UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NATIONAL FAIR HOUING ALLIANCE, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 3:14-CV-716
v.	)	
HUNT INVESTMENTS, LLC, *et al.*,	)	
Defendants.	)	

UNITED STATES OF AMERICA'S STATEMENT OF INTEREST

I. INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address the standard for determining the ripeness of a claim that a multifamily housing complex does not provide the accessibility features required by the Fair Housing Act ("FHA" or the "Act"). 42 U.S.C. § 3601 *et seq*. The United States Department of Justice and the United States Department of Housing and Urban Development (HUD) share enforcement authority under the FHA. *See* 42 U.S.C. §§ 3610, 3612(a)-(b), (o), and 3613(e). The United States thus has a strong interest in ensuring the correct interpretation and application of the provisions at issue in this case.

For the reasons explained below, the Plaintiffs' FHA claim is ripe, and therefore this Court should reconsider its dismissal of that claim.

II. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on October 21, 2014, and a First Amended Complaint on November 26, 2014 (ECF Nos. 1, 25). Defendants moved to dismiss the First Amended

Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). They argued, among other things, that Plaintiffs' claims were not ripe and, thus, must be dismissed for lack of subject matter jurisdiction. ECF Nos. 30, 32, 34. Following briefing and oral argument, the Court granted the motions to dismiss for lack of subject matter jurisdiction (ECF No. 61). In its decision (ECF No. 60), this Court relied extensively on its interpretation of *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc). Op. at 8-10. Plaintiffs thereafter filed a Motion to Reconsider or, in the Alternative, Motion for Leave to Amend Complaint (ECF No. 63). Defendants have filed memoranda in opposition (ECF No. 68, 69, 70).

III. LEGAL AND FACTUAL BACKGROUND

A. Relevant Legal Provisions

Section 804(f)(1)-(2) of the FHA makes it unlawful to discriminate in the sale or rental of dwellings, or in the terms, conditions or privileges in connection with such sale or rental, on the basis of disability. 42 U.S.C. § 3604(f)(1)-(2). Section 804(f)(3)(C) defines such unlawful discrimination to include the failure to design and construct "covered multifamily dwellings" without specified accessibility features. *See* 42 U.S.C. § 3604(f)(3)(C)(i)-(iii) (the "design and construct" provisions). "Covered multifamily dwellings" include "dwelling units" that are located in buildings with four or more units. *See* 42 U.S.C. § 3604(f)(7); 24 C.F.R. § 100.201 ("covered multifamily dwellings means buildings consisting of 4 or more dwelling units…"). In such a building without elevators, only the "ground floor units" are "covered multifamily dwellings" that must meet the accessibility requirements. 42 U.S.C. § 3604(f)(7)(b). In such a building that has an elevator, *all* units in that building are "covered multifamily dwellings" and must contain the specified accessibility features. 42 U.S.C. § 3604(f)(7)(a). The regulations define "dwelling unit" as "a single unit of residence for a family or one or more persons….

[including] an *apartment unit within an apartment building*." S*ee* 24 C.F.R. § 100.201 (emphasis added). Under the plain language of the FHA and its implementing regulations, then, it is unlawful to design and construct even a single apartment unit in violation of the Act's accessibility requirements, if that apartment unit falls within the definition of a covered multifamily dwelling.

Section 813 of the FHA creates a private right of action by which an "aggrieved person" may file suit to redress a "discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). Aggrieved persons include any persons who allege that they were "injured by a discriminatory housing practice" or "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i)(1)-(2). The FHA authorizes a court to award relief "if the court finds that a discriminatory housing practice has occurred or is about to occur." 42 U.S.C. § 3613(c)(1). Such relief may include "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." *Id*. The FHA defines a "discriminatory housing practice" to include "[any] act that is unlawful under section 804," including violations of the "design and construct" provisions set forth above. 42 U.S.C. § 3602(f); *see also Kuchmas v. Towson Univ.*, 2007 WL 2694186, at *5 (D. Md. Sept. 22, 2008) ("Section 3604(f)(3)(C) of the FHA expressly applies to one form of discrimination—the 'failure to design and construct' housing such that handicapped individuals have access"); *United States v. Quality Built Constr.*, 309 F. Supp. 2d 756, 759-60 (section 3604(f)(3)(C) defines a form of discrimination under the FHA). A private action must be filed "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).

