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IN THE SUPREME COURT FOR THE STATE OF NORTH DAKOTA  
SUPREME COURT DOCKET NO. 20080224

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State of North Dakota,  
by the North Dakota Department of Labor,  
for the benefit of Evert Johnson

*Appellant,*

vs.

Matrix Properties Corporation,  
f/k/a E.W. Wylie Corporation, Wild & Associates, Ltd.,  
and Ulteig Engineers, Inc.

*Appellees.*

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APPEAL FROM SUMMARY JUDGMENT GRANTED  
BY THE EAST CENTRAL JUDICIAL DISTRICT

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**BRIEF IN SUPPORT OF APPELLANT AND REVERSAL  
BY THE FOLLOWING *AMICI CURIAE*:**

FAIR HOUSING OF THE DAKOTAS; AARP; NATIONAL FAIR HOUSING ALLIANCE; THE ARC OF NORTH DAKOTA; DAKOTA CENTER FOR INDEPENDENT LIVING; FREEDOM RESOURCE CENTER FOR INDEPENDENT LIVING; INDEPENDENCE, INC.; LEGAL SERVICES OF NORTH DAKOTA; NORTH DAKOTA DISABILITIES ADVOCACY CONSORTIUM; NORTH DAKOTA HUMAN RIGHTS COALITION; NORTH DAKOTA STATEWIDE INDEPENDENT LIVING COUNCIL; AND OPTIONS INTERSTATE RESOURCE CENTER FOR INDEPENDENT LIVING

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## STATEMENT OF IDENTITY AND INTEREST

Fair Housing of the Dakotas (“FHD”) is a private, nonprofit group serving North and South Dakota by working to eliminate all forms of illegal discrimination in the rental, sale, and lending of housing for all protected classes covered by Title VIII of the Civil Rights Act of 1968 (“Fair Housing Act”), as amended in 1988, the North Dakota Housing Discrimination Act of 1999, and the South Dakota Human Relations Act of 1972. FHD educates tenants, landlords, and the public at large on fair housing laws, promotes public awareness regarding the importance of combating housing discrimination, and acts to support individuals and organizations seeking equal opportunity housing. In addition, FHD works to uncover and investigate systematic or specific acts of illegal housing discrimination.

Eleven other national and state-wide advocacy groups join FHD as *amici* in submitting this brief. These groups include: AARP; National Fair Housing Alliance; The Arc of North Dakota; Dakota Center for Independent Living; Freedom Resource Center for Independent Living; Independence, Inc.; Legal Services of North Dakota; North Dakota Disabilities Advocacy Consortium; North Dakota Human Rights Coalition; North Dakota Statewide Independent Living Council; and Options Interstate Resource Center for Independent Living.

AARP is a national, nonpartisan, nonprofit membership organization of over forty million members dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy, and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose.

National Fair Housing Alliance (“NFHA”) is a consortium of private, nonprofit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA’s mission is to identify and eliminate housing discrimination throughout the United States. NFHA was founded in 1988, the same year the Fair Housing Act was amended to add disability as an additional protected class. As part of its enforcement activities, NFHA assists its members and participates in federal and state court litigation brought under the Fair Housing Act and state and local fair housing laws.

The Arc of North Dakota is a private, nonprofit organization. The Arc promotes the general welfare of children and adults with intellectual disabilities.

Dakota Center for Independent Living (“DCIL”) is a private, nonprofit, North Dakota organization which believes in self-determination for people with disabilities and creates an environment in which self-determination can be achieved. Outreach services are provided in eighteen southwest and south central North Dakota counties, and on the Standing Rock and the southern part of the Fort Berthold Native American reservations.

Freedom Resource Center for Independent Living (“FRC”) is a disability rights organization operating in Fargo, North Dakota. FRC is dedicated to working toward equality and inclusion for people with disabilities through programs of empowerment, community education, and systems change. FRC works to help people reach goals they have set themselves by providing the following services: information and referral, independent living skills training, individual advocacy, and peer mentoring.

Independence, Inc., is located in Minot, North Dakota. Independence is a private, nonprofit corporation devoted to meeting the needs of individuals with disabilities and serving them, their families, and communities.

