Supreme Court, U.S.
FILED

07 - 421 SEP 26 2007

OFFICE OF THE CLERK

No. 06-____

IN THE
SUPREME COURT OF THE UNITED STATES

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,

Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DUANE J. DESIDERIO*
THOMAS J. WARD
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8200
**Counsel of Record*

STUART E. ALEXANDER, III
WILLIAM J. WALSH
TILFORD, DOBBINS,
ALEXANDER, BUCKAWAY, &
BLACK, PLLC
401 West Main Street
1400 One Riverfront Plaza
Louisville, KY 40202
(502) 584-1000

September 26, 2007

QUESTIONS PRESENTED

Under the Fair Housing Act, the "failure to design and construct" certain multifamily dwellings is unlawful discrimination against persons with physical disabilities. 42 U.S.C. § 3604(f)(3)(C). Respondents, public interest organizations, filed a civil action alleging that Petitioners built housing that does not comply with the Act's design and construction obligation.

1. Whether the injury in fact requirement for Article III standing is satisfied merely because a plaintiff incurred investigation and other pre-litigation expenses in preparation of filing the lawsuit.

2. Whether a continuing violation theory: (a) delays triggering the two-year statute of limitations in the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), until the date that the last unit in a housing development is sold or rented, regardless of when the unit was designed or constructed; or (b) allows suit against all prior sales of housing units, even if only a single sale occurs within the limitations period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, the Village of Olde St. Andrews, Inc., and WKB Associates, Inc., are small businesses incorporated in the Commonwealth of Kentucky that are in the business of developing and building multifamily housing. The Village of Olde St. Andrews, Inc., is a subsidiary of WKB Associates, Inc. No public company owns more than ten percent of its stock.

Respondents are the Fair Housing Council, Inc., and the Center for Accessible Living, Inc., which are Kentucky non-profit corporations concerned with issues of housing discrimination and the development of housing that is accessible to the physically disabled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

OTHER

TABLE OF APPENDICES

TABLE OF APPENDICES
(continued)

PETITION FOR A WRIT OF CERTIORARI

The Village of Olde St. Andrews, Inc. and WKB Associates, Inc. ("Petitioners"), respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 7a) is available at 210 Fed. Appx. 469, 2006 WL 3724128 (6th Cir. Dec. 15, 2006). It was not selected for publication in the Federal Reporter, and Petitioner's motion requesting publication was denied. App. 4a. The district court's opinion is unpublished. App. 38a.

JURISDICTION

The court of appeals issued its decision on December 15, 2006, and denied the petition for rehearing en banc on May 14, 2007. App. 5a. Justice Stevens extended the time to file this petition to and including September 26, 2007. App. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III, § 2, limits federal judicial power to "Cases ... [and] Controversies." App. 1a.

Relevant provisions of the Fair Housing Act, 42 U.S.C. §§ 3604(f), 3613(a)(1)(A), are reproduced at App. 1a-2a.

STATEMENT OF THE CASE

The Fair Housing Act ("FHA") makes it unlawful to discriminate against physically disabled buyers and renters. In particular, section 804(f)(3)(C) provides that the "failure to design and construct" covered multifamily dwellings[1] is unlawful discrimination, if that housing does not satisfy explicit structural elements to allow for greater accessibility. 42 U.S.C. § 3604(f)(3)(C)(i)-(iii).

In this case, non-profit organizations seek to enforce the FHA's design and construction provisions. This petition seeks guidance as to whether the organizational plaintiffs satisfied Article III standing requirements, and whether certain of their claims are stale under the FHA's statute of limitations. Similar cases have generated conflicting opinions among the circuits, and here, the court of appeals resolved both issues in a manner that subverts and ignores this Court's precedent. Respectfully, the petition should be granted.

I. WKB's Condominium Projects, and Local Code Office Approvals.

Petitioner WKB Associates, Inc. ("WKB") is a residential development company based in Louisville, Kentucky. It has built three condominium projects in

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

Jefferson County, Kentucky—Greenhurst, The Village of Olde St. Andrews, and Deer Creek.

For each project, WKB purchased building plans from Epcon, Inc. (now Epmark, Inc.), which markets a pinwheel design for condominium developments. Each building consists of four dwellings connected by four garages. App. 172a-173a. To effectuate the designs for each project, WKB needed to obtain building approvals from the Jefferson County Code Enforcement Division ("Code Enforcement"). For example, regarding Greenhurst, the Epcon plans were initially submitted to Code Enforcement in 1993. WKB later retained an architect, Ken Brown, who reviewed and altered the Greenhurst plans and submitted the revisions to Code Enforcement in September 1994. The county then issued building permits, allowing WKB to construct 156 units at Greenhurst. Of these, only the last three remaining units were sold within two years before the date Respondents filed their amended complaint. See *infra* pp. 25-26; App. 28a.