B. Factual Background

Plaintiffs filed the Amended Complaint in this action on November 26, 2014, and the facts contained therein are assumed to be true for purposes of Defendants' motions to dismiss. The Shockoe Valley View Apartments ("Shockoe Valley") is a multifamily apartment building with an elevator located at 1900, 1902 and 1904 Cedar Street in Richmond, Virginia.[1] Am. Compl. ¶ 2; http://www.shockoevalleyapartments.com. Defendants began developing the complex in 2012. Am. Compl. at ¶ 2. Defendants have obtained building permits from the City of Richmond pursuant to approved design plans and are in the process of completing construction. *Id*. at ¶¶ 2, 20-22. Defendants completed some units and began renting them out beginning no later than June 2014. *Id*. at ¶ 20. A substantial part of Shockoe Valley has been completed and a number of apartments either have been rented out or are being offered for rent. *Id*. at ¶¶ 20-21; http://www.shockoevalleyapartments.com/floorplans.aspx.

As designed and constructed, Shockoe Valley does not comply with the FHA's accessibility requirements. Am. Compl. ¶¶ 2-3, 20-28. The accessibility barriers in Shockoe Valley include steps precluding access to some ground floor apartments (including the model unit), doors within the units that are too narrow for people using wheelchairs, and kitchens and bathrooms that do not have sufficient clear floor space to be usable by persons who use wheelchairs. *Id*. at ¶¶ 21, 24, 26-28. The accessibility barriers described above are present in dwelling units that have been completed and are being offered for rent. *See id*. ¶¶ 20-22. These accessibility barriers are also present in the approved design plans which Defendants submitted to obtain building permits and which they are using to complete construction. *See id*.

[1] Defendants are also planning to construct an additional apartment building located at 1901, 1903, and 1905 Cedar Street, Richmond, Virginia. See First. Am. Compl. ¶ 2. Plaintiffs' claims, however, only concern the Shockoe Valley building located at 1900, 1902, and 1904 Cedar Street. See *id*. at ¶¶ 36-38.

Plaintiffs are organizations that seek to "eliminate housing discrimination," "ensure equal access to housing," and "promote accessible housing." *Id.* at ¶¶ 10, 11. As a result of Defendants' design and construction of Shockoe Valley, which discourages persons with disabilities from residing at Shockoe Valley, Plaintiffs have been frustrated in their missions to "eradicate discrimination in housing" and have had to "divert significant and scarce resources to identify, investigate, and counteract the Defendants' discriminatory practices." *Id.* ¶¶ 30-32.

IV. ARGUMENT

The United States agrees that Plaintiffs have set forth sufficient grounds for this Court to exercise its discretion under Fed. R. Civ. P. 59(e) to reconsider its Order. In the Eastern District of Virginia, there are four general grounds that may justify reconsideration:

> The courts of this District agree that a motion for reconsideration generally should be limited to those instances in which: the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . [or] a controlling or significant change in the law or facts since the submission of the issue to the Court [has occurred].

Shanklin v. Seals, No. 3:07cv319, 2010 WL 1781016, at *2-3 (E.D. Va. May 3, 2010) (internal citations and quotations omitted); *see also United States v. Smithfield Foods*, 969 F. Supp 975, 977 (E.D. Va. 1997) (same). While the parties disagree as to whether there was sufficient opportunity for the Court to fully consider the applicability of *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc), the United States respectfully submits that Plaintiffs' Motion to Reconsider should be granted at minimum because the Court has misapprehended the law.

Under a correct understanding of the FHA's "design and construct" provisions, Plaintiffs should be permitted to proceed with their First Amended Complaint, which sets forth claims that are ripe for judicial review because it alleges that discriminatory housing practices have occurred

and are about to occur. In the alternative, the Court should grant Plaintiffs leave to file their proposed Second Amended Complaint, as that proposed complaint also adequately alleges that discriminatory housing practices have occurred and are about to occur in connection with the design and construction at of Shockoe Valley. See Fed. R. Civ. P. 15(a)(2) (leave to amend should be granted "when justice so requires").