Legal Services of North Dakota is a nonprofit organization committed to providing quality legal advice, representation, and education to low income and disadvantaged elderly North Dakotans.

North Dakota Disabilities Advocacy Consortium (“NDDAC”) is a nonprofit organization advocating for public policy to ensure that people with disabilities have the supports and services they need to be as productive and independent as possible.

North Dakota Human Rights Coalition (“NDHRC”) works to affect change so that all people in North Dakota enjoy full human rights. NDHRC provides education on discrimination, civil rights, the Universal Declaration of Human Rights, and information on how human rights are protected and addressed in North Dakota.

North Dakota Statewide Independent Living Council (“ND SILC”) is a nonprofit organization. The mission of ND SILC is to guide the development of the Independent Living system in North Dakota through the active involvement of people with disabilities.

Options Interstate Resource Center for Independent Living is a private, nonprofit, community-based organization serving northeastern North Dakota and northwestern Minnesota. Options aims to assist people with disabilities to live independently in the communities of their choice and to eliminate barriers of attitude, architecture, and communication from the environments served.

FHD and the eleven fellow *amici* described above have an interest in the outcome of this appeal because the district court decision represents a step backward for people with disabilities. The adoption of an early trigger for the statute of limitations in design and construction cases is contrary to Congressional intent and, if affirmed, will severely

impede the commitment these organizations have made to ensure that people with disabilities receive fair and equal treatment as required by law. By granting summary judgment for the developers in this case, the district court set a precedent that forecloses the possibility of correcting inaccessible properties through private enforcement unless an action is commenced within two years after the issuance of a certificate of occupancy.

## ARGUMENT

### **I. The District Court’s Restrictive Interpretation of the Statute of Limitations on Design and Construction Discrimination Cases Erroneously Converts it into a Statute of Repose.**

#### **A. The district court decision converts the Fair Housing Act’s statute of limitations into a statute of repose.**

The district court decision should be reversed because it improperly converts a statute of limitations into a statute of repose and, in so doing, forestalls people with disabilities from asserting a claim, regardless of whether they have yet experienced disability or harm. See Hanson v. Williams County, 389 N.W.2d 319, 321 (N.D. 1986) (stating that statutes of repose terminate a right of action after a specified time period regardless of whether or not there has been an injury). In Hanson, this Court explained that in tort claims, “[a] statute of limitation period commences either upon the occurrence of an injury, or when the injury is discovered. A statute of limitation must allow a reasonable time after a cause of action arises for the filing of a lawsuit.” 389 N.W.2d at 321 (citing Wilson v. Iseminger, 185 U.S. 55, 62 (1902)); see generally Curtis v. Loether, 415 U.S. 189, 195 (1974) (a housing discrimination “cause of action is analogous to a number of tort actions recognized at common law”). The district court’s restrictive interpretation of the applicable Fair Housing Amendments Act (FHAA) statute of limitations ignores this well-settled principle. This Court should reverse that decision and lift the bar that will otherwise preclude the claims of people with disabilities who have yet to become injured by encountering the noncompliant housing.

The district court, relying on the Ninth Circuit Court of Appeals decision in Garcia v. Brockway, adopted the one-sided reasoning that claims brought more than two years following completion of construction are unfair to builders and developers who

blatantly violated the law. 526 F.3d 456, 466 (2008) petition for cert. filed, (U.S. July 31, 2008) (No. 08-140). The district court's holding disregards the resulting unfairness to people with disabilities. These people will have their fair housing rights extinguished before they seek to live in a multifamily dwelling and are prevented by access barriers, and for many their rights are extinguished before they even experience a disability. This Court has previously condemned such one-sided reasoning, highlighting the importance of applying the statute of limitations in an even-handed manner, while giving full effect to the purpose of the statute. Hanson, 389 N.W.2d at 325 (recognizing that there are economic consequences for manufacturers and insurers but unwilling to view human life "simply as a matter of economics," focusing instead on the individuals affected).

