No. 06-5109

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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DISABLED IN ACTION OF PENNSYLVANIA,

Plaintiff-Appellant

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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## IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States has an interest in this appeal because it could affect the ability of the federal government and private litigants to enforce 42 U.S.C. 12147 in federal court. The federal government has authority to file this amicus brief under Federal Rule of Appellate Procedure 29(a).

This case focuses on the statute of limitations for claims under 42 U.S.C. 12147(a). That provision states that, under certain circumstances, the failure to make altered portions of a transportation facility accessible to persons with disabilities is a form of discrimination prohibited by Title II of the Americans With

Disabilities Act (ADA), 42 U.S.C. 12131-12165 (Title II), and Section 504 of the Rehabilitation Act, 29 U.S.C. 794 (Section 504). The Attorney General has authority to bring civil actions to enforce Title II and Section 504.

In the context of public transportation, the Attorney General shares responsibility for enforcing Title II and Section 504 with the Department of Transportation (DOT). DOT has promulgated regulations to implement the transportation-related provisions of Title II, see 49 C.F.R. pt. 37, including the requirements of Section 12147, see 49 C.F.R. 37.43. In addition, DOT has issued regulations to implement Section 504 as it applies to entities (including the Appellee) that receive financial assistance from DOT. See 49 C.F.R. pt. 27. DOT has responsibility for administrative enforcement of these Title II and Section 504 regulations. See 49 C.F.R. 27.121-27.129, 37.11; 28 C.F.R. 35.170(c), 35.190(b)(8). DOT may refer violations of Title II and Section 504 to the Department of Justice, which may then file civil actions to enforce the statutes. See 28 C.F.R. 35.174; 49 C.F.R. 27.125(a)(1); 28 C.F.R. pt. 35, App. A, subpt. F, at 562-565 (2006).

In addition, the United States has an interest in ensuring that the ability of private litigants to enforce their rights under 42 U.S.C. 12147 is not unduly restricted. Because the Department of Justice has limited resources, private litigation plays an important role in the enforcement of federal nondiscrimination mandates.

## STATEMENT OF THE ISSUE

Whether the district court erred in determining which events would trigger the running of the statute of limitations on a claim alleging disability-based discrimination under 42 U.S.C. 12147(a).

## STATEMENT OF THE CASE

1. The Southeastern Pennsylvania Transportation Authority (SEPTA) is a state agency that operates a public transportation system in Philadelphia and its suburbs. App. 21-22, 152-153, 168.[1] This case involves renovations that SEPTA made at two facilities that are part of its subway system in downtown Philadelphia: (1) the subway entrance at the 15th and Market Street Courtyard (15th Street entrance), and (2) the subway exit at the City Hall Courtyard (City Hall exit). App. 24-29, 43, 124; DIA Br. 5-10.

The renovations at issue are the replacement of a stairway at the 15th Street entrance and an escalator at the City Hall exit. App. 24-29. SEPTA began replacing the stairway at the 15th Street entrance in February 2001. App. 26-27, 158, 194, 497. SEPTA completed the stairway and reopened it to the public on August 8, 2002. App. 27, 159, 180, 194. In 2001, SEPTA began construction to replace the escalator at the City Hall exit. App. 28, 59 n.44. SEPTA completed the escalator replacement on August 24, 2003. App. 27, 46, 164, 187-188, 320.

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[1] "App. __" refers to the page number of the appendix filed with Appellant's opening brief. "DIA Br. __" indicates the page number of Appellant's opening brief in this Court. "Doc. __" is the number of the entry on the district court docket sheet.