A. Plaintiffs' Claims Are Ripe Because There Is a Concrete Dispute As To Whether Defendants' Apartment Building Violates the Fair Housing Act

Ripeness, like standing, derives from the Constitution's Article III "case or controversy" requirement. The doctrines of standing and ripeness often "boil down to the same questions." *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) (citations omitted); *accord Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("[t]he standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention."). A claim is ripe when the challenged action is "felt in a concrete way by the challenging parties." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (internal citation omitted). The "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). There must be a "concrete dispute" between the parties, not merely the possibility for such a dispute in the future. *See National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807 (2003); *Donnangelo v. Myers*, 187 F.3d 639, 1999 WL 565834, *4 (4th Cir. Aug. 2, 1999) (unpublished disposition). *See also Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (Article III requires "that concrete adverseness which sharpens the presentation of issues") (citation and quotation omitted).

The Fourth Circuit has ruled that ripeness requires "balanc[ing] the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration[,]"

Ostergren v. Cuccinelli, 615 F.3d 263, 288 (4th Cir. 2010) (citations omitted). To the extent those two factors pose prudential questions that go beyond simply assessing whether an Article III case or controversy is present, using such factors as the basis for dismissal would be "in some tension with … the principle that a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging'." *Driehaus*, 134 S. Ct. at 2347 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). In any event, the "fitness" and "hardship" factors are easily satisfied here. *See id.*

1. Plaintiff's Claims Are Fit For Judicial Resolution Because Multiple Apartments Dwellings Have Been Constructed Without the Accessibility Features Required by the FHA

A case is fit for judicial decision when the action in controversy is final and the resolution of legal issues is not dependent on future factual uncertainties. *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007); *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992). In holding that it had no jurisdiction to consider Plaintiffs' claims, this Court accepted Defendants' argument that Plaintiffs' claims would not be ripe until every single contemplated dwelling in Shockoe Valley was complete. *See* Op. at 9 (claims not ripe because Shockoe Valley is still "under construction"). That view, however, cannot be reconciled with the plain language of the FHA.

The FHA provides that a court may award relief when "a discriminatory housing practice has occurred or is about to occur." *See* 42 U.S.C. § 3613(c)(1). The FHA defines a "discriminatory practice" to include, among other things, the design and construction of "covered multifamily dwellings." See 42 U.S.C. § 3602(f) (a discriminatory housing practice includes any practice made unlawful by 42 U.S.C. § 3604); 42 U.S.C. § 3604(f)(3)(C)(i)-(iii) (proscribing the

design and construction of covered multifamily dwellings without specified accessibility features). "Covered multifamily dwellings" include "dwelling units" in buildings with four or more units. See 42 U.S.C. § 3604(f)(7); 24 C.F.R. § 100.201. In buildings, like Shockoe Valley, that have an elevator, all the apartment dwellings in that building are "covered multifamily dwellings." *See id*. HUD's implementing regulations define a "dwelling unit" to mean "a single unit of residence for a family of or more persons." *See 24* C.F.R. § 100.201. "Examples of dwelling units include * * * an apartment unit within an apartment building." *See id*.

Once this statutory language is considered, the concrete nature of the dispute in this case is apparent. Plaintiffs allege that multiple apartment units in Shockoe Valley have been designed and constructed without the FHA's required accessibility features and that such units have been or are in the process of being rented out to the general public. *See* Am. Compl. ¶¶ 2-3, 20-28. Plaintiffs thus allege that a discriminatory housing practice – the design and construction of inaccessible dwelling units – has occurred.

The fact that the entire building that comprises Shockoe Valley has not been completed is immaterial. The statute defines a "dwelling" to include "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families * * *." *See* 42 U.S.C. § 3602(b). And the regulations make clear that the "covered multifamily dwellings" that must contain the required accessibility features include "an apartment unit within an apartment building". *See* 24 C.F.R. § 100.201. In this case, though, plaintiffs allege that a substantial number of inaccessible units have been completed and are being offered for rent, and that some units have already been occupied. *See* Am. Compl. ¶¶ 2-3, 20-28. These allegations are sufficient to show a "discriminatory housing practice" for which the court may grant relief has occurred within the meaning of the FHA.