This Court's ruling in Hanson is binding on the district court. The Ninth Circuit Court of Appeals decision in Garcia is not. See generally Dakota Bank & Trust Co., Fargo v. Grinde, 422 N.W.2d 813, 816-17 (N.D. 1988) (refusing to accept an Eighth Circuit Court of Appeals interpretation of North Dakota law regarding notice to guarantors in case of default that relied on precedent from the Ninth Circuit Court of Appeals); see Dickie v. Farmers Union Oil Co., 2000 ND 111, ¶ 5, 611 N.W.2d 168, 170 (2000) (finding a ten-year statute of repose barring a products liability claim unconstitutional); but see Bellemare v. Gateway Builders, 420 N.W.2d 733, 739 (N.D. 1988) (finding ten-year statute of repose for claims arising from improvements to real estate constitutional). Therefore, this Court should set aside the district court's ruling and read the statute of limitations as commencing when the injured party is denied access to housing due to discriminatory defects in design or construction.

**B. Filing a design and construction discrimination case more than two years after the issuance of a certificate of occupancy does not frustrate the purpose of the statute of limitations.**

The purpose of a statute of limitations is to prevent a court from adjudicating stale claims supported by stale evidence. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); see also United States v. Kubrick, 444 U.S. 111, 117 (1979) (statutes of limitations represent a “pervasive legislative judgment that it is unfair to fail to put the adversary on notice to defend within a specified period of time”). A building constructed in such a way that it lacks some or all of the seven basic accessibility elements required by the FHAA does not present typical concerns over stale claims or evidence. Those seven basic requirements are: 1) accessible building entrance and route; 2) accessible and usable public and common areas; 3) usable doors; 4) accessible route into and through the covered unit; 5) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; 6) reinforced walls for grab bars; and 7) usable kitchens and bathrooms. 42 U.S.C. § 3604 (f)(3)(C) (2008); N.D.C.C. § 14-02.5-06 (3)(c) (1999). When a person with a disability encounters such a building, the inaccessible features will be objectively evident. The architectural plans speak for themselves. Thus, the principle that an aggrieved person who waits until years later to enforce a right under the law is prevented from asserting a claim because to do so would be patently unfair to a defendant is simply not applicable in design and construction cases. Kubrick, 444 U.S. at 117. A person who has not yet encountered the noncompliant building, or who was not previously disabled, is not unfairly waiting to enforce an accrued right, because that person has not been injured prior to such an encounter.

**II. The District Court’s Interpretation of the Statute of Limitations Ignores the Purpose and Clear Congressional Intent of the Fair Housing Amendments Act.**

**A. The district court’s narrow application of the statute of limitations is contrary to Congressional intent.**

The overriding purpose of the FHAA’s design and construction requirements is “to help provide disabled persons equal access to multifamily housing and to eliminate de facto segregation to which handicap-inaccessible housing gives rise.” H.R. Rep. No 100-711 at 13; see generally 42 U.S.C. § 3604(f)(7) (defining “covered multifamily” dwellings as being the ground floor of complexes containing four or more units with no elevator or, where an elevator is present, all units in those complexes). The seven basic accessibility provisions in the FHAA were designed by Congress to be “minimal standards that would be easy to incorporate in housing design and construction” and not unreasonable or significantly costly to incorporate. Id. at 27. Congress intended to issue “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream ... [while not imposing] unreasonable requirements on homebuilders, landlords, or non-handicapped tenants.” Id. at 18, 27.

Congress established a two-year statute of limitations for FHA actions, but included language stating that the two years would encompass the time up until “...the termination of an alleged discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)(A). The use of “termination” in section 3613 was intended by Congress to “reaffirm the concept of continuing violations, under which the statute of limitations is measured from the last occurrence of the unlawful practice.” H.R. Rep. No. 100-711 at 33; see also Montana Fair Housing v. American Capital Dev., Inc., 81 F. Supp. 2d 1057, 1063 (D.

Mont., 1999) (housing discrimination claim included violations of accessibility requirements; violations did not terminate until ramp was installed).