2. On March 14, 2003, Disabled in Action of Pennsylvania (DIA) filed suit alleging, among other things, that SEPTA violated Title II and Section 504 by failing to install an elevator at the 15th Street entrance when it replaced the stairway at that site. App. 39, 46, 96-100. DIA later clarified that it was basing its Title II and Section 504 claims on the definition of discrimination in 42 U.S.C. 12147(a). See Doc. 85-3 at 1, 11, 14-18. Section 12147(a) provides, in relevant part, that

> With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29 [Section 504 of the Rehabilitation Act], for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

42 U.S.C. 12147(a). On February 15, 2005, DIA filed an amended complaint alleging that SEPTA had violated Section 12147(a) by replacing an escalator at the City Hall exit without also installing an elevator at that facility. App. 58, 127-129, 132-133.[2]

The parties filed cross-motions for summary judgment. See Docs. 129 & 130; App. 16-17. In its motion, SEPTA argued that DIA's claims regarding the 15th Street entrance and the City Hall exit were time-barred. App. 43, 45, 192-199.

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[2] The United States takes no position on the merits of DIA's claims.

3. The district court granted SEPTA's motion for summary judgment, denied DIA's cross-motion, and entered final judgment in favor of SEPTA. App. 21-95. The court concluded that DIA's claims regarding the alterations at the 15th Street entrance and City Hall exit were time-barred because they were filed outside the two-year limitations period prescribed by Pennsylvania law for personal injury actions (see 42 Pa. Cons. Stat. Ann. § 5524(7)).[3] App. 44-60.

The district court rejected DIA's argument that the statute of limitations did not begin to run until completion of the alterations. The court concluded that, despite the phrase "upon completion of such alterations" in 42 U.S.C. 12147(a), a violation of that statute could occur before the defendant had finished the alterations. App. 48-50. Concluding that "a claim accrues on the date 'when the plaintiff knows or has reason to know of the injury that is the basis of the action,'" App. 50, the court held that DIA had either actual or constructive notice of the alleged violations well before the completion of the alterations at the two sites. App. 50-53, 57-60.

With regard to the 15th Street entrance, the court held that the statute of limitations began to run no later than November 1, 2000, when the City of

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[3] Because neither Title II nor Section 504 contains a statute of limitations, "federal courts should apply 'the most appropriate or analogous state statute of limitations' to [the federal] claims." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004) (quoting *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 660 (1987)). The United States takes no position here on the question whether 42 Pa. Cons. Stat. Ann. § 5524(7) provides the most appropriate or analogous statute of limitations for Title II or Section 504 actions. DIA does not dispute that Section 5524(7) applies to this case. See DIA Br. 11, 13-14.

Philadelphia informed DIA that SEPTA could proceed with the planned renovations without installing an elevator. App. 53. Because DIA did not file its complaint until March 14, 2003, the court concluded that DIA had failed to meet the two-year deadline for bringing a claim regarding the 15th Street entrance. App. 57.

As for the City Hall exit, the district court concluded that DIA had constructive notice of the project no later than August 17, 2001, and thus the two-year statute of limitations began to run on that date. App. 59-60. Consequently, the court held that DIA's claim concerning the City Hall exit, which was raised in an amended complaint filed on February 15, 2005, was time-barred. App. 60. In reaching that conclusion, the court first noted that SEPTA's publicly available capital budget mentioned the escalator project in early 2001 and that DIA officials reviewed SEPTA's budget each year. App. 58-59 & n.43. The court explained that even if the budget did not make DIA aware of the escalator replacement plans, "DIA and the public in general certainly had notice of the project beginning in June 2001, or at least by August 17, 2001, when physical barricades were placed around the escalator with a sign indicating that the work was part of the Escalator Replacement Project." App. 60.

## SUMMARY OF ARGUMENT

The statute of limitations for a claim under 42 U.S.C. 12147(a) does not begin to run, at the earliest, until the public entity has completed the alterations that are the subject of the lawsuit. The district court's contrary holding conflicts with the plain language of Section 12147(a). Moreover, the court's ruling, if upheld on appeal, could trigger unnecessary litigation by encouraging the premature filing of lawsuits and discouraging parties from resolving disputes over architectural designs through informal means.

The district court's error is attributable in large part to its misapplication of the "discovery rule." In effect, the district court used the discovery rule to accelerate the running of the statute of limitations on DIA's claims. As this Court has held, however, the discovery rule can only be used to *postpone – not to accelerate* – the running of the limitations period.