A holding that a plaintiff's claim is not ripe until construction is complete frustrates the purpose of the FHA's "design and construct" provisions, to ensure that accessible housing is available to persons with physical disabilities. As the House Judiciary Committee noted in explaining the FHA's accessibility requirements "[p]ersons with mobility impairments need to be able to get into and around a dwelling units (or else they are in effect excluded because of their [disability]." H.R. Rep. No. 711, 100th Cong., 2d Sess. At 18 (1988) reprinted in 1988 United States Code Congressional and Administrative News (U.S.C.C.A.N.) at 2173, 2186. "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying "No Handicapped People Allowed." *Id*. at 25, 1988 U.S.C.C.A.N at 2188. Under the interpretation adopted by this Court, however, a person using a wheelchair who is unable to rent a finished apartment because he or she could not physically get to the apartment would have no ability to seek judicial redress until the entire complex was completed. Yet such a person has suffered an immediate, concrete injury -- namely, the denial of housing because of his or her disability -- that the FHA is intended to prevent. There is no reason to think that Congress intended to delay a person with a disability access to the courts in that situation.

2. In addition, Plaintiffs' claims are Fit For Judicial Resolution Because Plaintiffs Have Alleged that Discriminatory Housing Practices are About to Occur

Plaintiffs also allege that additional discriminatory housing practices are "about to occur" within the meaning of 42 U.S.C. § 3602(i)(2). Specifically, they allege that the remaining apartments in Shockoe Valley are being designed and constructed according to the same flawed design plans that led to the construction of the inaccessible dwellings that have been completed.

See Am. Compl. at ¶¶ 2, 20-22. Plaintiffs further allege that the City has issued building permits based on these design plans. *Id*.

Defendants suggest that until construction is complete, it is speculative whether any violations will occur. Op. at 4. This argument, essentially a claim that judicial relief is never possible until construction is complete, lacks merit. With respect to the units that are still under construction, Plaintiffs allege that those units are being constructed according to the same approved inaccessible design plans that were used for the completed units. *See* First Am. Compl. at ¶¶ 2, 20-22. Further the nature of the alleged barriers – stairs to unit entrances, doorways that are too narrow to accommodate wheelchairs, and kitchens and bathrooms that are configured without adequate clear floor space for a person using a wheelchair – are such that they are unlikely to change in the construction process absent a redesign of the complex, the submission of new design plans for approval, and the approval of those revised designs by the building department. *See* First Am. Compl. at ¶¶ 2, 20-22. Defendants do not suggest that they have begun any such changes or that they have halted construction until a redesign addressing the challenged barriers is completed. Thus, there is a concrete legal dispute between the parties. Plaintiffs allege that absent judicial intervention, the remaining units in Shockoe Valley will be completed with the same accessibility barriers that are present in the completed units.[2] *See id*. We recognize of course that in some cases a Defendant's design plans or the extent of their construction efforts may be too preliminary for a court to determine whether a discriminatory housing practice is about to occur. That is not the case, here, however, as the design plans are

[2] A violation has already occurred with respect to a number of inaccessible units that have been completed and have either been rented out or are being presently offered for rental. *See supra* at 7-8. Even if Defendants intended to construct the remainder of the Shockoe Valley apartments in compliance with the Act's accessibility requirements, it would not change the existence of a legal controversy with respect to the constructed units.

completed, permits have been issued, and the construction of barriers like stairs, too narrow doorways, and kitchens and bathrooms without sufficient maneuvering space is well underway. See First Am. Compl. at ¶¶ 2, 20-22. The legal issues before this Court, therefore, are not dependent on future uncertainties and are ripe for review.

This Court's decision appears to be the first time that any court has held that a design and construction claim is not justiciable until such time that the defendant has completed all of the inaccessible units that he or she plans to build. Such a ruling cannot be reconciled with either the language of the FHA or the applicable case law.

In private actions such as this one, the FHA allows the court to "grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." *See* 42 U.S.C. § 3613(c)(1). Such relief is also available in government enforcement actions. *See* 42 U.S.C. §§ 3612(k)(1)(a), 3612(o)(3), 3614(d)(1)(A); *see also* 42 U.S.C. § 3610(e) (allowing HUD Secretary to authorize Department of Justice to file "a civil action for appropriate temporary or preliminary relief pending final disposition of [an administrative] complaint"). Such authorization for preliminary or temporary relief would have little meaning in a design and construction claim if an action could not be brought until all inaccessible construction in the relevant development was complete.