Epcon's plans included "handicap accessibility notes" setting forth the FHA's accessibility requirements. These were attached to some of the plans filed with Code Enforcement. According to John Clark, an inspector employed with Code Enforcement since 1984, he "did not know that it was necessary" to incorporate these notes into WKB's projects; he thought that accessibility features were only required for projects "produced by the Department of Housing and Urban Development." App. 65a. Indeed, at least as of November 26, 2002 (the date Clark signed his affidavit), the County's

code enforcers "ha[d] not advised builders such as WKB" of the FHA's design and construction obligation. *Ibid.* Thus, Code Enforcement made no reference to the accessibility notes in its responses to any of WKB's plans.

II. The HUD Funding Programs, and Respondents' Receipt of HUD Funds.

HUD's Office of Fair Housing and Equal Opportunity ("OFHEO") administers the Fair Housing Initiative Program ("FHIP"), to support organizations working on fair housing issues. Under the FHIP Private *Enforcement* Initiative, HUD provides funds "to investigate violations and obtain enforcement of the rights granted under the Fair Housing Act" and similar state or local laws. 24 C.F.R. § 125.401(a). Grantees use Private Enforcement Initiative funds to hire and train "testers"[2] to investigate housing discrimination, and initiate litigation against non-compliant housing discovered through tester investigation. In addition, HUD's *Education* and Outreach Initiative provides funding for "programs designed to inform members of the public concerning their rights and obligations under the provisions of fair housing laws." 24 C.F.R. § 125.301(a).

---

[2] HUD's website describes testers as "minorities and whites with the same financial qualifications who evaluate whether housing providers treat equally-qualified people differently." Fair Housing Initiatives Program, http://www.hud.gov/offices/fheo/partners/FHIP/fhip.cfm (last visited Sept. 20, 2007).

Respondents, the Fair Housing Council, Inc., ("FHC") and the Center for Accessible Living ("CAL"), are Kentucky non-profit corporations concerned with housing discrimination issues. In 1997 and 1998, prior to bringing this lawsuit, HUD funded the FHC through two FHIP grants. The FHC's corporate representative acknowledged that "[f]or the most part" this litigation has been underwritten by HUD enforcement dollars. Deposition of Tony Baize ("Baize Depo."); App. 143a. Indeed, HUD funding comprised around 90% of the FHC's total budget. *Id.*; App. 133a.

The FHC received HUD monies to engage in both fair housing "enforcement" and "education." "Enforcement" activities included: litigating; conducting tests and investigations to find and document housing discrimination; and processing complaints. "Education" included creating and administering the www.fairhousing.com website; publishing a newsletter, the *National Fair Housing Advocate*; and making presentations at annual events. Plaintiffs' Responses to Defendants' First Interrogatories ("Interrogs.") ##4, 10; App.74a-75a, 80a-82a.

On December 1, 1997, HUD awarded a $349,997.00 enforcement grant to the FHC, $189,581.73 of which was applied to years 1997 and 1998. Interrog. #11; App. 83a-84a. This constituted 70% of FHC's total funding for these years (*id.*; App. 84a), and supported three of the FHC's five staff members. See Interrog. #14 (App. 85a-88a); Baize Depo. (App. 114a-116a). The FHC also received a FHIP education grant from HUD, accounting for 30% of the organization's funding during 1997 and 1998.

Interrog. # 12; App. 85a. The total education funding for this period was $81,797.17. Of this, $16,255.00 was the residual amount of a grant commencing September 28, 1995, for the purpose of establishing the FHC website. By September 15, 1998, the FHC had exhausted its education funding. Interrogs. ##12, 13; App. 84a-85a.[3]

Thus, between September 1998 and 2001, the FHC only had designated money remaining for enforcement purposes. Subsequently, in 2001 and 2002, after partnering with the CAL to obtain more federal dollars, the FHC was again funded by HUD through a $600,000.00 enforcement grant and a $96,000.00 education grant. Baize Depo.; App. 148a-150a.

III. The FHC's Use of "Testers" to Investigate WKB's Projects.

"Testing is performed on a systemic basis, as a component of a pattern or practice investigation ...." Interrog. #9; App. 79a. In 1997, as required by its HUD grant,[4] the FHC searched for FHA violations in the Louisville region. To locate non-compliant

[3] When HUD did not award a FHIP education grant to the FHC, it had to stop publishing the *National Fair Housing Advocate*. Publication stopped in November 1998. Baize Depo. (App. 134a); Interrog. #10 (App. 80a). Since then, the FHC has published only one other edition. Baize Depo.; App. 150a.

[4] The Budget Narrative Work Plan for the FHC's 1997 enforcement grant provides that the HUD disbursement earmarked $7,650 to hire testers for 255 tests. App. 23a, n.3.

properties, the FHC would "require[ ] a tester to go to a site, and, basically, eyeball the property to ... look for violations .... Essentially, we go for any new multi-family housing that we see going up." Baize Depo.; App. 110a. The CAL simply provided the testers, which the FHC then hired. *Id.*, App. 104a-105a.

The FHC initially targeted The Village of Olde St. Andrews because the steps in front of the homes there caught the testers' attention. *Id.*, App. 103a. The FHC would pay testers $25 each for training, and $25 per actual test. Interrog. #9; App. 79a. Testers performed site surveys at Olde St. Andrews between August 17, 1998 and September 1, 1998. Baize Depo. (App. 104a-105a); Interrog. #8 (App. 76a-78a). Prior to the investigation and this lawsuit, the FHC received no complaints from purchasers or potential purchasers of homes developed by WKB. Interrogs. ##5, 6; App. 75a-76a.