The interpretation we advocate in this brief would not preclude a plaintiff from bringing a claim for injunctive relief, under appropriate circumstances, to prevent anticipated violations of Section 12147(a) before the public entity has completed the facility's alterations. But the availability of such injunctive relief does not accelerate the running of the statute of limitations.

## ARGUMENT

The district court erred in holding that DIA's claims under 42 U.S.C. 12147(a) were time-barred. The statute of limitations for a Section 12147(a) claim does not begin to run, at the earliest, until the public entity has completed the alterations that are the subject of the lawsuit.[4] Consequently, both of DIA's Section 12147(a) claims were timely. DIA's claim concerning the 15th Street entrance was filed on March 14, 2003, less than two years after the completion of the alterations at that site in August 2002. The claim relating to the City Hall exit was filed on February 15, 2005, within two years after SEPTA completed the alterations at that facility in August 2003.

The district court's ruling is based on the mistaken premise that the statute of limitations can begin to run prior to completion of the alterations. This Court should reject that ruling.[5]

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[4] Even though the district court borrowed a state statute of limitations for DIA's claims, federal law determines when the limitations period begins to run. See *Romero* v. *Allstate Corp.*, 404 F.3d 212, 221 (3d Cir. 2005).

[5] Whether the statute of limitations on a Section 12147(a) claim could begin running later than the completion of the alterations is an open question, which has not been addressed by the parties and is not before this Court. The Court should not decide whether the "continuing violations" theory or any other theory would affect the running of the statute of limitations on a Section 12147(a) claim. DIA does not rely on such a theory in this appeal (see DIA Br. 31 n.11), and the district court declined to address the theory because DIA disavowed reliance on it below. See App. 47-48 n.34. This Court likewise should decline to decide the issue in this appeal.

*A. The District Court's Holding Conflicts With The Statutory Language*

The district court misinterpreted Section 12147, which states, in relevant part, that

> With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29 [Section 504 of the Rehabilitation Act], for a public entity *to fail to make such alterations* (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, *upon the completion of such alterations*.

42 U.S.C. 12147(a) (emphasis added). The district court's reading of the statute is incorrect.

The district court's interpretation conflicts with the "fail[ure]" language of 42 U.S.C. 12147(a). The statute provides that, when certain types of alterations are made to a facility, it will be considered discrimination for a public entity to "*fail* to make such alterations" in way that results in "the altered portions of the facility" being "readily accessible." 42 U.S.C. 12147(a) (emphasis added). In this context, "fail" means "[t]o be deficient or unsuccessful; to fall short." *Black's Law Dictionary* 631 (8th ed. 2004). No such "fail[ure]" has occurred if the public entity has made the altered portions of the facility accessible by the time the alterations are completed. Under those circumstances, the public entity has not "fall[en] short" (*ibid.*) of its statutory obligation to make the altered portions of the facility accessible. Nor can one reasonably say that such a public entity has been

"deficient or unsuccessful" (*ibid.*) in ensuring that the altered areas are accessible to persons with disabilities. Consequently, the most natural reading of the "fail[ure]" language is that a violation of Section 12147(a) cannot occur, at the earliest, until the public entity completes the alterations without having made the altered portions of the facility accessible.

This reading of Section 12147(a) is bolstered by the general anti-discrimination provisions of Title II of the ADA (42 U.S.C. 12132) and Section 504. Section 12147(a) defines a type of discrimination prohibited by both Section 12132 and Section 504. Consequently, the language of Section 12132 and Section 504 is relevant in construing 42 U.S.C. 12147(a). Section 12132 provides, in relevant part, that "no qualified *individual with a disability* shall, by reason of such disability, * * * *be subjected to discrimination* by any [public] entity." 42 U.S.C. 12132 (emphasis added). Similarly, Section 504 states, in relevant part, that "[n]o otherwise qualified *individual with a disability* * * * shall, solely by reason of her or his disability, * * * *be subjected to discrimination* under any program or activity receiving Federal financial assistance * * *." 29 U.S.C. 794(a) (emphasis added).