Indeed, courts have required defendants to take steps to bring properties that are still under construction into compliance before completing construction or consummating a sale or rental. In *United States v. Edward Rose & Sons*, for example, the Sixth Circuit affirmed the granting of a preliminary injunction with respect to 19 different buildings that all had a similar

design in which the front entrances to the ground floor dwellings would have steps. *Edward Rose*, 384 F.3d 258, 260-61 (6th Cir. 2004). The 19 buildings were "at various stages of construction." *Id.* Little if any construction had occurred at 11 of the buildings. *See* Br. for Plaintiff-Appellee, at 6, available at http://www.justice.gov/crt/about/app/briefs/rose.pdf. At five of the buildings, construction was more advanced but occupancy permits had still not been issued. *See id.* And construction was complete and certificates of occupancy had been issued for the three remaining buildings. *See id.*

Even though construction was not complete, the Sixth Circuit affirmed a preliminary injunction halting further construction and occupancy of the ground floor dwellings at all 19 buildings. *Edward Rose*, 384 F.3d at 265. Considering the four factor test for granting a preliminary injunction, the court concluded that "the strong likelihood of success on the merits coupled with the public's interest in eradicating housing discrimination" supported the entry of a preliminary injunction as to all 19 buildings. *See id.* Although the court did not explicitly consider ripeness, it necessarily concluded that the United States was likely to show that defendants had or were about to violate the FHA and that there was a strong public interest in avoiding such discrimination. *See id*. The Sixth Circuit's conclusion in *Edward Rose* that a preliminary injunction was appropriate simply cannot be reconciled with Defendants' argument in this case that no actionable harm occurs until every unit in the entire complex is complete.

Other decisions have also granted relief with respect to dwellings where construction and occupancy is not yet complete. *See United States v. Richard & Milton Grant Co.*, No. 2:01-cv-2069, at 3 (W.D. Tenn. Apr. 27, 2004) (granting partial summary judgment in favor of plaintiffs where design and construction violations were alleged as to two apartment complexes, one of which was still under construction); *HUD v. Perland Corp.*, HUD ALJ 05-96-1517-8, 1998 WL

142159, at *4, 17 (prohibiting sale of remaining dwellings, including those not yet constructed, until retrofits were complete). And in other contexts, courts have frequently found civil rights claims to be ripe even though the illegal act has not yet been completed. *See, e.g., Jackson v. Okaloosa County*, 21 F.3d 1531, 1541 (11th Cir. 1994) (claim that policy concerning public housing project violated FHA was ripe, even though there was no attempt to comply with policy and policy had not yet been applied); *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1176-77 (S.D. Fla. 1997) (finding claims ripe where preliminary plans showed that design of hockey arena would violate the Americans with Disabilities Act); *Mitchell v. United States Dep't of Hous. & Urban Dev.*, 569 F. Supp. 701, 704-05 (N.D. Cal. 1983) (likelihood of eviction coupled with slight prospect of finding alternative, affordable housing held to constitute threat of irreparable harm to enjoin eviction).

The Third Circuit's decision in *Disabled In Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority*, 539 F.3d 199, 215 (3rd Cir. 2008), a case brought under the Americans with Disabilities Act (ADA), also recognizes the availability of preliminary relief in cases regarding alleged inaccessible construction, even where the construction has not yet begun. In *Disabled In Action*, the plaintiff organization challenged the Defendants' action in renovating two Philadelphia subway stations by replacing the stairs and escalators without installing elevators. *Id*. at 202-206. Although the plaintiff filed suit eight months after the completion of one of the stations, there was evidence that the plaintiff had been aware of the defendant's plans for some time and had unsuccessfully attempted to persuade the defendant to change its plans during the design phase. See *id*. The district court dismissed plaintiffs' action as untimely, holding that it had failed to bring suit within two years of when it knew or had reason to know that the defendant's renovation would not include elevators. See *id*. at 207.