Based on its testing work, on October 6, 1998, the Respondents filed a complaint against WKB alleging FHA violations at The Village of Olde St. Andrews. Subsequently, Respondents hired an expert to conduct on-site investigations not only at Olde St. Andrews, but also at Greenhurst and Deer Creek. As a result, on February 12, 1999, Respondents amended their complaint to include allegations against Greenhurst and Deer Creek. App. 154a.

IV. The District Court's Decision.

WKB moved for summary judgment on standing grounds. The district court found that the FHC offered no proof to support its claim that it suffered

injury due to a diversion of organizational resources. App. 52a-53a. However, whether the FHC was injured by spending money on tester investigation was "a much closer question" for the district court. It analyzed the varying opinions among the circuit courts of appeals, as to whether litigation preparatory costs can provide the basis for standing. App. 46a-49a. It grudgingly relied on *Hooker v. Weathers*, 990 F.2d 913 (6th Cir. 1993), to find standing based on investigation expenses: "If it were not for the *Hooker* opinion, the [district] [c]ourt would almost certainly conclude that the pre-litigation investigation in this case is insufficient to establish standing under Article III." App. 55a.

WKB also moved for summary judgment on statute of limitations grounds regarding the claims against the Greenhurst development. The district court decided that the act which triggered the FHA's two-year statute of limitations, 42 U.S.C. § 3613(a)(1)(A) (App. 1a), "is the design and construction of covered multi family dwellings .... 'The proper emphasis here must remain on Defendant's act (*i.e.*, the design and construction of non-compliant buildings)' ...." App. 59a (citation omitted). But then, in the next breath, the district court switched focus to the act of *selling* units, and applied the "continuing violation doctrine" to conclude the limitations period begins to run "as to the *entire* development when the last unit is sold." App. 60a (emphasis supplied). In other words, *all* of Greenhurst's 156 units were subject to the FHA, even though only three dwellings were sold within the two-year limitations period.

V. The Court of Appeals' Decision.

The court of appeals also acknowledged that the "circuit courts differ ... on the extent to which they will consider injury related to litigation in reviewing standing." App. 16a. It explained it follows the "lenient approach," that "prelitigation investigation can form the basis for standing." App. 19a. Consequently, after stating it was not free to overrule *Hooker*, the court of appeals rejected WKB's argument that the FHC sustained no injury by investigating, hiring testers, and litigating to satisfy HUD's requirements as a recipient of federal grants. It decided that the FHC's receipt of HUD enforcement dollars "does not mean that the use of a portion of those funds to investigate WKB properties does not amount to a concrete injury." App. 23a.[5] The court of appeals further rationalized:

> In our world of scarce resources, every expenditure of money, time or other resources results in the loss of the benefit that would have resulted if the same time or money had been spent on something else. If the [FHC] had not expended time and money on testing at Olde St. Andrews, it could have used those monies for other testing.

App. 24a. With respect to the CAL, the court of appeals disagreed with the district court and found no

[5] The court of appeals did not find exactly how much money the FHC spent on testers to investigate WKB properties. It must have been in the range of $150—three testers hired at $50 each, at $25 for training and $25 for the actual test. See Interrog. #9; App. 79a.

standing because its injury was "limited to its time spent rounding up three testers." App. 27a.

In a concurring opinion Judge Ryan wrote that, but for *Hooker*, he would not have found the FHC had standing:

> It strikes me as obvious that a non-profit corporation created for the purpose, *inter alia,* of bringing lawsuits to enforce the FHA, has not suffered a "concrete and demonstrable *injury* to [its] activities," (emphasis added), simply by conducting one of its activities—finding suable defendants. But *Hooker* has held otherwise, and it is a binding precedent ....

App. 36a. Judge Cook concurred *only* in Judge Ryan's opinion. App. 37a.

Finally, the court of appeals found that Respondents' claims were timely regarding Greenhurst. It decided that if an owner has built several housing developments that do not comply with the FHA's design and construction requirements, "the continuing violation doctrine may toll the running of the limitations period until the last unit of all the implicated developments is sold." App. 33a. Thus, because three of the Greenhurst dwellings were sold within the limitations period, the court of appeals held that claims against *all* units were timely.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE INJURY IN FACT REQUIREMENT FOR ARTICLE III STANDING.

A. Article III Standing Principles.

Federal judicial power is restricted to deciding "Cases" and "Controversies." U.S. Const. art. III, § 2. "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (citations omitted). One of Article III's "core component[s]" is standing, "an essential and unchanging part of the case-or-controversy requirement ...." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). See also *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (standing "'enforces the Constitution's case-or-controversy requirement'") (citations omitted).

