No. 09-40734

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HENRY BILLINGSLEY, *et al.*,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the appellants' request for oral argument.

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STATEMENT OF JURISDICTION

The district court possessed jurisdiction over this case pursuant to 28 U.S.C. 1331 and 1345, and 42 U.S.C. 3612(o), as the case arose under the Fair Housing Act, 42 U.S.C. 3601 *et seq*. This Court possesses jurisdiction over the appeal under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the *Noerr-Pennington* doctrine protects documents on which the district court relied in ordering preliminary injunctive relief.

2. Whether the district court correctly determined that the Anti-Injunction Act did not bar entry of a preliminary injunction.

STATEMENT OF THE CASE

This action arises out of a complaint that Sheryl and Alfred Pick filed with the United States Department of Housing and Urban Development (HUD), against Henry Billingsley, Lucy Billingsley, David Noell, Lucilio Peña, Air Park GP, L.L.C., Crow-Billingsley Air Park, Ltd., and Air Park – Dallas Zoning Committee (collectively, the appellants). The Picks alleged that the appellants' demand that they remove a footbridge they installed to enable Ms. Pick to get to the street in front of their house discriminated on the basis of disability in violation of the Fair Housing Act (FHA or the Act). On March 4, 2008, following an investigation and determination of reasonable cause, HUD filed a Charge of Discrimination alleging that the appellants engaged in discriminatory practices in violation of 42 U.S.C. 3604(f) of the Act. On March 25, 2008, the appellants elected to have the claims asserted in the Charge resolved in a civil action.

The United States subsequently filed suit on behalf of the Picks against the appellants in federal district court pursuant to 42 U.S.C. 3612(o). The United States moved the district court for a preliminary injunction to enjoin the appellants from removing or altering the footbridge. On June 29, 2009, the district court issued an order granting the preliminary injunction. The appellants filed this interlocutory appeal to prevent enforcement of the preliminary injunction.

STATEMENT OF FACTS

1. Since 1983, Alfred and Sheryl Pick have lived in Air Park Estates. CR

126.[1] In 1998, Ms. Pick was diagnosed with adrenomyeloneuropathy, a progressive neurological disorder that causes spinal cord dysfunction, resulting in great difficulty in walking, balance problems, and constant pain. CR 126, 147-148, 153-155, 272, 310, 899, 929. According to Ms. Pick's physicians, Dr. James Cable and Dr. Alan Martin, as of August 2007 the prognosis for her recovery from this disease is poor, and her symptoms will worsen over time. CR 150-151, 195-196. As a result of her disability, Ms. Pick requires the assistance of a cane to walk inside her home. Outside her home, with her husband's assistance, she uses a Segway or a motorized three-wheeled scooter to get around. CR 126, 144, 680-684.

In 2002, the Picks installed a two-foot wide, arched footbridge with handrails across a drainage ditch in front of their home to allow Ms. Pick to reach her mailbox and get to the street. CR 126, 310, 689-690, 701. Without the footbridge, and without the assistance of another individual, Ms. Pick would be able to leave the house only with great difficulty, if at all. CR 127. This footbridge extends a short distance past the Picks' property line and into the right of way owned by Crow-Billingsley Air Park, Ltd.[2] CR 225, 310. Under Air Park

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[1] This brief uses the following abbreviations: "CR ___" for the page number of the Certified Record; and "Br. __" for the page number of the appellants' opening brief filed with this Court.

[2] Crow-Billingsley Air Park, Ltd., is a limited partnership that owns the community areas of Air Park Estates. Airpark GP, L.L.C. is the general partner of Crow Billingsley Air Park, Ltd. CR 224-225.

Estates' restrictive covenants, the Picks needed permission to install the footbridge. CR 227, 230-232. The Picks stated that prior to installing the bridge, they consulted with two then-members of the Air Park – Dallas Zoning Committee, an unincorporated association that enforces the community's restrictive covenants. CR 225-227, 320. Those two members of the Zoning Committee told the Picks that no written request for the footbridge was necessary, and they then verbally approved the bridge. CR 270, 310. Thus, according to Mr. Pick, the Zoning Committee has been fully aware of Ms. Pick's disability and her need for the bridge since 2002. CR 242.

2. The footbridge remained in place from 2002 to 2004 without incident. CR 930. On August 24, 2004, the four members of the Zoning Committee — Henry Billingsley, Lucy Billingsley, David Noell, and Lucilio Peña — voted to tell the Picks that they were required to remove the footbridge because it extended beyond their property line into the street right-of-way. CR 260. Mr. Billingsley, acting on behalf of the Zoning Committee, sent Mr. Pick letters dated September 15 and 30, 2004. Those letters told Mr. Pick that the footbridge violated Zoning Committee policy prohibiting structures that extend beyond the property line into the right-of-way, and demanded that he remove the footbridge by mid-October 2004. CR 260-261. In a letter dated October 8, 2004, Ms. Pick notified the Zoning Committee of her disability and explained that removing the footbridge "would deny me access to our street and our mailbox since my disability severely affects my balance and limits my mobility." CR 270. Mr. Billingsley responded

to Ms. Pick's request for accommodation by sending Mr. Pick another letter, dated October 22, 2004, reiterating the Zoning Committee's demand that he remove the footbridge within one month and threatening legal action if he did not. CR 262. The bridge was not removed.

Nearly one year later, on October 18, 2005, Mr. Billingsley sent Mr. Pick another letter repeating the Zoning Committee's demand that he remove the footbridge or risk legal action, and gave Mr. Pick until November 10, 2005, to comply. CR 263. On November 23, 2005, the Zoning Committee's attorney sent Mr. Pick a final demand letter asking him to remove the footbridge on or before December 9, 2005, and informing him that his failing to do so would result in a lawsuit against him. CR 264.

When that deadline passed with the footbridge still in place, the Zoning Committee filed suit against Mr. Pick in the District Court of Collin County, Texas, on January 18, 2006. CR 227, 266-269. The state-court suit alleged that Mr. Pick violated several of Air Park Estates' restrictive covenants by installing the footbridge in front of his home without prior authorization and refusing to remove it despite notices from the Zoning Committee. CR 267-268. The suit sought, *inter alia*, an injunction compelling Mr. Pick to remove the offending footbridge. CR 268-269. In response, Mr. Pick filed an answer that included a counterclaim alleging that the Zoning Committee discriminated against the Picks in violation of the Fair Housing Act by failing to make reasonable accommodations and failing to permit reasonable modifications for his wife's

disability. CR 42-47.