Reversing, the Third Circuit held that the statute of limitations had not begun to run until the alterations were complete. *See id*. at 210-211. It also made clear, however, that either SEPTA or DIA could have sought relief before construction had even begun.

> [O]ur interpretation of § 12147(a) does not prevent a public entity like SEPTA from obtaining preliminary declaratory relief to ensure ADA compliance prior to commencing alterations. * * * *
>
> Conversely, our interpretation of § 12147(a) does not prevent an entity like DIA from seeking an injunction prior to the commencement of construction to prevent threatened ADA violations. * * * *

Id. at 215.

3. Withholding Adjudication Would Impose Hardship on Persons with Disabilities, But Adjudicating the Case Now Would Not Unduly Burden the Defendants

Plaintiffs have alleged that inaccessible dwellings with stairs leading to the unit entrance have been constructed and rented out, thus denying persons with disabilities who need an accessible unit an opportunity to consider renting those units. *See supra* at 4-5. Thus, Plaintiffs allege that Defendants' conduct has already denied housing to persons with disabilities and imposed a hardship to such persons. The impending completion of more inaccessible units at Shockoe Valley poses a further hardship to persons with disabilities by preventing even more persons with disabilities from residing at Shockoe Valley. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief….If the injury is certainly impending, that is enough"). Accordingly, absent the adjudication of Plaintiffs' claims now, persons with disabilities will suffer a hardship cognizable under the FHA.

Defendants, by contrast, face no more of a burden to defend the legality of the constructed units and the proposed designs for the remainder of the units whether now, when a

substantial number of the units have already been constructed and offered for rent, or at a later date, when all of the units are ready for occupancy. Any prospective remedial action Defendants may take on their own to comply with the FHA does not change the existing burden to defend, at minimum, the legality of units that have already been constructed. Indeed, the delay in adjudication only increases the likelihood that any violations of the FHA will not be timely remedied and that the costs of future remediation will increase for Defendants. Providing accessibility is easier and less expensive at the design phase than after construction is complete. "Unlike some other forms of discrimination, the built environment itself creates a barrier to equal access for persons with mobility impairments, which may be difficult or costly to fix down the road." *United States v. Shanrie Co., Inc.*, 2007 WL 980418 at * 5 (S.D. Ill. March 30, 2007. For that reason, it is often advantageous to all parties to resolve issues regarding accessible construction at an early stage. *See* DIA, 539___ F.3d at 215 ("There is little doubt that it would have been better for all if DIA or SEPTA had sought declaratory or injunctive relief before construction began."). Accordingly, withholding adjudication would impose a hardship to people with disabilities seeking to live in Shockoe Valley without any meaningful reduction of burden on Defendants. Plaintiffs' claims are, therefore, ripe for judicial review.

B. *Garcia v. Brockway* Does Not Call Into Question the Ripeness of Plaintiffs' Action

In ruling that Plaintiffs' claim is not ripe, the Court relied on the rationale in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc), a case deciding when it is too late to bring a design or construct claim, not when it is too early to do so. Op. at 8-10. In *Garcia*, construction of the relevant complexes in the two consolidated appeals was completed in or around 1994 and 1997, respectively. *Garcia* 526 F.3d at 459-460. Plaintiffs filed actions more than two years later, and argued that their claims were not time barred because the violation should be viewed as

continuing until such time as the complexes were brought into compliance with the FHA. *See id.* at 461. The *Garcia* court rejected that argument and held that the alleged practice of failing to design and construct multifamily housing with required accessibility features was terminated once the last certificate of occupancy for the complex was issued. *See id.* at 466 ("an aggrieved person must bring a private civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued").[3]

Garcia must be read in context of the FHA's statutory language. The FHA specifically contemplates that the statute of limitations can be triggered by the occurrence *or* termination of a discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A) (A private action must be filed "not later than 2 years after the *occurrence or the termination* of an alleged discriminatory housing practice") (emphasis added); *accord* H.R. Rep. 100-711, at 33 (1988), *reprinted* in 1988 U.S.C.C.A.N. 2173, 2194 (the term "terminated" is "intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last