Between 1991, when the FHAA became effective, and 1999, studies showed an overwhelming level of noncompliance with the Act's design and construction mandates and an increasing number of enforcement suits. Robert Schwemm, Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases under the Fair Housing Act, 40 U. Rich. L. Rev. 753, 768-69 (2006). As a result of inconsistencies between local building codes and FHA accessibility requirements, developers encouraged passage of House Resolution 2437, the "Justice in Fair Housing Enforcement Act of 1999." Report on the Activities of the Committee on the Judiciary of the House of Representatives During the One Hundred Sixth Congress, 106th Cong. (Jan. 2, 2001) (statement of Henry Hyde, Chairman, House Comm. on the Judiciary) ["Hearing on H.R. 2437"]. The bill sought an exception to the enforcement of the design and construction accessibility requirements for buildings certified to be in compliance with a local building code. Id. At a sub-committee hearing on H.R. 2437, members heard testimony on whether it was appropriate to provide "relief from prosecution to those in the building community who may have committed building design violations under the [FHAA]." Hearing on H.R. 2437 (statement of Charles T. Canady, Chairman). Both a government official and a developer pointed out that relieving liability for noncompliant housing would not only seriously harm people with disabilities, but it would also be unfair to those who had complied by rewarding those who had violated the law. Hearing on H.R. 2437 (statement of William J. Malleris, President, Maple Court Development, Inc.) (statement of Bill Lann Lee, Acting Attorney General, Civil Rights Division). "If H.R. 2437 is enacted,

hundreds of thousands of housing units built since 1991 that should have included these minimal accessible features will be exempt from enforcement . . . [The] bill effectively immunizes from federal enforcement all noncompliant buildings constructed in the last eight years.” Id. (statement of Bill Lann Lee, Acting Attorney General, Civil Rights Division). House Resolution 2437 never even made it out of committee and was not re-introduced – the attempt to skirt Fair Housing obligations at the expense of people with disabilities was a non-starter.

**B. The United States Department of Housing and Urban Development’s reasonable interpretation of the Fair Housing Amendments Act is entitled to great deference.**

The district court’s decision is contrary to the United States Department of Housing and Urban Development’s (“HUD”) unequivocal guidance that design and construction violations do not terminate under the statute of limitations and are subject to enforcement by people who are injured by the ongoing violations. HUD has clearly, reasonably, and consistently articulated:

With respect to the design and construction requirements, complaints could be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice – failure to design and construct the building in compliance – does not terminate.

Fair Housing Act Design Manual: A Manual to Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act (rev. 1998) (available at <http://www.huduser.org/publications/destech/fairhousing.html>).

The United States Supreme Court has repeatedly deemed HUD’s reading of FHA provisions to be entitled to "great weight," even when it is not formalized in the Code of Federal Regulations. Skidmore v. Swift & Co., 23 U.S. 134, 140 (1944); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972). See also Meyer v. Holley, 537 U.S. 280,

287 (2003) ("[W]e ordinarily defer to [HUD's] reasonable interpretation of the FHA."); Gladstone Realtors v. Village of Bellwood, 447 U.S. 91, 107 & n.19 (1979) (holding that HUD's interpretation of the FHA, as set forth in a manual intended for internal agency use, "commands considerable deference"). Where HUD has articulated that design and construction violations are continuing in nature for purposes of the FHA's statute of limitations, this Court should give the agency's interpretation "great weight" and overturn the district court's contrary decision.

**C. The continuing violation theory applies and is consistent with Congressional intent and the broad remedial purpose of the Fair Housing Amendments Act.**

This Court should recognize the nature of design and construction violations as being physical discrimination that requires adoption of the continuing violation theory. The continuing violation theory is used in both tort and civil rights contexts to toll the statute of limitations so long as wrongful acts continue. See Eastern Paralyzed Veterans Association, Inc. v. Lazarus-Burman Associates, 133 F. Supp. 2d 203, 212 (E.D.N.Y. 2001) ("where a plaintiff's claim is based on an ongoing policy as opposed to a discrete incident, a continuing wrong is present"). Failure to incorporate basic accessibility requirements in multifamily housing is a continuing act of discrimination. Until the building is brought into compliance with accessibility standards, the discrimination has not terminated. Kuchmas v. Towson Univ., 553 F. Supp. 2d 556, 563 (D. Md. 2008). "Termination" should focus on termination of the discrimination, not on termination of the construction. In Kuchmas, a Maryland federal district court found the continuing violation doctrine applicable to those individuals with continuing control over the building containing inaccessible features. Id. The Kuchmas court used the date the

plaintiff leased the unit as the trigger for the statute of limitations as to the defendant with continuing control of the building. Id. This holding is supported by Fair Housing Council, Inc. v. Village of Olde St. Andrews, in which the western district court of Kentucky found that the statute of limitations was triggered by the sale of the last inaccessible unit, rather than the completion of construction. 250 F. Supp. 2d 706, 719 (W.D. Ky. 2003), aff'd, 2006 FED App. 0900N (6th Cir.).