3. On February 26, 2007, Ms. Pick sent a new letter to the Zoning Committee stating that her disability was "severe" and asking to keep the footbridge so that she could get to the street. CR 271. Ms. Pick attached a letter from Dr. Martin describing her condition and confirming that a footbridge with handrails is "required to prevent falling injury." CR 272. Ms. Pick's letter did not refer to the pending litigation against Mr. Pick.

On March 2, 2007, Zoning Committee members Henry Billingsley, Lucy Billingsley, and David Noell voted to deny Ms. Pick's request to keep the footbridge. CR 278. Instead, the committee agreed to entertain plans for an alternative design of an at-grade walkway without handrails. CR 278. The Zoning Committee did not inform Ms. Pick of its decision to reject her request and suggest an alternative until it sent her a letter with this information nearly one month later. CR 265, 278. This letter did not refer to the pending state-court litigation.

On March 26, 2007, Ms. Pick wrote a letter to Henry Billingsley in which she reiterated that she suffers from "an incurable, progressive, debilitating condition for which there is no effective treatment" and that this condition causes her "chronic, severe pain." CR 281. In the letter, Ms. Pick stated that the current footbridge "provides me with safe, secure, direct access to the street in front of my home" that is not available from other routes. CR 281. Nevertheless, "[i]n an effort to end th[e] [state-court] lawsuit," Ms. Pick indicated that she was willing to

accept an alternative footbridge "which would not be ideal," and proposed a slightly arched span no more than two feet wider than the current footbridge. CR 281. According to Ms. Pick, because the alternative span has no handrails, it would cause her "greater balance problems" and would put her "at greater risk of falling." CR 127. Ms. Pick requested that Billingsley submit her request to the Zoning Committee for consideration and approval. CR 281.

On April 13, 2007, the Zoning Committee tentatively approved Ms. Pick's request for an alternative footbridge without handrails, subject to final approval of detailed drawing plans, and communicated that decision to Mr. Pick's attorney by letter dated June 4, 2007. CR 280, 283. The state-court litigation proceeded to mediation, and on August 13, 2007, Mr. Pick and the Zoning Committee reached a settlement in that lawsuit. CR 291-292. The settlement agreement provided that Mr. Pick would pay the Zoning Committee $32,500 within 14 days of the agreement's execution in return for dismissal of the suit, and released both parties from all claims and counterclaims, including HUD-related claims. CR 291-292. The parties also agreed that, following mediation, they would execute a more formal written settlement agreement, but Mr. Pick refused to sign the more detailed settlement documents prepared by the Zoning Committee. CR 720. Ms. Pick was not a party to the agreement. CR 320.

Following execution of the initial settlement agreement in principle, Mr. Pick neither paid the agreed-upon sum to the Zoning Committee nor removed the footbridge, and contended that the agreement did not require him to do the latter.

CR 329, 331, 720. On May 15, 2008, the Zoning Committee moved for summary judgment in Texas state court, asserting that Mr. Pick breached the settlement agreement by failing to remove the footbridge. CR 326-336. The state court rendered summary judgment in favor of the Zoning Committee on June 27, 2008 (CR 337-338), and entered a final judgment on July 24, 2008 (CR 351-354).

The final judgment only interpreted the settlement agreement, and did not make any determinations on the merits of the FHA claims. The final judgment provided that Mr. Pick "shall remove the existing * * * foot bridge after the Zoning Committee approves an alternate design of the existing foot bridge with an extension of one foot on either side of the sidewalk as well as a rise of three inches to the slope." CR 352. The final judgment also ordered Mr. Pick to pay the agreed-upon sum of $32,500, plus interest, attorney's fees, and court costs, and dismissed his counterclaims. CR 351-352. Mr. Pick has paid the money, but has refused to remove the footbridge. CR 734. He did not appeal the final judgment. CR 638, 658.

In accordance with the final judgment, in September 2008, the Zoning Committee approved the alternative design of a four-foot wide bridge with handrails that it claimed Ms. Pick requested, and informed Ms. Pick of that decision. CR 740, 776. According to Ms. Pick, however, she never requested the bridge the appellants approved, because it "does not meet my needs or adequately protect me from injury when walking from my house to the street." CR 776. Because of the rise, and because Ms. Pick becomes dizzy and experiences balance

problems when walking over the bridge, she needs to hold on to both handrails while crossing. CR 776. She can hold the handrails with both hands on the current bridge, but will be able hold only one handrail at a time on the proposed bridge due to its greater width. CR 777.

4. While the state-court suit was pending, the Picks filed a verified complaint with HUD on June 11, 2007 — which they subsequently amended on July 20, 2007, and November 20, 2007, to add additional parties and to withdraw Mr. Pick as a complainant, respectively — alleging that the appellants discriminated against Ms. Pick on the basis of disability in violation of the Fair Housing Act by refusing to authorize the footbridge. CR 18, 48-49, 293-295, 297-299. Pursuant to 42 U.S.C. 3610(a) and (b), HUD investigated the complaint, attempted conciliation without success, and prepared a final investigative report. CR 238-259. HUD determined that reasonable cause existed to believe that the appellants had violated the Fair Housing Act. CR 314-321. On March 4, 2008, HUD issued a Charge of Discrimination pursuant to 42 U.S.C. 3610(g)(2)(A), charging the appellants with engaging in discriminatory practices in violation of the Fair Housing Act. CR 308-313.

On March 25, 2008, the appellants elected to have the claims asserted in the Charge heard in a civil action in federal court, pursuant to 42 U.S.C. 3612(a). CR 325. The case was referred to the United States Department of Justice. CR 930. On April 24, 2008, the United States filed a lawsuit on behalf of Ms. Pick to enforce the Fair Housing Act, pursuant to 42 U.S.C. 3612(o). The suit alleged that

the appellants violated Section 3604(f) of the FHA by failing to make a reasonable accommodation or modification for Ms. Pick's disability, and by treating her on unequal terms as compared to individuals who do not have disabilities. CR 14-21. On August 4, 2008, after the state-court action had concluded, the United States moved for a preliminary injunction to prevent the appellants from removing or tampering with the Picks' footbridge pending resolution of this action. CR 381-399. The district court held a hearing on the motion on March 5, 2009. CR 925-967.