Section 12132 and Section 504 thus focus on whether an individual with a disability has suffered discrimination. In light of that emphasis, it would be anomalous to conclude, as the district court did here, that a violation of Section 12147(a) could occur long before any individual with a disability could suffer discrimination related to the altered portion of the facility. While construction is in progress, the portions of the facility undergoing the alterations typically will be

closed to the public. During this period, any inability to use the affected areas of the facility will be attributable to their closure, not to any accessibility problem covered by Section 12147(a). Until that facility is reopened to the public after the alterations have been completed, it is not possible for any individual with a disability to suffer discrimination related to the altered portions of the facility.

The phrase "upon the completion of such alterations" in 42 U.S.C. 12147(a) confirms what is implicit in the other language of Section 12147(a). As previously noted, Section 12147 states, in relevant part, that it is discrimination for a public entity to fail to make alterations "in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, *upon the completion of such alterations*." 42 U.S.C. 12147(a) (emphasis added). The most natural reading of this language is that discrimination, as defined in Section 12147(a), cannot occur prior to "the completion of [the] alterations." *Ibid*.

Moreover, our reading of Section 12147(a) is consistent with the Department of Justice's interpretation of other, similarly-worded anti-discrimination provisions of the ADA and the Fair Housing Act that impose accessibility requirements for alterations and new construction. Title III of the ADA, for example, defines "discrimination" to include, under certain circumstances, "a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12183(a)(2).

In addition, Title III defines "discrimination" to include "a failure to design and construct [certain new] facilities * * * that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1). Similarly, the Fair Housing Act defines "discrimination" to include "a failure to design and construct [certain multi-family] dwellings in such a manner that * * * the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons." 42 U.S.C. 3604(f)(3)(C)(i). The Department of Justice has responsibility for enforcing each of these provisions in federal court. See 42 U.S.C. 3614 (Fair Housing Act), 12188(b) (Title III of ADA). The Department reasonably interprets these Title III and Fair Housing Act provisions to mean that the statute of limitations cannot begin to run, at the earliest, until the construction or alterations at issue have been completed.[6]

[6] The provisions of Title III and the Fair Housing Act that impose accessibility requirements for new construction and alterations do not include the "completion" language that is found in Section 12147(a). See 42 U.S.C. 12183(a)(1) (Title III requirements for new construction of public accommodations and commercial facilities); 42 U.S.C. 12183(a)(2) (Title III requirements for alterations); 42 U.S.C. 3604(f)(3)(B) (Fair Housing Act requirements for new construction). These provisions, however, contain "fail[ure]" language analogous to that found in Section 12147(a).

### *B. The District Court's Interpretation Could Have Negative, Unintended Consequences By Discouraging Informal Resolution Of Disputes And Unnecessarily Increasing Litigation*

The district court's ruling, if endorsed by this Court, could trigger an increase in unnecessary litigation by encouraging the premature filing of lawsuits and discouraging attempts to resolve disputes informally. Cf. *Franconia Assocs.* v. *United States*, 536 U.S. 129, 146-147 (2002) (rejecting argument that notice of intent to breach a contract in the future triggered the running of the statute of limitations; relying, in part, on concerns that acceptance of that argument "would surely proliferate litigation"). It is unclear, under the district court's theory, how definite a public entity's plans must be before the statute of limitations would begin running on a Section 12147(a) claim. See App. 44-53, 57-60. Faced with such uncertainty, potential litigants are likely to err on the side of caution by filing lawsuits when plans are merely tentative or where the proposed construction or alterations are scheduled far in the future.

Fearing that the clock may be ticking on their Section 12147(a) claims, potential plaintiffs may be unwilling to spend time trying to resolve disputes informally before filing suit. Such informal negotiations offer an important opportunity for potential plaintiffs to convince a builder to modify its plans to address accessibility problems. It is not unusual for builders to revise architectural designs during the construction process. See DIA Br. 21-22. The Department of Justice, which has enforced the ADA's architectural requirements for more than a decade, has discovered many instances in which builders made significant changes

to designs as the construction progressed. Because designs often are in flux even after construction begins, individuals with disabilities may be able to influence the ultimate design of an ongoing project without resorting to litigation. Once a lawsuit is filed, however, parties' positions are likely to harden, making compromise more difficult than it would have been if the parties had tried resolving the dispute informally without litigation. Consequently, if the district court's ruling is allowed to stand, many ADA disputes that otherwise would have been resolved informally without litigation may instead end up in federal court.