[3] *Garcia*'s conclusion on this point is not universally shared. *See, e.g., id.* at 467 (Pregerson and Reinhardt, JJ., dissenting); *Garcia v. Brockway*, 503 F.3d 1092, 1101-11 (9th Cir. 2007) (Fisher, J., dissenting); *Fair Hous. Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 F. App'x 469, 480 (6th Cir. 2006) (with respect to the design and construction of an inaccessible condominium complex, the practice does not terminate until the last unit in the development is sold); *Eastern Paralyzed Veterans Assoc., Inc. v. Lazarus-Burman Assocs.*, 133 F.Supp.2d 203, 212-13 (E.D.N.Y. 2001) (failure to design and construct housing with required accessibility features does not terminate until property is made accessible); *Mont. Fair Hous. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (1999) (same); *see also* DOJ-HUD, Joint Statement, Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the Fair Housing Act, at 28-29 (Apr. 30, 2013), *available at* http://www.justice.gov/crt/about/hce/documents/jointstatement_accessibility_4-30-13.pdf; 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, 849-55 (2006) (failure to design and construct housing with required accessibility features does not terminate until person with disabilities encounters the inaccessible conditions). For purposes of this brief only, the United States takes no position on whether *Garcia* was decided correctly. Even assuming *Garcia* was correctly decided, it did not require dismissal of Plaintiffs' action here.

asserted occurrence of the unlawful practice"); *Garcia*, 526 F.ed at 462 ("Congress has since codified this continuing violation doctrine by amending the FHA to include both 'the occurrence [and] the *termination* of an alleged discriminatory housing practice' as events triggering the two-year statute of limitations") (emphasis in original); *see also Espinal-Andrades v. Holder*, 777 F.3d 163, 168 (4th Cir. 2015) ("[i]t is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (citations omitted). A discriminatory housing practice can refer both to a discrete act, as well as a series of discrete but related acts that are part of one larger practice. A discriminatory housing practice in violation of the Act's "design and construct" provisions "occurs" whenever a single covered dwelling unit in a multifamily development is designed and constructed without meeting the Act's accessibility requirements. The FHA's accessibility requirements apply to "covered multifamily dwellings," which, in the case of a building with an elevator, encompasses all apartment units within the building. 42 U.S.C. § 3604(f)(7)(a); 24 C.F.R. § 100.201. But where that practice is part of a series of other similar actions, such as the design and construction of the rest of the inaccessible units in that development, the practice does not "terminate" until the last occurrence of the series of related discriminatory actions. As noted in *Moseke v. Miller & Smith, Inc.*, 202 F. Supp.2d 492 (E.D. Va. 2002), an earlier design and construction case that adopted the statute of limitations theory ultimately endorsed by *Garcia*, the statute of limitations can be triggered by "either a discrete discriminatory event ('the occurrence…of a discriminatory housing practice') *or* [by] the last discriminatory event in a series of discriminatory events ('the termination of a discriminatory housing practice')." *Id*. at 502 (emphasis in original).

Garcia, therefore, addressed not when a discriminatory housing practice first occurs, but

only when a practice "terminates," and it concluded that starting the clock on the statute of limitation any later than the date the last certificate of occupancy for the development is issued would be to allow the continuing *effects* of a past violation to toll the statute of limitation. *Garcia*, 526 F.3d at 462 ("Plaintiffs and HUD confuse a continuing violation with the continuing effects of a past violation. 'Termination' refers to 'the termination of an alleged discriminatory housing practice.'"); *see also Nat'l Fair Hous. Alliance, Inc. v. HHHunt Corp.*, 919 F. Supp. 2d 712, 716 n.3 (W.D. Va. 2013) (*Garcia* rejected only continuing effects theory). It is of note that in *Garcia*, the Ninth Circuit cited favorably to its decision in *Smith v. Pac. Props. Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 1994), which held that a tester could bring suit based on the harm incurred by merely observing an inaccessible feature in a dwelling. *See Garcia*, 526 F.3d at 463, 465 ("the harm of the violation occurs when a design-and-construction defect is observed") (citing *Smith*). The *Garcia* court clarified that the tester must encounter the feature within the limitations period, *i.e.* no more than two years after the completion of construction of the relevant development. *See id.* at 465. *Smith* never suggested, however, that the tester would also have to encounter those barriers after every dwelling in a development was completed in order for the claim to be ripe. Accordingly, *Garcia* plainly contemplates that a plaintiff can be injured by design and construction violations prior to the termination of the construction of a development.