1. The "irreducible constitutional minimum."

The "irreducible constitutional minimum" for standing is well-established:

> First, the plaintiff must have suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized ...; and (b) "actual or imminent, not 'conjectural or

> hypothetical,'" .... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560 (1992) (citations omitted). The case at bench addresses the first element—injury in fact. More specifically, this petition seeks guidance on whether pre-litigation expenses incurred by an organization can satisfy the injury requirement for Article III standing.[6]

2. Organizational standing.

There are two recognized tests for organizational standing. First, an organization can show "representational standing" to litigate as a surrogate on its members' behalf. See *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The *Hunt* test is not at issue here. Rather, Respondent FHC seeks standing in its own right as a first-party litigant. As *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) explains, an organization can sue

---

[6] Aside from Article III prerequisites, the Court has imposed prudential standing limitations to "avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979). The Court has ruled that "the normal prudential rules do not apply [under the FHA]; as long as plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." *Id.* at 103, n. 9. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

"under the same inquiry as in the case of an individual: Has the plaintiff "'alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction'?" *Id.* at 378-379 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). See also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (plaintiffs "allege[d] no injury to themselves as organizations" and thus lacked first-party standing).

In *Havens,* a non-profit organization called "HOME" sued real estate brokers for FHA violations. HOME pressed its rights for damages caused by "racial steering," a practice that preserves segregated living patterns by encouraging tenants to live in apartment buildings predominantly occupied by persons of their own race. HOME did not itself (nor did any of its members) intend to lease an apartment. Nonetheless, the Court found that HOME sufficiently alleged Article III injury to survive a motion to dismiss. The complaint stated that the brokers' steering practices "frustrated" HOME's efforts to combat discrimination and assist in ensuring "equal access to housing through counseling and other referral services." *Havens,* 455 U.S. at 379. HOME also alleged it had to "devote significant resources to identify and counteract" the defendants' conduct. *Ibid.* The Court found these allegations were enough at the motion to dismiss stage:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there

> can be no question that the organization has suffered injury in fact. *Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests ....*

Id. at 379 (emphasis supplied). While HOME survived a motion to dismiss, the Court emphasized that, at trial, the organization needed to demonstrate "it has indeed suffered impairment in its role of facilitating open housing ...." *Id.* at n. 21.

B. The Court of Appeals Decided that a Plaintiff Sustains Article III Injury Simply by Spending Resources to Investigate and Prepare the Suit.

The court of appeals considered the "drain on resources" language from *Havens* quoted above, and acknowledged that the circuits have fallen into conflict "on the extent to which they consider injury related to litigation in reviewing standing." App 16a. Following its own precedent, the lower court decided "that costs related to pre-litigation investigation can form the basis for standing." App. 19a. It chiefly relied on *Hooker v. Weathers,* 990 F.2d 913 (6th Cir. 1993), as "[h]olding that the act of sending a tester to investigate ... claims of discrimination was sufficient to confer standing" upon an organization that "'devoted resources to investigating the defendants' practices.'" App. 20a (citing *Hooker,* 990 F.2d at 915). Applying *Hooker*, the court of appeals concluded "the resources that [Respondent FHC] directed toward

training and employing testers to investigate the Village of Olde St. Andrews constitutes a concrete injury." App. 26a.

The lower courts adopted a reluctant, almost apologetic, tone to justify their reliance on *Hooker*. The court of appeals rationalized that *Hooker* "remain[ed] controlling authority" unless overruled through en banc review or reversed by this Court. App. 21a (citation omitted). Two members of the three-judge panel regretted that *Hooker* controlled the outcome. Judge Ryan wrote a separate concurrence to emphasize that "[w]ere it not for *Hooker* ... I would hold that [FHC] does not have Article III standing to maintain this lawsuit." App. 36a. Judge Cook joined in the concurring opinion "only." App. 37a. The district court felt similar constraints: "If it were not for the *Hooker* opinion, the [c]ourt would almost certainly conclude that the pre-litigation investigation in this case is insufficient to establish standing under Article III." App. 55a.

There is no evidence in the record—not in any interrogatory response (App. 67a-100a) or deposition testimony (App. 101a-153a)—showing that FHC suffered some present, tangible injury separate and apart from its costs to investigate and file this specific suit.[7] Neither the appellate nor district courts found

[7] The standing issue in this case first presented itself at the summary judgment phase, not on a motion to dismiss as in *Havens*. App. 44a, 63a. Accordingly, mere allegations are not enough at this juncture, and Respondent FHC bears the burden to set forth by affidavit or other evidence specific facts to satisfy

any concrete proof of harm other than pre-litigation tester expenses. The only injury the court of appeals could muster was that FHC lost purported opportunities to combat some other unknown, unidentified instances of discrimination not attributable to Petitioners: "If [FHC] had not expended time and money on testing at Olde St. Andrews, it could have used those monies for other testing." App. 24a.

In short, the court of appeals believed that "an organization suffers a concrete injury sufficient to confer standing when it devotes resources to training and deploying testers to investigate" the very conduct that culminates in the lawsuit. App. 23a.