Such an outcome would undermine Congress's goal of encouraging resolution of ADA disputes through settlement negotiations and other informal means. See 42 U.S.C. 12212 ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter."). As Congressman Glickman emphasized in explaining why he offered the amendment that ultimately became Section 12212:

> There are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation.

136 Cong. Rec. H 2431 (daily ed. May 17, 1990); accord *id.* at H 2616 (daily ed. May 22, 1990) (statement of Rep. Glickman) ("While the language [of 42 U.S.C. 12212] is purely voluntary, it establishes an important principle that we ought to try to avoid litigation under this bill, if possible, and that encouraging dispute

resolution between the parties is a positive idea."). The district court's ruling, if upheld by this Court, could inhibit the very type of cooperative resolution of ADA disputes that Congress intended to encourage.

### *C. The District Court Improperly Used The "Discovery Rule" To Accelerate The Running Of The Statute Of Limitations On DIA's Claims*

The district court's erroneous ruling in this case is attributable in large part to its misapplication of the "discovery rule." "Typically in a federal question case, and in the absence of any contrary directive from Congress, courts employ the federal 'discovery rule' to determine when the federal claim accrues for limitations purposes." *Romero* v. *Allstate Corp.*, 404 F.3d 212, 222 (3d Cir. 2005). "Under the general formulation of the discovery rule, a claim will accrue when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Ibid.* Although the district court's opinion in this case did not use the term "discovery rule," the court plainly was invoking that equitable doctrine when it concluded that a claim under 42 U.S.C. 12147(a) accrues "on the date 'when the plaintiff knows or has reason to know of the injury that is the basis of the action.'" App. 50 (quoting *Smith* v. *City of Philadelphia*, 345 F. Supp. 2d 482, 485 (E.D. Pa. 2004)).

The district court fundamentally misunderstood the purpose of the discovery rule. As this Court has held, the discovery rule can only be used to *postpone – not to accelerate* – the running of the statute of limitations beyond the point when the violation occurs. *CGB Occupational Therapy, Inc.* v. *RHA Health Servs. Inc.*, 357

F.3d 375, 383 (3d Cir. 2004); see also *Oshiver* v. *Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) ("the discovery rule functions to *delay* the initial running of the statutory limitations period") (emphasis added); *id.* at 1386 (the discovery rule functions "to *postpone* the beginning of the statutory limitations period from the date when the alleged unlawful employment practice occurred") (emphasis added).

In *CGB*, this Court rejected the argument that a claim for tortious interference with contractual relations was time-barred. The defendant in that case had relied on the discovery rule to argue that the statute of limitations began to run as soon as the plaintiff received notice that a third party intended to terminate its contract with the plaintiff. *CGB*, 357 F.3d at 383-384. This Court disagreed, holding that plaintiff's cause of action did not accrue, and thus the statute of limitations did not begin to run, until the contract was actually terminated. *Id.* at 384. As this Court explained,

> [Defendant] attempts to take that unremarkable proposition – that the statute of limitations should be *postponed* where the victim is unaware of the injury – and reverse it, so as to mandate that the statute of limitations *accelerates* when the victim becomes aware that he will suffer injury in the future. That is logically fallacious. The "discovery rule" has nothing to do with this case.
>
> * * * * *
>
> The situation in this case is like one person telling another that, in three months, he intends to trespass. The tort of trespass has not occurred until the victim's property is entered by the tortfeasor. That the victim was informed in advance of the inevitable does not alter the accrual of his damages action for trespass.

*Id.* at 384-385 & n.9.