Failing to include required basic accessibility features in covered multifamily dwellings effectively excludes people with disabilities on a daily basis, as though posting a sign, “No Handicapped People Allowed.” H.R. Rep. No. 100-711 at 25. Congress recognized that “[a]cts having the effect of causing discrimination can be just as devastating as intentional discrimination.” Id. at 25.

In finding the instant action time-barred, the district court relied heavily on Garcia v. Brockway. (Summ. J. Hr’g Tr. 7:21-22, July 18, 2008.) Garcia relied on Moseke v. Miller and Smith, Inc. and Ledbetter v. Goodyear Tire & Rubber Company, an employment discrimination case. 526 F.3d at 463; 202 F. Supp. 2d 492 (E.D. Va. 2002); 127 S. Ct. 2162 (2007). The Moseke court wrongly characterized design and construction violations as a continuing effect of discrimination, rather than as a continuing violation of the law. 202 F. Supp. 2d at 507. The physical nature of the discrimination at issue with design and construction cases renders it unfair to distinguish the act from the effect. H.R. Rep. No. 100-711 at 25. Unlike in Ledbetter, where the Supreme Court found that a single discriminatory act merely had continuing effects for the person who was initially injured, an inaccessible building continues to injure each person who encounters it, much as an ongoing application of a facially discriminatory

policy or practice would. 127 S. Ct. at 2169. People with disabilities who now encounter FHAA noncompliant units built prior to 2006 will be forever excluded from these units if this Court affirms the district court's decision.

Design and construction violations are fundamentally different from the implementation of racially discriminatory hiring and promotion plans or compensation plans that discriminate on the basis of gender. Despite recognizing these differences, the Moseke court used gender and racial discrimination examples in rejecting the design and construction claim. 202 F. Supp. 2d at 506. Rather than relying on cases of gender or racial discrimination to determine the applicability of the continuing violation theory, this Court should look to other laws prohibiting the use of inaccessible features. See e.g., Deck v. City of Toledo, 56 F. Supp. 2d 886 (N.D. Oh. 1999) (applying continuing violation theory to cases arising under the Americans with Disabilities Act).

The restrictive application of the statute of limitations in Garcia and Moseke greatly frustrates the intent of Congress in passing the FHAA. Both the Garcia and Moseke courts claimed that a plaintiff did not lose the right to redress because he or she could still rent the nonaccessible unit, request and be prepared to pay for an accommodation, and if the accommodation was refused, be able to bring suit for failure to make a reasonable accommodation. Although the FHAA does allow disabled individuals the right to make reasonable modifications at their own expense to make their housing accessible, this is an inadequate substitute for compliance with the FHAA's accessibility requirements. It improperly shifts the expense and burden of compliance under the FHAA to the person with a disability. Congress clearly mandated, to the

contrary, that the housing provider bear the initial burden of making the housing minimally accessible.

**III. The District Court Ruling Unfairly Burdens Local Governments, Advocacy Groups, and Persons with Disabilities.**

**A. The certificate of occupancy trigger for the statute of limitations unfairly burdens local governments in contravention of Congressional intent.**

When Congress amended the FHA to enhance its protection of people with disabilities, it included specific provisions allowing these individuals to bring suit for noncompliance. 42 U.S.C. §§ 3602(i), 3604(f)(1-3). As the United States Supreme Court has noted in Trafficante, “it is apparent...that complaints by private persons are the primary method of obtaining compliance with the Act. 409 U.S. at 209. Enforcement through private litigants acting “as private attorneys general in vindicating a policy that Congress considered to be of the highest priority,” empowers individuals to enforce laws furthering broad public purposes, rather than relying primarily upon stretched government agencies for enforcement. Id. at 211. Absent private enforcement, the important public purpose of ensuring that people with disabilities are not excluded from mainstream society will be subverted, because governmental enforcement agencies do not have the capacity or resources to fill the role of private litigants.