C. The Circuits Conflict on Whether Litigation Preparation Expenses Provide the Basis for Article III Standing.

There is manifest conflict in the Courts of Appeals on whether pre-litigation expenditures provide the injury basis for standing. The court below catalogued the variant approaches taken by its sister circuits (App. 16a-19a), and selected the broadest of the extant interpretations of *Havens*'s "diversion of organizational resources" language. See also Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act,* 34 Akron L. Rev. 613, 626-630 (2001) (analyzing the circuits' "[l]iberal," "[s]trict," and "[m]iddle ground" interpretations of *Havens*). If

---

Article III standing prerequisites. *Lujan,* 504 U.S. at 561 (citations and quotation marks omitted).

the Court further postpones review, the random circumstance of the circuit where suit is filed will determine which plaintiffs do, or do not, obtain federal court review. Forum shopping would be encouraged. Respectfully, this Court must provide a uniform answer to the significant Article III question presented herein.

1. Liberal Approach: Litigation expenditures, without more, comprise Article III injury.

In deciding that pre-litigation investigation expenses incurred by Respondent FHC met the standing injury requirement, the court of appeals aligned itself with the Second and Eighth Circuits. In *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993), a fair housing organization was among the plaintiffs that filed suit under FHA § 804(c), 42 U.S.C. § 3604(c), challenging discriminatory housing advertisements that only depicted white models; persons of color were not portrayed in certain ads extolling upscale Manhattan apartments. Relying on *Havens,* the court found "perceptible impairment" of the organization's fair housing objectives. *Id.* at 905. As evidence of that injury, the Second Circuit relied on trial testimony of the organization's deputy that "she and her small staff devoted substantial blocks of time to investigating and attempting to remedy the defendants' advertisements," such as by filing an administrative complaint, identifying developers and marketing agents, and attending a "conciliation conference." *Ibid.* "That some of the ...staff's time was spent exclusively on litigating this action does not deprive the organization of standing to sue in

federal court." *Ibid.* Like the Second Circuit in *Ragin,* the Eighth Circuit has decided that a plaintiff's "monitoring and investigation" of the suit's underlying bases "is itself sufficient to constitute an actual injury ...." *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Ltd.,* 160 F.3d 433, 434-35 (8th Cir. 1998).

In short, the court of appeals joined the Second and Eighth Circuits in reading *Havens* broadly and conferred standing on a litigant—just because it spent money to litigate.

2. Strict Approach: Litigation expenditures do not comprise Article III injury.

"[A]s an interpretation of the decision of the Supreme Court in *Havens Realty,* the decision of the Second Circuit [in *Ragin*] is hardly a tour de force." Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act,* 60 Mo. L. Rev. 547, 586 (Summer 1995). Accordingly, other courts have rejected the approach of the Second, Sixth, and Eighth Circuits. In *Spann v. Colonial Vill.,* 899 F.2d 24 (D.C. Cir. 1990) (Bader Ginsburg, J.), the D.C. Circuit interpreted *Havens* and considered discriminatory advertising under the same FHA provision, Section 804(c), that the Second Circuit analyzed in *Ragin.* Yet, it reached the exact *opposite* conclusion:

> An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were

> the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation.

Id. at 27. The *Spann* court interpreted *Havens* as conferring standing only where an organization "increases the resources the group must devote to programs *independent of its suit* challenging the action." *Ibid* (emphasis supplied).[8]

The Third Circuit has explicitly endorsed *Spann*. See *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers,* 141 F.3d 71, 79-80 (3d Cir. 1998): "[T]he pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III."[9] Because the organizational plaintiff "did not devote time and resources to legal efforts short of litigation," it lacked standing. *Id.* at 80, n.7.

Citing both *Spann* and *Montgomery Newspapers,* the Ninth Circuit "agree[s] that a plaintiff cannot establish standing by filing its own lawsuit ...." *Walker v. City of Lakewood,* 272 F.3d 1114, 1124 (9th

---

[8] The *Spann* court found its standard had been met. To combat preferential advertising, the organizational plaintiffs "devote[d] more time, effort, and money to ... educate" minority home buyers and renters, real estate professionals, and the public, about housing discrimination. *Spann,* 899 F.2d at 27.

[9] On another occasion the Third Circuit indicated that an organizational plaintiff might have standing where it "stopped everything else" and diverted *all* of its resources to the subject lawsuit. *Alexander v. Riga,* 208 F.3d 419, 427 n.4 (3d Cir. 2000).

Cir. 2001). Likewise, the Fifth Circuit similarly held that a public interest group did not demonstrate Article III impairment simply due to litigation costs: "The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Ctr. Bd. of Trustees,* 19 F.3d 241, 244 (5th Cir. 1994).

The court of appeals cited all of these cases and categorized them under the "more restrictive approach, holding that to show standing an organization must demonstrate that it suffered a concrete injury that is *completely independent* from the economic and non-economic costs of the litigation." App. 16a-17a (emphasis supplied). By refusing to adopt the analyses of the D.C., Third, Fifth and Ninth Circuits, the court of appeals widened the judicial divide.