5. On June 29, 2009, the district court granted the United States' motion for a preliminary injunction. CR 916-924. As an initial matter, the district court rejected the appellants' argument that the exchange of letters between February and March of 2007 were protected by the *Noerr-Pennington* doctrine by finding that Ms. Pick's February 2007 request to keep the existing footbridge was not an offer of settlement in the state-court action. CR 918. The district court also concluded that the Anti-Injunction Act, 28 U.S.C. 2283, did not bar entry of preliminary injunctive relief, because the Act does not extend to an action in which the United States is the plaintiff. CR 919.

Applying the four-factor test for a preliminary injunction, the court first determined that the United States demonstrated a substantial likelihood of success on the merits of its claims, and was entitled to rely upon the appellants' denial of Ms. Pick's February 2007 request for a reasonable accommodation. CR 920-921. The district court also determined that the United States' claim was not barred by

claim preclusion, because the United States is the plaintiff and entitled to relief independent of Ms. Pick. CR 921-923. The district court then concluded that the United States demonstrated a substantial threat of irreparable personal injury to Ms Pick if the footbridge was removed; that this substantial threat of injury to Ms. Pick outweighed the minimal harm to the appellants if the footbridge remained in place, as it has since 2002; and that an injunction would further the public's interest in prohibiting discriminatory acts that violate the FHA. CR 923. Accordingly, the district court ordered the appellants to refrain from taking any actions that would result in the removal of the footbridge or interfere with its access. CR 924.

STANDARD OF REVIEW

The grant or denial of a preliminary injunction is reviewed under the abuse of discretion standard. See *Lakedreams* v. *Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991). This Court reviews the district court's factual findings underlying its decision for clear error and the district court's legal conclusions *de novo*. See *ibid.*

SUMMARY OF ARGUMENT

1. The district court acted well within its discretion in ordering preliminary injunctive relief to preserve the status quo. With regard to the first element of the test for granting a preliminary injunction, the substantial likelihood of success on the merits, the United States easily established a prima facie case that the appellants' rejection of Ms. Pick's February 2007 request to keep the footbridge violated the Fair Housing Act's reasonable accommodation and modification

provisions. The appellants' argument that the *Noerr-Pennington* doctrine immunized their conduct from FHA liability is without merit. Contrary to the appellants' contention, the February 2007 request and the Zoning Committee's March 2007 rejection of this request were not protected conduct "incidental" to litigation. The letters were merely the latest exchange in a longstanding attempt by the Zoning Committee to get the Picks to remove the footbridge. And this Court should clearly resist broadly extending the doctrine to permit a defendant to immunize discriminatory conduct simply by filing a state-court action over the underlying dispute.

The United States satisfied the remaining factors for preliminary injunctive relief as well. As an initial matter, irreparable injury is presumed where, as here, a statutory violation is involved and the statute authorizes injunctive relief. Assuming, *arguendo*, that this presumption is rebuttable, the United States demonstrated that Ms. Pick could well suffer irreparable personal injury if the injunction is not issued and the current bridge is replaced. The appellants' argument that Ms. Pick will sustain only economic injury if the footbridge is removed is belied by the facts, which demonstrate that the proposed bridge is not nearly as safe as the current one for Ms. Pick. The United States also proved that the threatened physical injury to Ms. Pick outweighs (at best) the minimal harm the appellants will sustain if the footbridge remains in place for the duration of this litigation. Finally, the public interest is advanced by preventing housing discrimination.

2. The district court also correctly determined that the Anti-Injunction Act did not bar entry of the preliminary injunction the government sought. The Act prohibits a federal court from enjoining the proceedings of a state court except in specific circumstances. The Act does not apply in this case, not only because the United States is the plaintiff, but also because, at the time of the request for the preliminary injunction and the entry of the injunction itself, the state-court proceedings had concluded and were not enjoined or otherwise affected.

The appellants' contentions that Section 812(o) of the FHA limits the relief available to the United States to the relief available to the aggrieved party, who would be precluded by the Anti-Injunction Act from enjoining enforcement of the state-court judgment, is without merit. The plain language and structure of the Fair Housing Act contemplate a scheme in which a civil action by an aggrieved party and a civil action by the government are distinct. This dual mechanism for public and private enforcement recognizes that the interests of the United States, and the aggrieved party on whose behalf it is bringing suit, may diverge. Accordingly, as the plaintiff pursuant to Section 812(o) of the Act, the United States litigates both on behalf of the interests of the aggrieved party, and on behalf of the broader public interests in enforcing the FHA, and is not limited to relief available to the aggrieved party in pursuing the latter. The appellants' attempt to limit the litigation options available to the United States would lead to the anomalous result of the United States not being able to enforce the FHA merely

because a discriminator elects first to have his non-FHA claims resolved in state court.

ARGUMENT

I

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING PRELIMINARY INJUNCTIVE RELIEF

A. The United States Demonstrated A Substantial Likelihood Of Success On The Merits Of Its Fair Housing Act Claims

To prevail on its motion for a preliminary injunction, the United States must establish the following:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum v. *Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (citing *Speaks* v. *Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006)).

1. Defendants' Actions Violate The Fair Housing Act's Requirements Of Reasonable Accommodation And Reasonable Modification

The United States established the first factor of the preliminary injunction test — a substantial likelihood of success on the merits of its Fair Housing Act claims — by showing that the Zoning Committee's rejection of Ms. Pick's February 2007 request to keep the footbridge constituted a prima facie violation of the FHA's requirements of reasonable accommodation and reasonable modification. See *Ruiz* v. *Estelle*, 650 F.2d 555, 565 (5th Cir. 1981); 11A Charles

Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2948.3 (2d ed. 2009).

a. Reasonable Accommodation

Section 804(f) of the Fair Housing Act prohibits individuals from refusing "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B); 42 U.S.C. 3604(f)(2). To make a prima facie case, the United States must show that (1) Ms. Pick suffers from a "handicap" (disability) as defined in 42 U.S.C. 3602(h); (2) the appellants knew or should reasonably have been expected to know of her disability; (3) accommodation of the disability "may be necessary" to afford Ms. Pick an equal opportunity to use and enjoy her dwelling; and (4) the appellants refused to make such accommodation. See *United States* v. *California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997). "[A] violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings." *Groome Res. Ltd., L.L.C.* v. *Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (quoting *Bryant Woods Inn, Inc.* v. *Howard County, Md.*, 124 F.3d 597, 602 (4th Cir. 1997)). The denial of a reasonable accommodation "can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial." *Ibid.*