Additionally, enforcement of accessibility standards is increasingly necessary. Housing discrimination complaints associated with disability now exceed those of race, which in the past had surpassed all other bases of housing discrimination. HUD Ann. Rep. (2007), available at <http://www.hud.gov/offices/fheo/library/FairHousing-FY2007AnnualReport.pdf> (contrasting the estimated 43% of disability complaints in 2007, compared to 37% based on race). “Housing experts say disability-based

complaints will continue to rise as the population ages.” Janet Loehrke, Housing Discrimination Complaints on Rise, (2006) available at [http://courier-journal.gns.gannettonline.com/graphics/housing/complaint\\_national832x389.gif](http://courier-journal.gns.gannettonline.com/graphics/housing/complaint_national832x389.gif) (discussing HUD statistics in 2006, which documented an estimated 4110 disability complaints compared to 3152 in 2003).

Finally, it is apparent that local efforts to police the FHAA have failed. Multifamily housing requires approval by the local government unit charged with enforcing building codes and other applicable laws, yet widespread noncompliance continues. Schwemm, supra at 805-806. “[E]very dwelling constructed in violation of 3604(f)(3)(C) was once approved by local building officials.” Id.

**B. The certificate of occupancy trigger unduly burdens North Dakota advocacy groups.**

Fair Housing of the Dakotas (“FHD”) is presently the only nonprofit fair housing enforcement group in North Dakota; in fact, it is the only nonprofit HUD funded enforcement group in the entire HUD-Denver region (comprising CO, MT, ND, SD, UT, and WY). With limited resources and only three full-time staff members, FHD received 1712 calls, inquiries, and contacts in 2007 alone. FHD Ann. Rep. (2007), available at <http://www.fhdakotas.org/Press/2007%20FHD%20Annual%20Report.pdf>. FHD filed or referred thirty-five (35) complaints of discrimination against North Dakota housing providers in 2007. Another forty-six (46) clients were referred to the North Dakota Department of Labor or to HUD. Most of the intakes were received from people who identified themselves as being from Fargo (475), Bismarck (399), and Grand Forks (146); of these, 133 involved allegations of housing discrimination. Id. Discrimination on

account of disability ranked highest with fifty-seven (57) allegations, more than familial status, race, color, and national origin combined. Id.

The district court's decision will force FHD to devote significantly more of its very limited time and resources to monitoring and inspecting the accessibility and compliance of all new multifamily housing units throughout the state within two years of the issuance of a certificate of occupancy. North Dakotans will suffer as a result, in view of the likelihood that FHD's education and community outreach missions will be compromised, and fewer violations of fair housing law could be pursued.

**C. The certificate of occupancy trigger disproportionately burdens North Dakotans with disabilities.**

The district court's ruling will undoubtedly "render [the FHA] of far less use to disabled individuals than Congress intended." Garcia, 526 F.3d at 466 (2008) (Pregerson, J. & Reinhardt, J., dissenting). The opportunity to live in a safe place is one of the most basic necessities in our society. Beyond hampering the ability of North Dakotans with disabilities to find safe housing, "because of [a] landlord's discrimination, the tenants [may] los[e] social benefits of living in an integrated community." Trafficante, 409 U.S. at 208 (discussing the intent of the FHA to deter racial stigma, along with all other stigmas that may follow a protected class of persons under the Civil Rights Act of 1968).

Achieving integration has long been identified as a struggle for persons with disabilities. "People with disabilities desire integration to learn and live amongst others with and without disabilities just like anyone else, and the fair housing act [sic] provides this fairness." Hearing on H.R. 2437, (statement of William J. Malleris, President, Maple

Court Development, Inc.) (testifying against an exception to enforcement of accessibility requirements for buildings constructed between 1991 and 1999). The district court's decision makes integrated, accessible housing much less likely to be obtained by people who are disabled or who may become disabled in the future. This issue is especially pertinent in North Dakota where more than 15% of the state's estimated 635,867 residents live with disabilities. U.S. Census Bureau, State and County Quick Facts, North Dakota, available at <http://quickfacts.census.gov/qfd/states/38000.html>. That number can only reasonably be expected to rise in the very near future as North Dakota is presently home to the fifth highest percentage of elderly persons in the country. The Merck Manual of Geriatrics (Mark H. Beers & Thomas V. Jones eds., 2006), available at <http://www.merck.com/mkgr/mmg/sec1/ch2/ch2b.jsp>.