3. Middle Ground Approach: Lost opportunities from pursuing litigation comprise Article III injury.

Inventorying the variant circuit holdings, the lower court also considered *Vill. of Bellwood v. Dwivedi,* 895 F.2d 1521 (7th Cir. 1990) (Posner, J.). *Dwivedi,* like *Havens* and this case, involved an organizational plaintiff's use of testers to smoke-out

possible FHA violations.[10] The Seventh Circuit found that the organization had standing due to the "deflection of ... time and money from counseling to legal efforts directed against discrimination. These are *opportunity costs of discrimination,* since although the counseling is not impaired directly *there would be more of it* were it not for the defendant's discrimination." *Id.* at 1526 (emphasis supplied).

Under the Seventh Circuit's "opportunity cost" approach to standing, but for the resource demands necessary to bring the lawsuit, the organizational plaintiff could have devoted more energy toward other fair housing activities. *Dwivedi* differs from the liberal approach adopted by the court of appeals and the Second and Eighth Circuits, because it does not find standing injury simply based on litigation expenses but rather on prospects foregone as a result of pursuing the suit at hand. *Dwivedi* also differs from the strict approach adopted in the D.C., Third, Fifth and Ninth Circuits, because it does not demand affirmative organizational expenditures toward activities independent of the lawsuit. Rather, *Dwivedi* hinges on *the lack* of expenditures, focusing

[10] But the particular FHA violation in each case differs. This matter concerns Section 804(f), regarding the design and construction of housing inaccessible to the physically disabled. 42 U.S.C. § 3604(f). *Havens* concerned misrepresentation of housing opportunities prohibited by Section 804(d), *id.* § 3604(d). *Dwivedi* considered Section 804(a), which forbids making a dwelling unavailable to the Act's protected groups (*id.* § 3604(a)), and Section 804(b), outlawing discrimination in the provision of services for the sale or rental of housing. *Id.* § 3604(b).

on efforts an organization *would have* pursued but could not due to insufficient funds.

So, what is the rule? Is Article III standing conferred on a plaintiff because of the money spent on suing? Or, must a plaintiff demonstrate injury independent of litigation expenses? Does a plaintiff sustain sufficient Article III injury because it decides to sue, at the expense of other lost opportunities? There is evident discord in the circuits' analyses that only this Court can resolve.

D. The Court of Appeals' Broad View of Article III Injury Contradicts This Court's Jurisprudence.

The purpose of Article III is to restrict the prerogatives of the federal courts. See, *e.g.*, *Cuno,* 126 S. Ct. at 1860 ("Article III ... assumes particular importance in ensuring that the Federal Judiciary respects "'the proper—and properly limited—role of the courts in a democratic society.'" (quoting *Allen v. Wright,* 468 U.S. 737, 750 (1984), quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). The "case-or-controversy limitation is crucial in maintaining the "'tripartite allocation of power'" set forth in the Constitution." *Cuno,* 126 S. Ct. at 1861 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 474 (1982), quoting *Flast v. Cohen,* 392 U.S. 83, 95 (1968)). ""[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."" *Cuno,* 126 S.Ct. at 1861 (quoting *Raines v. Byrd,* 521 U.S.

811, 818 (1997), quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

The court of appeals' decision disserves these time-honored principles. Far from limiting the judiciary's role, the opinion below dramatically expands Article III powers. It is impossible to imagine an instance in which an organization like the FHC would not have standing under the lower court's reasoning; *all* plaintiffs could invoke federal court jurisdiction because they necessarily spend time, money, and effort to prepare their lawsuits. The injury in fact element could be manufactured *every* time. Standing would thus be relegated to merely "'an ingenious academic exercise in the conceivable.'" *Lujan,* 504 U.S. at 566, quoting *United States v. SCRAP,* 412 U.S. 669, 688 (1973)).

Consider those cases where plaintiffs were found to lack standing. The taxpayers in *Hein,* 127 S. Ct. 2553, surely conducted pre-litigation research into conferences funded by the Bush Administration's faith-based initiatives. Likewise, the taxpayers in *Cuno,* 126 S. Ct. 1854, must have spent resources prior to filing suit so they could analyze the contract between the City of Toledo and DaimlerChrysler Corporation. And, the environmental organizations in *Lujan,* 504 U.S. 555, certainly incurred expenses investigating federal agencies' international projects and assessing their impacts on endangered species. In each case, the Court found the plaintiffs' respective injuries too generalized and remote. Yet, if the court of appeals' decision holds sway, the *Hein, Cuno,* and *Lujan* plaintiffs all would have had standing. Their

pre-litigation investigation expenses would satisfy Article III injury in fact—under the suspect ruling.

Moreover, the holding below greatly distorts this Court's narrow recognition of tester standing in *Havens.* "The standing of the testers is, as an original matter, dubious. They are investigators; they suffer no harm other than that which they invite in order to make a case against the person investigated ...." *Dwivedi,* 895 F.2d at 1526. In *Havens,* the Court found that Congress "conferred on all 'persons' a legal right to truthful information about available housing" under FHA Section 804(d), 42 U.S.C. § 3604(d). 455 U.S. at 373. Thus, an African American tester had standing because a broker lied to her about housing opportunities—but a white tester did not have standing because he did not receive false information. *Id.* at 374-75. This Court has never recognized tester standing outside of this narrow context. In the case at bench, the testers did not receive untruthful housing information; they had no intent to rent or buy one of Petitioners' homes; and they were not even members of Respondent FHC. Allowing the FHC to sue here stretches *Havens*'s endorsement of testers beyond all recognition.