The evidence in the record demonstrates that the Zoning Committee's

rejection of Ms. Pick's February 2007 request to keep the footbridge violated its legal obligation to allow her a reasonable accommodation necessary to afford her the equal opportunity to use and enjoy her home. As the district court found in its order granting preliminary injunctive relief, the appellants do not dispute the first two elements of the reasonable accommodation prima facie case. CR 920. It is undisputed that Ms. Pick is "handicapped" as that term is defined in Section 3602(h) of the Act, because she has "a physical or mental impairment which substantially limits one or more of [her] major life activities," 42 U.S.C. 3602(h), namely, walking. The record strongly indicates that, as early as 2002, members of the Zoning Committee knew of Ms. Pick's disability, as they reviewed and approved her request to install the footbridge. CR 242, 270, 310. It is also undisputed that the appellants in this case knew of her disability no later than October 8, 2004, when she sent a letter to Mr. Billingsley notifying the Zoning Committee of her disability and explaining that removing the footbridge "would deny me access to our street and our mailbox since my disability severely affects my balance and limits my mobility." CR 270. The Zoning Committee subsequently sent Mr. Pick several letters in 2004 and 2005 demanding that the Picks remove the footbridge. CR 262-264. Indeed, this dispute has now been ongoing for more than five years.

The evidence in the record also supports the third element of the prima facie case, that accommodation of her disability through the use of the footbridge is very likely necessary to afford Ms. Pick an equal opportunity to use and enjoy her

home. Ms. Pick stated in a sworn and unrebutted declaration filed in district court that she suffers from a rare neurological disorder that causes her great difficulty in walking, balance problems, and constant pain. CR 126. Her two treating physicians confirmed this diagnosis in sworn depositions, and added that the prognosis for her recovery from this disease is poor and that her symptoms will worsen over time. CR 147-148, 150-151, 153-155, 195-196. The record shows that she and her husband installed the footbridge across a drainage ditch in front of their home to allow her to reach her mailbox and to get to the street in case of an emergency, and that, without the footbridge, she would be able to leave her home only with great difficulty, if at all. CR 126-127.

Finally, the evidence also indicates that the government will prove at trial that the appellants refused to make a reasonable accommodation for Ms. Pick. As early as 2002, the Zoning Committee was aware of Ms. Pick's disability, and allowed her to use a footbridge to accommodate that disability for two years without incident. CR 242, 270, 310. Beginning in 2004, however, the Zoning Committee sent letters to Mr. Pick demanding that the Picks remove the footbridge. CR 260-261. The Zoning Committee repeated its demands three times in 2004 and 2005, even after Ms. Pick formally informed the Zoning Committee by letter that she was disabled and needed the footbridge. CR 262-264.

Ms. Pick's February 2007 letter to the Zoning Committee stated that her disability was "severe" and asked to keep the footbridge so that she could access the street. CR 271. To this letter she attached a letter from one of her treating

physicians describing her condition and confirming a footbridge with handrails is "reasonable and required to prevent falling injury and allow her equal access [to the street] for a disabled person." CR 272. Ms. Pick's request was clearly a new request for a reasonable accommodation, made because her condition had deteriorated; she was again seeking an exception to the zoning policy. The appellants again rejected her request to keep the current footbridge and approved an alternative, but likely insufficient, design in September 2008, nineteen months later. The alternative design was not a reasonable accommodation because using it posed the substantial risk of personal injury to Ms. Pick. See pp. 27-28, *infra*. The Zoning Committee's rejection of Ms. Pick's February 2007 request to keep the footbridge was yet another rejection of a requested accommodation in a pattern that had continued for 2½ years. See Part I.A.2.a, *infra*.

b. Reasonable Modification

Section 804(f) of the Fair Housing Act prohibits individuals from refusing "to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises." 42 U.S.C. 3604(f)(3)(A); 42 U.S.C. 3604(f)(2). As stated above, pp. 15-18, *supra*, all elements of a prima facie violation of this portion of the FHA have been satisfied.[3]

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[3] The United States also alleged in its complaint that the appellants violated the FHA by treating Ms. Pick on unequal terms as compared to individuals who do not have disabilities. CR 19. This claim is not at issue on this appeal because the

(continued...)

2. *The* Noerr-Pennington *Doctrine Does Not Immunize Defendants' Actions From Fair Housing Act Liability*

In their opening brief, the appellants do not challenge the district court's finding that the United States established a prima facie case of discrimination in violation of the Fair Housing Act. Instead, the appellants assert (Br. 12-13) only that the United States cannot establish a substantial likelihood of success on the merits because their actions are immunized from FHA liability as a matter of law by the *Noerr-Pennington* doctrine. The appellants contend (Br. 18-23) that the Zoning Committee's rejection of Ms. Pick's February 2007 request to keep the footbridge was conduct "reasonably attendant" to litigation because granting this request would have affected the state-court lawsuit, and appear to argue that absent these letters there is no basis for liability. This contention is without merit.

a. *The Zoning Committee Engaged In A Multi-Year Campaign To Compel The Picks To Remove The Footbridge, Culminating In Its Rejection Of Ms. Pick's February 2007 Request*

Contrary to the appellants' argument, this case is not solely about an exchange of letters in early 2007. The Zoning Committee's rejection of Ms. Pick's February 2007 request to keep the footbridge was the latest action in the longstanding effort to compel the Picks to remove the footbridge. That effort commenced well before the Zoning Committee initiated litigation against Mr. Pick in state court in 2006. The Picks notified the Zoning Committee in 2002 of their

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[3](...continued)
district court did not address it in its order granting the preliminary injunction.

intention to install a footbridge necessitated by Ms. Pick's disability, and the footbridge remained in place for the next two years.[4] CR 242, 930. In September 2004, however, the Zoning Committee changed course and sent Mr. Pick two letters demanding that the Picks remove the footbridge. CR 260-261. After Ms. Pick formally notified the Zoning Committee of her disability and requested to keep the footbridge in an October 2004 letter, the Zoning Committee responded by sending Mr. Pick three more letters, in October 2004, October 2005, and November 2005, each one reiterating its demand that the Picks remove the footbridge. CR 262-264.

Finally, in February 2007, Ms. Pick made yet a new request to convince the Zoning Committee to allow her to keep the footbridge, sending it a letter in which she described her condition as "severe" and attaching a letter from her physician confirming her need for the footbridge. CR 271-272. Consistent with its prior actions, the Zoning Committee denied Ms. Pick's request in its March 2007 meeting and informed Ms. Pick of its decision nearly a month later. CR 265, 278. There clearly is evidence beyond the 2007 exchange of letters of the appellants' violation of the Fair Housing Act, which places the 2007 rejection of her request firmly within the ongoing course of conduct of the Zoning Committee.