The district court's decision will place further barriers before those people with disabilities who wish to challenge alleged discriminatory behavior. According to current statistics, only 1% to 5% of individuals who believe they are the victims of discrimination (nationally) initiate any type of formal complaint, largely due to more pressing concerns like obtaining housing or lack of knowledge regarding the complaint-filing process. U.S. Department of Housing and Urban Development, Do We Know More Now? Trends in Public Knowledge, Support, and Use of Fair Housing Law, 35-36 (2006), available at <http://www.huduser.org/Publications/pdf/FairHousingSurveyReport.pdf>); Brief for Silver State Fair Housing, et al. as Amicus Curiae Supporting Appellants, Garcia v. Brockway, 526 F.3d 456 (2008) (Nos. 05-35647 and 06-15042) ["Garcia Amicus Brief"]. This is especially true in North Dakota, where the poverty rate of people with disabilities is nearly 20%. U.S. Census Bureau, 2006 American

Community Survey available at <http://www.census.gov/hhes/www/disability/2006acs.html> (then select S1801.Disability Subject Table, then select State and North Dakota, then Show Result link).

If the ruling of the lower court is upheld, a disabled person living in North Dakota who seeks to file a timely complaint pursuant to the FHA will now need to take the following steps within the limited two-year period following the issuance of the allegedly noncompliant building's certificate of compliance:

“(1) the newly constructed housing must be placed on the rental or sales market (this alone may take several months or a year or more); (2) an individual with a disability must encounter the noncompliant conditions; (3) that individual must suffer injury as a result of the noncompliant conditions; (4) that individual must be aware that the housing is subject to, and in noncompliance with, the FHA's requirements, and that she has a legal right to address such noncompliance; and (5) that individual must have the means, interest, and wherewithal to file a complaint.”

Garcia Amicus Brief at 18. The FHA allows people with disabilities the right to make reasonable modifications to a unit at their own expense to make it accessible. However, this is “an inadequate substitute for compliance with the FHA’s accessibility requirements.” Id. Victims of housing discrimination and advocates working on their behalf should not be held responsible for ferreting out, correcting, and paying to rectify the violations of developers and landlords.

**D. The certificate of occupancy leaves little incentive for developers to comply with the Fair Housing Amendments Act.**

The extremely small chance of a timely complaint being filed opens the door to further noncompliance by inviting developers “to assume the risk of noncompliance, in order to save construction costs, by taking the chance that [their] violations of the law would remain undiscovered by the disabled community for a period of two years.”

Garcia, 526 F.3d at 467 (Pregerson, J. & Reinhardt, J., dissenting). Once the statute of limitations has run, the entire housing complex will effectively be off the market for persons with disabilities.

In Fargo, where this claim originated, the impact of de-incentivizing developer compliance with the FHA will be significant because of the high number of multifamily housing units in the city. In 2006, there were an estimated 45,964 total housing units in Fargo, more than half (23,994) of which were occupied by renters. U.S. Census Bureau, 2006 American Community Survey available at <http://www.census.gov> (American Fact Finder link). By upholding the lower court's decision, rental housing that excludes people with disabilities will be granted a permanent exemption from private enforcement of accessibility standards, provided the units were built any time prior to 2006.

CONCLUSION

For the foregoing reasons, FHD and the other advocacy groups endorsing this brief respectfully request that this Court reverse the district court decision. If this Court affirms the decision, North Dakotans with disabilities will continue to be without adequate accessible housing, enforcement of the law requiring accessibility will be more difficult, and Congressional attempts to enforce the Fair Housing laws through enactment of FHAA will be circumvented.

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Respectfully submitted,

CLINICAL EDUCATION PROGRAM

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