The Supreme Court's reasoning in *Franconia Assocs.* v. *United States,* 536 U.S. 129 (2002), supports this Court's rationale in *CGB.* In *Franconia*, the Supreme Court rejected the argument that petitioners' cause of action for breach of contract was time-barred. *Franconia* involved the federal government's "repudiation" of a contractual obligation – *i.e.*, a "renunciation of a 'contractual duty *before* the time fixed in the contract for . . . performance.'" *Id.* at 142-143. The Supreme Court held that the statute of limitations on petitioners' contractual claims did not begin to run when the government renounced its contractual obligation but only later when the breach of contract actually occurred. The Court held that, although petitioners could have sued immediately by treating the repudiation as a present breach of contract, they were not obligated to do so. Instead, they had the choice of waiting until the actual breach occurred before the clock started to tick on their cause of action. *Id.* at 143-148.

Other courts of appeals have used similar reasoning in other contexts in concluding that a statement of intent to violate a legal duty in the future does not trigger the running of the statute of limitations. See *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997) (dictum) ("If an employer tells his employee, 'I am going to infringe your rights under Title VII at least once every year you work for me,' this does not start the statute of limitations running on the future violations, violations that have not yet been committed."); *Ramey* v. *District 141*, 378 F.3d 269, 278-279 (2d Cir. 2004) (holding that the statute of

limitations for a claim alleging a violation of the duty of fair representation does not begin to run "when a union announces an intention, even if it does so unequivocally, to advocate against the interests of its members in the future"; instead, the breach of the duty occurs, and the limitations period begins to run, only "when the union acts against the interests of its members").

### *D. Under Appropriate Circumstances, A Plaintiff Can Seek Injunctive Relief To Prevent An Anticipated Violation Of Section 12147(a) Before The Alterations Are Completed; The Availability Of Such Relief Does Not Accelerate The Running Of The Statute Of Limitations*

The interpretation we advocate in this brief would not preclude a plaintiff from bringing an action for injunctive relief, under appropriate circumstances, to prevent an anticipated violation that has not yet occurred. "[A] suit for an injunction deals primarily, not with past violations, but with threatened future ones." *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928). Consequently, "an injunction may issue to prevent future wrong, *although no right has yet been violated*." *Ibid.* (emphasis added); accord *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations, * * * and, of course, it can be utilized even without a showing of past wrongs."). Therefore, a plaintiff who has not yet suffered discrimination under Section 12147(a) may nonetheless bring an action to enjoin an anticipated violation of the statute, so long as standing and ripeness requirements are met.

Allowing a plaintiff to bring an action for injunctive relief before a violation occurs does not accelerate the running of the statute of limitations. See *Ramey*,

378 F.3d at 279 & n.4 (even though a plaintiff may be able to seek injunctive relief to stop an anticipated breach of a legal duty, "the possibility of maintaining a preliminary injunction proceeding does not trigger the statute of limitations," which does not begin to run until the breach actually occurs); cf. *Franconia,* 536 U.S. at 142-148 (even though plaintiffs can sue immediately upon receiving notice of defendant's intent to breach a contract in the future, the statute of limitations does not begin to run until the breach actually occurs). Therefore, even though a plaintiff may seek injunctive relief under appropriate circumstances to prevent an impending violation of Section 12147(a), the statute of limitations does not begin to run, at the earliest, until the alterations at issue are completed.

## CONCLUSION

This Court should reverse the district court's ruling that DIA's claims under 42 U.S.C. 12147(a) are time-barred.

Respectfully submitted,

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**COMBINED CERTIFICATIONS**



I hereby certify as follows:

1. This brief complies with the type-volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 12 and contains 4,875 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

2. The text of the electronic version of this brief, which has been emailed to the Court, is identical to the text of the hard copies of the brief that have been sent to the Clerk's Office. The electronic copy has been scanned with the most recent version of Trend Micro Office Scan (version 7.0) and is virus-free.

3. On March 28, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL were served by Federal Express, overnight delivery, on:

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## COMBINED CERTIFICATIONS



4. On the same date, copies of the United States' brief were sent by Federal Express, overnight delivery, to the Clerk of the United States Court of Appeals for the Third Circuit.

/s/ Gregory B. Friel
GREGORY B. FRIEL
Attorney

March 28, 2007