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[4] The knowledge of the then-members of the Zoning Committee in 2002 that Ms. Pick needed the footbridge because of her disability is imputed to the Committee under principles of vicarious liability. See *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003) ("[I]t is well established that the [Fair Housing] Act provides for vicarious liability.").

b. The Noerr-Pennington *Doctrine Protects Typical Litigation Activities, Not Activities That Merely Have An Impact On Litigation*

The *Noerr-Pennington* doctrine provides that, as a general rule, lobbying and other efforts to obtain governmental action do not violate the antitrust laws, even when those efforts are intended to eliminate competition or otherwise restrain trade. The Supreme Court first announced this doctrine in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), where it held that the Sherman Anti-Trust Act, 15 U.S.C. 1 *et seq.*, did not bar an association of railroad companies from seeking legislation and regulations detrimental to the trucking industry. *Id.* at 136-140. The Court subsequently extended this holding to cover petitioning of administrative agencies, see *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-672 (1965), and courts, see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). *Noerr-Pennington* immunity is based upon the "inextricably associated" First Amendment right of citizens to petition the government for redress of grievances and the Sherman Act. *Bayou Fleet, Inc.* v. *Alexander*, 234 F.3d 852, 859 n.7 (5th Cir. 2000), cert. denied, 532 U.S. 905 (2001).

Viewed in the context of its multi-year campaign to compel the Picks to remove their footbridge, the Zoning Committee's denial of Ms. Pick's February 2007 request to keep the footbridge, despite its knowledge of her disability, clearly raised issues concerning the Fair Housing Act's requirement of reasonable accommodation. See Part I.A.1, *supra*. As the district court correctly determined,

the letters were not protected by the *Noerr-Pennington* doctrine, as they were *not* conduct "incidental to litigation." CR 921. Neither the February 2007 letter requesting to keep the footbridge, nor the minutes of the Zoning Committee's March 2007 meeting in which it rejected Ms. Pick's request, nor the Zoning Committee's letter to Ms. Pick informing her of its decision, referred to the then-ongoing state-court litigation. As such, the Zoning Committee's rejection of Ms. Pick's request was not "reasonably and normally attendant upon effective litigation." *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983). Instead, the "context and nature" of Ms. Pick's request and the Zoning Committee's rejection thereof, like the prior demands to remove the footbridge, "make [them] the type of * * * activit[ies] that ha[ve] traditionally had [their] validity determined by the [Fair Housing Act] laws themselves." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 505 (1988). In other words, this exchange is not typical litigation activity, but rather is "more aptly * * * characterized as [Fair Housing Act] activity" — a request for reasonable accommodation or modification that is rejected — that happens to have an impact on litigation. *Id.* at 507.

The appellants argue (Br. 18-23) that their rejection of Ms. Pick's February 2007 request to keep the footbridge was the equivalent of a rejection of a settlement offer incidental to litigation because granting her request would have mooted the state-court lawsuit. This argument is meritless. As an initial matter, the district court declined to find that Ms. Pick's February 2007 request to keep

the existing footbridge was an offer of settlement. CR 918. This clearly is equivalent to a finding that the February 2007 request was not an offer of settlement, and as such, this Court reviews it for clear error. And Ms. Pick's action requesting, yet again, to keep the footbridge would hardly be a means to settle a suit where the appellants sought through their lawsuit to have the bridge immediately removed.

Finally, even if this Court believes that the *Noerr-Pennington* doctrine stands for the general proposition that petitioning activity should be immune from liability, that view hardly justifies applying the doctrine to cover the appellants' conduct in this case. The appellants' novel interpretation of the scope of *Noerr-Pennington* protection will expand the doctrine far beyond the circumstances in which courts have applied it.[5] The appellants are asking this Court to take the

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[5] The few courts that the appellants have identified (Br. 13-14) as immunizing activity from FHA liability pursuant to *Noerr-Pennington* have protected conduct directly related to litigation. In *White* v. *Lee*, 227 F.3d 1214, 1231-1234 (9th Cir. 2000), the Ninth Circuit applied the *Noerr-Pennington* doctrine to protect a state-court lawsuit brought by several individuals who sought to enjoin the conversion of a motel into a multi-family housing unit for homeless persons. In *New West, L.P.* v. *City of Joliet*, 491 F.3d 717, 721-722 (7th Cir. 2007), the Seventh Circuit opined that the *Noerr-Pennington* doctrine protects a municipality's lobbying of HUD and its filing of lawsuits to condemn property occupied by low-income individuals. And in *Pathways, Inc.* v. *Dunne*, 172 F. Supp. 2d 357, 365-366 (D. Conn. 2001), vacated in part on other grounds, 329 F.3d 108 (2d Cir. 2003), a district court concluded that the *Noerr-Pennington* doctrine applied to a neighborhood association's petitioning of a planning commission and filing of a state-court lawsuit to oppose the purchase and renovation of a house for use as a group home for low-income individuals with mental handicaps. These cases thus extend the breadth of *Noerr-Pennington* protection but do not fundamentally alter its coverage.

unprecedented position that once litigation commenced in this case, all conduct concerning the subject of the litigation — *e.g.*, every prior zoning committee meeting, every decision made, and every letter sent even before the suit was filed — automatically became "incidental" to litigation and protected from being used as evidence of discrimination.

This interpretation could easily erect a serious and unnecessary barrier to the United States' and private parties' ability to enforce the Fair Housing Act in many instances. Many Fair Housing Act cases, including this one, can go to state court over a zoning, eviction or similar issue that is unrelated to the FHA claims being asserted. Under the use of *Noerr-Pennington* the appellants espouse, an entity can file a state-court lawsuit, and thereby immunize documentation and conduct evincing discriminatory activity that preceded the state-court action or went on during the action, even if such documentation or conduct was not tied directly to the state-court action. Given the importance of combating unlawful housing discrimination, Congress and the courts could not have intended that defendants be able to insulate themselves so easily from FHA liability. This Court should therefore reject the appellants' attempt to shield their otherwise actionable discriminatory conduct by their mere filing of a state-court lawsuit about the footbridge. Cf. *Primetime 24 Joint Venture* v. *National Broad., Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (noting that a rejection of a settlement offer that "would, absent litigation, violate the Sherman Act * * * cannot be immunized by the existence of a * * * lawsuit") (internal citations omitted).