The FHC's insistence that it has suffered concrete injury is utterly suspicious, given that the source for its tester funding was the same money it received through enforcement grants from HUD. How could the FHC possibly be injured by investigating a claim when, as a condition to receiving a federal grant, it must spend those very dollars on investigation? According to the Budget Narrative Work Plan for the 1997 enforcement grant, HUD awarded the money to

the FHC *precisely* for the purpose of tester investigations. *Supra* p. 6 n.4. If the FHC didn't conduct the investigations then it would have lost the grant. And, if it didn't receive the HUD award then it would have had no resources to investigate WKB's projects. Finding standing in these circumstances, while the FHC runs its own litigation mill, makes a mockery out of Article III.

Of course, physically disabled persons can readily show standing when they are the objects of illegal discrimination. Likewise, the non-profit organizations legitimately representing them must be given fair litigation opportunities to achieve the FHA's broad remedial goals. Standing should not be an onerous bar to hurdle, but there must be *some* bar. Otherwise, the case-or-controversy requirement is rendered meaningless. With respect, the Court should grant this petition to restore the limits on judicial power imposed by Article III and the injury in fact requirement that derives from it.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' ERRONEOUS STATUTE OF LIMITATIONS HOLDING.

The court of appeals also afforded an unduly expansive—and ultimately wrong—interpretation to the FHA's statute of limitations.

42 U.S.C. § 3613(a)(1)(A) states that a civil action can be brought within two years "after the occurrence or the termination of an alleged discriminatory housing practice ...." App. 1a. On February 12, 1999, Respondents filed their amended complaint, which

included claims against Petitioner's Greenhurst project. App. 157a-163a. This 1999 filing occurred more than two years after Petitioners completed construction at Greenhurst, in 1995. App. 28a. Nonetheless, the court of appeals found the design and construction claim timely.

A. The Court of Appeals Incorrectly Decided that the Sale of the Last Housing Unit is the Triggering Event for Design and Construction Claims.

In construing section 813(a)(1)(A), the court of appeals thought "it makes little practical sense to start the limitations period running from the date of completion of the design and construction." App. 31a. Instead, it decided that "the discriminatory act occurs during the sale or rental of that unit. Thus, once a unit has been sold or rented, the discriminatory act is complete." *Ibid.* The court of appeals relied on section 804(f)(1) as the controlling "catch-all provision" (App. 32a), which generally makes it unlawful "[t]o discriminate in the sale or rental [of] ... a dwelling ... to any buyer or renter because of a handicap ...." 42 U.S.C. § 3604(f)(1); App. 1a. Although Petitioner finished construction at Greenhurst in 1995, it sold the last three dwellings there in 1997—within two years of the date Respondents' filed their amended complaint in 1999. The lower court then decided that *all* units at Greenhurst were subject to the FHA, because "*the continuing violation doctrine* applies to toll the statute of limitations until the sale of the last unit in that development." App. 33a (emphasis supplied).

In concluding that the last unit sale triggers the FHA's two-year requirement, the court of appeals failed to give appropriate weight to 42 U.S.C. § 3604(f)**(3)**—the section that *describes* the very type of discrimination that § 3604(f)**(1)** prohibits. Section (f)(3) is tailored "[f]or purposes" of section (f)(1), and includes the "failure to design and construct" covered dwellings in an accessible manner. *Id.* § 3604(f)(3)(C); App. 1a-2a. Subsections 804(f)(3)(C)(i)-(iii) then set forth detailed structural elements that such housing must incorporate: ensuring accessible routes to and through common areas; providing sufficiently wide doors for wheelchair passage and reinforced bathroom walls for grab bars; installing light switches, outlets and thermostats in accessible locations; and designing kitchens and bathrooms so wheelchairs can better maneuver. *Id.* § 3604(f)(3)(C)(i)-(iii); App. 2a.

The lower court's emphasis on the § 3604(f)(1) "catch-all," over the more precise (f)(3), was wrong. Specific statutory provisions must govern over general ones. See, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted). Accordingly, the court of appeals should have decided that the FHA's statute of limitations starts upon completion of construction, not the date the last housing unit in a development is sold.

The decision below will yield untenable results. 42 U.S.C. § 3604(f)(1) makes it unlawful "[t]o discriminate in ... sale or rental ...." App. 1a. Accordingly, under the lower court's view, the two-year period would run anew any time that covered housing is sold or rented. Consider the following transactional chain: A multifamily builder (1) sells to a first buyer who, after two years, (2) flips to another buyer who, after three years, (3) rents to a tenant who remains in possession for four years, and then (4) subleases to a subtenant. Nine years have elapsed since the first sale. If the lower court is correct that sale or rental triggers design and construction claims, then two years after the subtenant took occupancy he could still reach back to sue the initial developer. Eleven years would have elapsed since the initial sale.

