judges**

Re: **Protection and Advocacy Inc's letter joining the arguments made by amici curiae Silver State Fair Housing Council, Inc. Et al in support of Petition for panel rehearing and petition for rehearing en banc**

05-35647 *Garcia v. Brockway*

06-15042 *Thompson v. Gohres Construction*

Opinion Dated 9/20/07

Panel Judges: Honorable Alex KOZINSKI, Chief Circuit Judge

Honorable Raymond C. FISHER, Circuit Judge

Honorable Richard C. TALLMAN, Circuit Judge

Date circulated to the court: December 11, 2007

IMPORTANT:
All requests for 5.4 notice must be made within 21 days of the circulation date.

PAI Protection & Advocacy Inc.

Advancing the rights of Californians with disabilities

COPY

LOS ANGELES REGIONAL OFFICE
3580 Wilshire Boulevard, Suite 902
Los Angeles, CA 90010
Tel: (213) 427-8747
TTY: (800) 781-4546
Toll Free: (800) 776-5746
Fax: (213) 427-8767
www.pai-ca.org

December 3, 2007

RECEIVED
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

DEC - 4 2007

FILED
DOCKETED
DATE INITIAL

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Noll Garcia v. Dennis Brockway, et al.*
Consolidated Case Nos. 05-35647 and 06-15042

Protection and Advocacy, Inc. hereby requests the Court's permission to submit this letter in the above-entitled matter, joining in the arguments made by *amicus curiae* Silver State Fair Housing Council et al. in their brief in support of Appellants' petition for panel rehearing and for rehearing en banc.

Protection and Advocacy, Inc. (PAI) is the State of California's designated protection and advocacy agency for people with disabilities.[1] PAI provides counsel and direct representation in administrative and court proceedings to individuals with all categories of disability, including but not limited to physical/orthopedic, sensory, cognitive and psychiatric. PAI is frequently called upon to provide housing advocacy for its clients, many of whom are confronted with significant barriers to securing affordable accessible housing, and experience increased rates of unnecessary institutionalization and homelessness as a result.

The decision of the majority of the panel in this case frustrates and undermines the purpose and goals of the Fair Housing Act, and should be reheard.

---

[1] PAI provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. §794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. §3011,3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. §1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. §300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. §15461-62, PL 107-252.

New construction tends to be more expensive housing in suburban areas, where lack of transit and other factors make accessibility difficult for the plurality of people with disabilities with low incomes. The likelihood of accessibility violations being noticed within one to two years of construction completion is remote when individuals with disabilities are unlikely to move into these new housing units to experience the discrimination for years. This is particularly problematic when current compliance procedures for the Act as they relate to new construction are weak; driven largely by post-construction complaints.

If, in the case of new construction, the statute of limitations for claims under the Act is interpreted as running from the date of construction completion, it is true that the vast majority of "victims" will be effectively precluded from being able to pursue any relief for the discrimination they experienced whatsoever. *Amicus Br. at 9.* It is therefore essential that the Fair Housing Act's enforcement provisions be interpreted in a manner most consistent with its structure and legislative purpose. Accordingly, we join the arguments of *Amici* in this matter and urge the court to grant Petitioners request for a panel rehearing or rehearing en banc.

Respectfully Submitted,

Michelle Uzeta, Associate Managing Attorney
Protection and Advocacy Inc.