B. The United States Satisfied The Remaining Factors For Preliminary Relief In This Case

The United States easily satisfied the remaining factors a court must consider in deciding whether to grant preliminary relief: whether there is a substantial threat of irreparable injury if the injunction is not issued; whether the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and whether the grant of an injunction will not disserve the public interest. These factors essentially involve a balancing of the relevant benefits and harms of a preliminary injunction to the public and the affected parties.

As a threshold matter, the irreparable injury element here is presumed upon a violation of the Fair Housing Act. This Court has held that "[w]here * * * an injunction is authorized by statute and the statutory conditions are satisfied[,] * * * the usual prerequisite of irreparable injury need not be established." *United States* v. *Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969) (footnote omitted). Instead, "in such a case, irreparable injury should be presumed from the very fact that the statute has been violated." *Ibid.* These principles apply to this case. Sections 812(o)(2) and 813(c)(1) of the Act, read in conjunction, provide that a court may grant a temporary injunction to enjoin "a discriminatory housing practice [that] has occurred or is about to occur." See 42 U.S.C. 3612(o)(2); 42 U.S.C. 3613(c)(1). The district court determined that the United States made a prima facie showing that the appellants violated the Fair Housing Act's

requirement of reasonable accommodation. CR 920-921. Accordingly, this Court should presume irreparable injury.

Consistent with the above conclusion, several federal courts have held that irreparable injury is presumed where the plaintiff shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations. See, *e.g.*, *Gresham* v. *Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir.), cert. denied, 469 U.S. 882 (1984); *Stewart B. McKinney Found.* v. *Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1208 (D. Conn. 1992); *Baxter* v. *City of Belleville*, 720 F. Supp. 720, 734 (S.D. Ill. 1989); *Bronson* v. *Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153 (S.D.N.Y. 1989); cf. *Silver Sage Partners, Ltd.* v. *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (violation of Fair Housing Act established reasonable likelihood of future violations warranting injunctive relief). Although this Court has not yet applied this presumption to Fair Housing Act cases, it has applied the presumption to Age Discrimination in Employment Act (ADEA) cases, holding that "when a civil rights statute is violated, 'irreparable injury should be presumed from the very fact that the statute has been violated.'" *E.E.O.C.* v. *Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (quoting *Hayes*, 415 F.2d at 1045). This Court reasoned that "[t]he public interest protected by EEOC enforcement of the ADEA justifies extending the *Hayes* presumption to ADEA retaliation cases." *Id.* at 1091. Given the public interest protected by enforcement of the FHA, see pp. 29-30, 33-35, *infra*, this logic compels this Court to apply the *Hayes*

presumption of irreparable injury to a statutory violation of the Fair Housing Act.[6]

The appellants do not dispute that binding precedent from this Court warrants the conclusion that irreparable injury should be presumed from a violation of the Fair Housing Act. Instead, the appellants assert, without citation (Br. 37-38), that the presumption of irreparable injury is rebuttable because the evidence in this case disproves such injury. Assuming, *arguendo*, that such a presumption is rebuttable, the appellants are mistaken.

To establish a substantial threat of irreparable injury, the United States must "establish that at the time of the injunction [Ms. Pick] was under a substantial threat of harm which cannot be undone through monetary remedies." *Spiegel* v. *City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981) (internal quotation marks omitted). The United States easily satisfied this standard. Ms. Pick asserted in a sworn declaration filed in district court that, without the current footbridge, and without the assistance of another individual, she would be able to leave the house only with great difficulty, if at all. CR 127. She asserted in another sworn declaration that the proposed replacement bridge "does not meet my needs or adequately protect me from injury when walking from my house to the street" because it will not allow her to hold both of the handrails when crossing. CR 776-777. Her doctors supported her statements. CR 157, 165-166, 213. The

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[6] In fact, *Gresham*, the seminal case for the proposition that irreparable injury should be presumed from the violation of fair housing statutes, cited *Hayes* in support of its conclusion. See *Gresham*, 730 F.2d at 1423.

substantial threat of personal, physical injury that Ms. Pick would face if the footbridge was removed, even were it to be replaced with the proposed alternative, suffices to establish irreparable injury for purposes of a preliminary injunction. See *Shapiro* v. *Cadman Towers, Inc.*, 51 F.3d 328, 332-333 (2d Cir. 1995) (finding irreparable harm where plaintiff "was subject to risk of injury, infection, and humiliation in the absence of" a reasonable accommodation).

The appellants' challenges to the irreparable injury element are without merit. First, they assert (Br. 38-39) that the United States failed to prove that Ms. Pick would suffer irreparable, personal injury if the footbridge is removed, because it will be replaced by an alternative bridge designed to her specifications and the only injury she will sustain is the economic cost of the latter. This contention is belied by Ms. Pick's own sworn statements that she did not request the alternative footbridge, and that this alternative footbridge would not serve her needs or adequately protect her from injury. CR 776. In a sworn declaration filed with the district court, Ms. Pick stated that the alternative design she proposed to the Zoning Committee would cause her "greater balance problems" and would put her "at greater risk of falling" (CR 127), indicating that this design did not negate the substantial threat of personal injury.[7]

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[7] The fact that the alternative footbridge approved by the Zoning Committee has handrails, which the alternative bridge Ms. Pick originally envisioned did not, does not change the accuracy of this assessment. Ms. Pick stated in a sworn declaration that because she becomes dizzy and experiences balance problems when walking over the bridge, she needs to hold on to both

(continued...)

The appellants also contend (Br. 39-40) that the United States will not suffer irreparable injury if the injunction is denied because it possessed the adequate remedy of law of intervening in the state-court lawsuit. The United States' showing of a substantial threat of irreparable injury to Ms. Pick eliminates the need to show that it would suffer irreparable injury if the injunction is denied and renders this contention moot. Cf. *E.E.O.C.* v. *Anchor Hocking Corp.*, 666 F.2d 1037, 1043 (6th Cir. 1981) (when EEOC brings Title VII suit on behalf of aggrieved party and moves for preliminary injunction, it may prove irreparable injury either to the EEOC or to the charging party).

Balanced against the substantial threatened harm to Ms. Pick if the injunction is denied is the minimal harm that will result to the appellants if the injunction is granted pending the end of this litigation. The appellants do not mention in their brief any harm that would befall them if the footbridge remains in place pending resolution of this action, and the district court correctly found that the appellants will suffer little or no harm if the footbridge remains in place, as it has done so without incident since 2002. CR 923. The third factor thus weighs heavily in favor of the preliminary injunction.