In relying on *Garcia*, this Court failed to take into account the fact that the question as to when the statute of limitations begins to run on a discrimination claim is distinct from the question of when a lawsuit can be filed to prevent that discrimination. In *Disabled in Action*, for example, the Third Circuit concluded in a case construing the ADA that "the discriminatory acts defined by § 12147(a) occur, and the statute of limitations begins to run, 'upon the completion of

... alterations' to public transportation facilities." *See Disabled in Action*, 539 F.3d at 213. The Third Circuit made clear though that, notwithstanding that holding, a claim for declaratory or injunctive relief would be ripe even before that discrimination had occurred. *Id.*, at 215. The court noted that "[d]eclaratory relief is available to settle actual controversies *before* they ripen into violations of a law or a breach of duty." *Id*. (emphasis in original) (citation and quotation omitted). Similarly, the court noted that an action for injunctive relief could be brought "prior to the commencement of construction to prevent threatened ADA violations". *Id*. Here, completed discriminatory acts occurred, at the latest, when construction was completed on the first dwelling units at Shockoe Valley. In addition, claims for injunctive and declaratory relief with respect to units that are under construction but not yet complete are also ripe.

The Court's misapprehension of *Garcia* is compounded by its erroneous reliance on *Frank v. Ross*, 313 F.3d 184 (4th Cir. 2002), for the proposition that a claim cannot be ripe if the statute of limitations has not begun to run. *See* Op. at 8. *Frank* stands only for the proposition that a statute of limitation cannot begin to run *unless* a claim is ripe. *Id.* at 194 ("put simply, the applicable statute of limitations could not have been triggered [as early as defendants contend] because the [p]laintiffs' claims would not then have been ripe for determination"). Indeed, *Frank* acknowledges that a cause of action accrues "when the plaintiff could first have successfully maintained a suit based on that cause of action." *Id.* *Frank* nowhere suggests that the earliest time that the statute of limitations could begin to run is also invariably the latest it could have begun to run. Accordingly, regardless of whether the statute of limitation has begun to run, because Plaintiffs have alleged that a discriminatory housing practice has occurred and is about to occur, they have stated a cause of action that is ripe for judicial review.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Plaintiffs' Motion for Reconsideration be granted.

Respectfully submitted,

LORETTA E. LYNCH
Attorney General

DANA J. BOENTE
United States Attorney
Eastern District of Virginia

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/
L. MARGARET HARKER
VSB No. 82188
Assistant U.S. Attorney
U.S. Attorney's Office
600 East Main Street
Suite 1800
Richmond, VA 23219
Tel: (804) 819-5400
Fax: (804) 819-7417
Margaret.Harker@usdoj.gov

s/ Ronald H. Lee
STEVEN H. ROSENBAUM
Chief
TIMOTHY J. MORAN
Deputy Chief
RONALD H. LEE
Trial Attorneys
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. – NWB
Washington, D.C. 20530
Tel: (202) 616-1892
Fax: (202) 514-1116
ronald.lee@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2015, I electronically filed the foregoing Statement of Interest in Support of Plaintiffs' Motion for Reconsideration with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Laura Gaztambide-Arandes
larandes@relmanlaw.com

Michael G. Allen
mallen@relmanlaw.com

Morgan Whitney Williams
mwilliams@nationalfairhousing.org

Stephen Dane
sdane@relmanlaw.com

Thomas Keary
tkeary@relmanlaw.com

Tim Schulte
schulte@scs-work.com

William Norman Watkins
wwatkins@sandsanderson.com

Sarah Warren Smith
swsmith@sandsanderson.com

John Lester Cooley , Jr.
jlcooley@cooleysublett.com

Mark Charles Nanavati
mnanavati@snllaw.com

/s/
L. Margaret Harker
VSB No. 82188
Office of the United States Attorney
600 East Main Street, Suite 1800

Richmond, Virginia, 23219-2430
(804) 819-5400 (phone)
(804) 819-7417 (fax)
Margaret.Harker@usdoj.gov