Congress could not have intended such an absurd result, and it would greatly undermine the very purpose of having a statute of limitations at all. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). See also *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944) ("Statutes of limitation ... promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

B. There is Disagreement in the Lower Courts on the Triggering Event in Design and Construction Cases.

Not surprisingly, lower courts disagree on the precise "discriminatory housing practice" that triggers the two-year limitations period in design and construction cases. At least one case followed the courts of appeals' approach, holding that the statute runs after the last unit's sale. See *Balt. Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 710 (D. Md. 1999). Other cases hold that the limitations period starts when the last FHA non-compliant feature in a dwelling is corrected. See *Mont. Fair Hous. v. Am. Capitol Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999); *E. Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 212-213 (E.D.N.Y. 2001).

Other courts reject the court of appeals' approach, concluding that the two-year period starts upon completion of the construction process. See, *e.g.*, *Moseke v. Miller & Smith, Inc.* 202 F. Supp. 2d 492, 506 (E.D. Va. 2002) (emphasizing "acts" of construction rather than ongoing "effects" of inaccessible features); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d. 1129, 1142, 1144 (D. Idaho 2003) (citing *Moseke*, and agreeing that the continued existence of an alleged non-compliant building is "more akin to a continuing effect rather than a continuing violation"; limitations period starts after "the latest date that could be considered the date the design or construction process was completed ... [which is] the date the last certificate of occupancy was issued").

C. The Court of Appeals' Decision Contradicts This Court's Understanding of the Term Discriminatory "Practice."

Assuming the court of appeals correctly decided that sale or rental triggers the statute of limitations, it wrongly decided that *all* units in a development are subject to FHA claims because a single dwelling is sold within the limitations period.

An FHA claim must be brought within two years "after the occurrence or the termination of an alleged discriminatory housing *practice* ...." 42 U.S.C. § 3613(a)(1)(A). The last three dwellings at Greenhurst were sold in 1997, within two years of Respondents' 1999 filing of the amended complaint. The court of appeals thus decided that *all* Greenhurst units were subject to the FHA—not just the last three dwellings—because "*the continuing violation doctrine* applies to toll the statute of limitations until the sale of the last unit in that development." App. 33a (emphasis supplied).

The lower court's interpretation undermines this Court's understanding of discriminatory "practice" as used in other civil rights statutes. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002), held that discrete acts of discrimination occurring *outside* a statute of limitations are not actionable as "practice" just because some acts occurred *within* the limitations period.

Morgan addressed the limitations provision for employment discrimination under Title VII of the Civil Rights Act. (The FHA is Title VIII.) That

provision requires an employee to file a charge within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[11] Morgan, an African-American, alleged that Amtrak "'harassed and disciplined [him] more harshly than other employees on account of his race.'" *Morgan,* 536 U.S. at 105. Some of these discriminatory acts took place within the applicable statute of limitations, yet many were beyond it. *Id.* at 106. Morgan prevailed at the Ninth Circuit, which held that a plaintiff can establish a continuing violation for claims older than 180 days by showing "'a series of related acts one or more of which are within the limitations period.'" *Id.* at 107.

This Court reversed. It explained that the statute gives "no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111. Furthermore, the Court has "repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts." *Ibid.* The Court recently reaffirmed its reasoning in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2169 (2007): "A new violation does not occur, and a new [limitations] period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail

[11] The FHA's provision is parallel: a claim for housing discrimination must be brought within two years "after the occurrence or the termination of an alleged discriminatory housing practice ...." 42 U.S.C. § 3613(a)(1)(A); App. 1a.

adverse effects resulting from the past discrimination."

In short, each act that comprises a discriminatory "practice" starts a new clock. Separate acts may not be lumped together to form a single unlawful practice to fabricate a timely filing. In the case at bench, the court of appeals made the same mistake as the Ninth Circuit in *Morgan,* and it should be similarly reversed. Assuming for design and construction purposes that the triggering event is sale or rental, *each* sale or rental is discrete and independent for limitations purposes. The court of appeals erroneously concluded that the last unit sale at Greenhurst, occurring within the limitations period, allowed Respondents to then sue for *all prior* unit sales, no matter how long ago they occurred.

The court of appeals was wrong as to the triggering act for the FHA's statute of limitations. It was also wrong to lose sight of the discrete acts that constitute a timely discriminatory "practice." This Court should correct these errors.

CONCLUSION

The opinion of the court of appeals is a boon for *all* plaintiffs. It gives them Article III standing in *every* case. Furthermore, FHA plaintiffs are now free to litigate statutory violations that *always* renew. To restore the important principles restricting federal court review established by Article III and statutes of limitations, this Court should examine the court of appeals' decision.

For all of the foregoing reasons, the petition should be granted.

September 26, 2007

Respectfully submitted,

DUANE J. DESIDERIO*
THOMAS J. WARD
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8200
*Counsel of Record

STUART E. ALEXANDER, III
WILLIAM J. WALSH
TILFORD, DOBBINS,
ALEXANDER, BUCKAWAY, &
BLACK, PLLC
401 West Main Street
1400 One Riverfront Plaza
Louisville, KY 40202
(502) 584-1000