Finally, with regard to the public interest factor, the preliminary injunction serves a compelling public interest by preventing unlawful housing discrimination.

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[7](...continued)
handrails while crossing, which she can do with the current bridge, but will not be able to do with the proposed bridge due to its greater width. CR 776-777.

Congress has determined that it is in the public interest to prevent discrimination in housing practices, see 42 U.S.C. 3601, and the Supreme Court has echoed Congress's sentiments, finding that the anti-discrimination objective of the FHA is an "overriding societal priority." *Meyer* v. *Holley*, 537 U.S. 280, 290 (2003). Thus, the balance of the equities weighs heavily in favor of the preliminary injunction.

II

THE ANTI-INJUNCTION ACT DOES NOT BAR ENTRY OF A PRELIMINARY INJUNCTION

A. The Anti-Injunction Act Is Inapplicable Because The Injunction Was Issued After The State-Court Litigation Had Concluded And Because The United States Is The Plaintiff

The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. 2283. By the Act's plain language, a prerequisite for its applicability is a pending state-court proceeding with which the injunction sought would interfere, either directly or indirectly. In this case, the state-court litigation ended on July 24, 2008, when the state court issued a final judgment that was not appealed. On August 4, 2008, *after* this final judgment was issued, the United States moved in district court for a preliminary injunction, which the court granted on June 29, 2009. Because the state-court proceedings had already concluded when the United States sought injunctive relief, which the

district court granted, the Anti-Injunction Act poses no barrier to the entry of the injunction. See *Pathways, Inc.* v. *Dunne*, 329 F.3d 108, 114 (2d Cir. 2003) (vacating district court's order dismissing plaintiff's claim for injunctive relief on basis of Anti-Injunction Act because defendants' state-court lawsuits had concluded after order issued, and thus, "there are no pending state court claims that the [defendants] are pursuing against [the plaintiff] and no completed state proceeding that [the plaintiff] seeks to avoid").

Supreme Court precedent provides that the Anti-Injunction Act does not bar the entry of an injunction for the additional reason that the Act does not apply "when the plaintiff in the federal court is the United States itself." *Mitchum* v. *Foster*, 407 U.S. 225, 235-236 (1972); see also *United States* v. *Composite State Bd. of Medical Exam'rs*, 656 F.2d 131, 135 (5th Cir. 1981). The Court reasoned that "[t]he frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings * * * would be so great that we cannot reasonably impute such a purpose to Congress." *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-226 (1957). The district court thus correctly determined (CR 919) that because the United States is the plaintiff in this case, the Anti-Injunction Act does not preclude it from seeking a preliminary injunction. See *United States* v. *Village of Palatine*, 845 F. Supp. 540, 542-543 (N.D. Ill. 1993) (district court had power to grant United States' request for injunctive relief under Fair Housing Act, even though order might interfere with state-court civil action); *United States* v.

Commonwealth of Puerto Rico, 764 F. Supp. 220, 226-227 (D.P.R. 1991) (Anti-Injunction Act did not preclude United States from seeking preliminary injunction under Fair Housing Act to stop the closure of a nursing home ordered by commonwealth zoning agency).

B. The United States Can Seek An Injunction To Vindicate Its Broader Public Interests In Enforcing The Fair Housing Act And Is Not Limited To Relief Available To The Aggrieved Party

The appellants do not dispute that the Anti-Injunction Act is inapplicable where the state-court proceedings have concluded and the United States is the plaintiff in federal court. Instead, the appellants contend (Br. 30-33) that the government cannot seek an injunction because Section 812(o) limits the United States to the relief available to the aggrieved party, Ms. Pick, who would be precluded by the Anti-Injunction Act from enjoining enforcement of the state-court judgment. The appellants also argue (Br. 35-37) that the logic behind Court precedent, holding that the Anti-Injunction Act is inapplicable to the United States as plaintiff, is absent here because the injunction sought serves no "superior federal interest," only the personal interest of Ms. Pick. These interrelated arguments are without merit.

Under the FHA, once the Secretary of HUD decides that there is a reasonable cause to believe that a discriminatory housing practice has occurred and a charge is filed, either the complainant or the respondent can choose to place the case into the federal courts. 42 U.S.C. 3612(a). The United States then files its action on behalf of the aggrieved person pursuant to Section 812(o) of the Act,

42 U.S.C. 3612(o). Once the United States sues, the aggrieved party may nonetheless intervene as of right in the civil action. 42 U.S.C. 3612(o)(2). This intervention provision "acknowledges the likelihood of some divergent interests [between the United States and the aggrieved party]." *United States* v. *California Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1379 (9th Cir. 1997); cf. *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc) ("The Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."). Congress was well aware of how to phrase a statute to limit the United States to securing relief only for the aggrieved person, as evidenced by the Uniformed Services Employment and Reemployment Rights Act of 1994, which authorizes the Attorney General, upon referral of a employment discrimination complaint by the Secretary of Labor, to "appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person." 38 U.S.C. 4323(a).

In fact, the Fair Housing Act itself and the Supreme Court both recognize the United States' legally distinct interests in enforcing the Act. The Act states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. The Supreme Court has found this anti-discrimination objective of the FHA to be an

"overriding societal priority." *Meyer* v. *Holley*, 537 U.S. 280, 290 (2003); accord *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting that the eradication of housing discrimination is a policy that Congress considered to be "of the highest priority"); see also *Housing Opportunities Made Equal, Inc.* v. *Cincinnati Enquirer, Inc.*, 943 F.2d 644, 652 (6th Cir. 1991) (observing that the government interest in promoting fair housing and halting discriminatory housing is "substantial"). Accordingly, the United States litigates on behalf of the interests both of an aggrieved party and of the broader public in enforcing the Act and preventing housing discrimination when it brings suit on behalf of the aggrieved party pursuant to Section 812(o) of the Fair Housing Act.

The conclusion that the government possesses broader public interests when bringing suit on behalf of an aggrieved party pursuant to Section 812(o) of the FHA finds support in analogous statutory and case law regarding the Equal Employment Opportunity Commission's (EEOC) enforcement of Title VII on behalf of aggrieved parties. In an employment discrimination action, the aggrieved party files a complaint with the EEOC, which investigates the claim and engages in informal dispute resolution if it finds reasonable cause to believe that discrimination has occurred. 42 U.S.C. 2000e-5(b). If these informal attempts fail, the EEOC may then bring a civil action against any non-governmental respondent. 42 U.S.C. 2000e-5(f)(1). The aggrieved party may intervene in the EEOC's civil action and may file a civil action of its own at the end of the EEOC's 180-day period of exclusive administrative jurisdiction if the agency has not

moved the case to the party's satisfaction. *Ibid.* In interpreting this provisions, the Supreme Court has held that the government "is not merely a proxy for the victims of discrimination[.] * * * When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Tel. Co. of the Northwest* v. *E.E.O.C.*, 446 U.S. 318, 326 (1980); see also *Riddle* v. *Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 922 (11th Cir. 1990) ("The [Supreme] Court's analysis of the relationship between the EEOC and an individual victim of discrimination indicates that the interests of the two parties are not always identical. The EEOC is primarily interested in securing equal employment opportunity in the workplace.").

The appellants' attempt (Br. 33-35) to distinguish the Title VII authorities is unavailing. Contrary to the appellants' contention (Br. 34), the absence in 42 U.S.C. 2000e-5(f) of the phrase "on behalf of" and of another provision's remedies by reference is hardly dispositive in light of the significant similarities that exist between the relevant FHA and Title VII provisions. Like Section 812(o) of the Fair Housing Act, Section 2000e-5(f)(1) establishes the right to intervene by the aggrieved party — the most significant recognition that the interests of the government and of the aggrieved party will likely diverge — and endows the government with exclusive jurisdiction to bring the civil action, indicating that the

government litigates in a dual capacity.[8] No more convincing is the appellants' suggestion (Br. 34-35) that the persuasive value of Title VII cases is limited to the means of establishing violations of the Fair Housing Act. That courts have generally analogized the FHA to Title VII in proving claims does not prove that they should not analogize the two statutes in other circumstances where the comparison is warranted.

Because the United States possesses a legally distinct interest when it brings suit on behalf of an aggrieved party, it is not limited to relief available to that party. Instead, in such a suit, the United States is implementing its interest in preventing housing discrimination, and may seek an injunction to vindicate that interest where necessary. In this case, an injunction is necessary to preserve Ms. Pick's right to keep her footbridge pending resolution of the government's FHA claims. Moreover, because the United States possesses a superior federal interest in enforcing the Fair Housing Act, it may assert this interest in federal court and is not limited, as the appellants suggest (Br. 36), to exercising its rights in the state-court lawsuit.

The appellants' attempt to limit the relief available to the United States fails as a matter of statutory interpretation as well. Section 812(o)(3) provides that "if the court finds that a discriminatory housing practice has occurred or is about to

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[8] The ability of a Title VII aggrieved party to bring suit at the end of the EEOC's 180-day period of exclusive administrative jurisdiction, if the agency has not moved the case to the party's satisfaction, does not change this analysis.

occur, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 3613 of this title." 42 U.S.C. 3612(o)(3). The next sentence of Section 812(o)(3) states: "Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 3613 of this title shall also accrue to that aggrieved person in a civil action under this subsection." 42 U.S.C. 3612(o)(3). If the United States cannot, in any circumstances, secure relief beyond that which the individual can secure, the second sentence cited above would have no meaning. These two sentences, read together, evince Congress's intent that Section 812(o)(3) not bind the United States to the limitations on the relief available to the aggrieved party if the latter sued in court.

Plain language aside, the appellants' interpretation of Section 812(o)(3) also leads to a result that Congress could not have intended. Under the interpretation of Section 812(o)(3) that the appellants propose, the United States, acting through the Secretary of HUD, would be authorized to move in administrative proceedings for an injunction against the appellants preventing the removal of the footbridge, see 42 U.S.C. 3612(g)(3), but could not seek an injunction in this case merely because the appellants elected to have the claims asserted in the Charge resolved in federal court. The appellants' interpretation would also nullify the aforementioned Supreme Court precedent holding that the Anti-Injunction Act does not apply to the United States as plaintiff in federal court. This outcome cannot be the law. See *United States* v. *Izaguirre-Flores*, 405 F.3d 270, 277 (5th

Cir.) ("[W]e will not interpret a statute in a fashion that will produce absurd results."), cert. denied, 546 U.S. 905 (2005).

Relevant case law supports the conclusion that the United States may seek an injunction when bringing suit on behalf of an aggrieved party pursuant to Section 812(o) of the FHA, even if the aggrieved party could not. In both cases the appellants cite (Br. 31) — *United States* v. *Forest Dale, Inc.*, 818 F. Supp. 954 (N.D. Tex. 1993) and *United States* v. *Wagner*, 930 F. Supp. 1148 (N.D. Tex. 1996) — the district court held that, where the United States brings a civil action on behalf of an aggrieved party, the district court may award the same relief that the aggrieved party could obtain if he or she brought a private action. See *Forest Dale*, 818 F. Supp. at 967-968; *Wagner*, 930 F. Supp. at 1152. Because these holdings occurred in the context of discussions of the availability of monetary damages, these cases stand for the unremarkable proposition that the United States may recover the same amount of damages on behalf of an aggrieved party that the latter could recover if it filed a civil action itself, and say nothing about the availability of injunctive relief.

Finally, the appellants' citation (Br. 32-33) to Section 814 of the Fair Housing Act also does not change this analysis. Section 814 provides that the United States may bring a civil action in federal court to address "a pattern or practice" of housing discrimination, or to address housing discrimination against "any group of persons" that "raises an issue of general public importance." 42 U.S.C. 3614(a). The United States did not rely upon Section 814 as a basis for its

lawsuit against the appellants.

CONCLUSION

This Court should affirm the district court's order granting the United States' motion for a preliminary injunction.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

_____
MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, two copies of the foregoing BRIEF FOR APPELLEE, along with an electronic copy on disk of the same, were served by FedEx overnight delivery, to the following counsel of record:

Ken Carroll
Tod B. Edel
Thomas F. Allen, Jr.
Carrington, Coleman, Sloman & Blumenthal, L.L.P.
901 Main Street, Suite 5500
Dallas, Texas 75202

Merwyn D. Price
2514 Boll Street
Dallas, Texas 75204

M. Fletcher Reynolds
219 N. Smythe Street
Bowie, Texas 76230

_____
CHRISTOPHER C. WANG
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains no more than 10,095 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
CHRISTOPHER C. WANG
Attorney

Date: January 13, 2010