

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ASTRALIS CONDOMINIUM ASSOCIATION,

Petitioner/Cross-Respondent

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, ON BEHALF OF
CARLOS GARCÍA-GUILLÉN AND SONIA VÉLEZ-AVILÉS,

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW OF A DECISION OF THE
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND CROSS-
APPLICATION FOR ENFORCEMENT OF THE AGENCY'S ORDER

BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 09-2497 & 09-2589

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Petitioner/Cross-Respondent

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING
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CARLOS GARCÍA-GUILLÉN AND SONIA VÉLEZ-AVILÉS,

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW OF A DECISION OF THE
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND CROSS-
APPLICATION FOR ENFORCEMENT OF THE AGENCY'S ORDER

BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

STATEMENT OF JURISDICTION

The Administrative Law Judge (ALJ) and the Secretary of the United States Department of Housing and Urban Development (HUD) had subject matter jurisdiction under 42 U.S.C. 3612(b)-(h). The ALJ's September 10, 2009, Initial Decision and Order that disposed of all claims became the final agency decision on October 10, 2009. See 42 U.S.C. 3612(h)(1). On November 2, 2009, Astralis timely sought review in this Court (No. 09-2497). On November 18, 2009, the

Secretary filed an application for enforcement of the agency's order (No. 09-2589).

This Court has jurisdiction over the appeals pursuant to 42 U.S.C. 3612(i), 28 U.S.C. 2342(6), and 42 U.S.C. 3612(j)(1). Venue properly lies in this Court under 42 U.S.C. 3612(i)(2) because Astralis's discriminatory housing practice took place in Carolina, Puerto Rico, within the First Circuit.¹

STATEMENT OF ISSUE

Whether the ALJ's ruling that García-Guillén and Vélez-Avilés are entitled – pursuant to the Fair Housing Amendments Act of 1988 – to the reasonable accommodation of assigned parking spaces near their residence is arbitrary and capricious or based on factual findings not supported by substantial evidence.

STATEMENT OF THE CASE

1. This case requires this Court to review HUD's application of the Fair Housing Act's (FHA) reasonable accommodation requirement. As originally enacted, the FHA prohibited discrimination in housing on the basis of race, color, national origin, and religion. See Title VIII of the Civil Right Act of 1968, Pub. L. No. 90-284, 82 Stat. 88. In 1988, the Fair Housing Act was amended to prohibit discrimination on the basis of disability. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. Section 804(f)(2)(A) of the amended FHA,

¹ This brief uses the following abbreviations: "Add. ____" for the page number of the Addendum to Astralis's brief; "App. ____" for the page number of the Respondent/Cross-Petitioner's Appendix; and "Br. ____" for the page number of Astralis's opening brief.

42 U.S.C. 3604(f)(2)(A), states that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of * * * that person.” Section 804(f)(3), 42 U.S.C. 3604(f)(3), states:

For purposes of this subsection, discrimination includes * * * (B) a refusal 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.

HUD has issued regulations making clear that the obligation to accommodate extends to “public and common use areas.” 24 C.F.R. 100.204(a). Indeed, HUD’s regulations specify that accommodation is required in the area of parking. See 24 C.F.R. 100.204(b), Example (2) (discussed at pp. 22-25, *infra*).

The FHA also prohibits retaliation against persons who exercise their right to a reasonable accommodation: “It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, * * * any right granted or protected by section * * * 3604 * * * of this title.” 42 U.S.C. 3617.

2. At the end of February 2007, Carlos García-Guillén and his wife Sonia Vélez-Avilés filed a fair housing complaint with HUD against the Astralis Condominium Association. Add. 10.

On September 11, 2008, HUD filed a charge of discrimination on behalf of Complainants García-Guillén and Vélez-Avilés against the Astralis Condominium

Association. Add. 1. The charge alleged that Astralis unlawfully discriminated on the basis of disability in violation of the FHA. Specifically, the charge alleged that Astralis failed to provide a reasonable accommodation to García-Guillén and Vélez-Avilés, in violation of 42 U.S.C. 3604(f)(2)(A) and 42 U.S.C. 3604(f)(3)(B), and that it retaliated against García-Guillén and Vélez-Avilés in violation of 42 U.S.C. 3617. Add. 1-2.

On January 8 and 9, 2009, and February 9 and 10, 2009, an administrative hearing was held before an ALJ. Add. 2. On September 10, 2009, the ALJ issued an Initial Decision and Order, concluding that Astralis violated 42 U.S.C. 3604(f)(2)(A), 42 U.S.C. 3604(f)(3)(B), and 42 U.S.C. 3617. Add. 24. The ALJ assessed damages and a civil penalty and ordered other injunctive relief. Add. 27-29.

Pursuant to 42 U.S.C. 3612(h)(1) and 24 C.F.R. 180.680(b)(2), the ALJ's decision became the final agency decision on October 10, 2009, because the Secretary of HUD did not issue a decision before that date.

On November 2, 2009, pursuant to 42 U.S.C. 3612(j), Astralis filed in this Court a Petition for Review of the ALJ's September 10, 2009, Initial Decision and Order. On November 18, 2009, the Secretary filed a cross-application for enforcement of the agency's order.

On November 23, 2009, Astralis filed a motion in this Court seeking a stay of HUD's final agency decision. This Court denied the motion because Astralis

“failed to show that it would suffer irreparable injury absent a stay” and because it “has also not shown a likelihood of success on the merits.” 12/17/09 Order.

STATEMENT OF FACTS

Carlos García-Guillén and his wife Sonia Vélez-Avilés have medical problems that make walking very difficult. Add. 4-6. When García-Guillén and Vélez-Avilés moved to the Astralis Condominium Complex in December 2005, they asked to be assigned two handicapped accessible parking spaces that are 45 feet from their building entrance, instead of inaccessible spaces that are 230 feet away. Add. 5-7. This request was ultimately denied by the Astralis Condominium Association and no other reasonable accommodation was made. Add. 10-11.

1. García-Guillén And Vélez-Avilés Have Great Difficulty Walking Because Of Their Disabilities

García-Guillén has a degenerative hip condition and experiences severe pain in his left knee and his lower back. Add. 5; App. 22-23. When he stands up, he has strong back pain and must stand still until it subsides. Add. 5; App. 22, 25. He also experiences particularly severe back pain when standing for a long time and severe knee pain when flexing his left knee. Add. 5; App. 22. When walking, he sometimes loses his balance. Add. 6; App. 25. García-Guillén takes several prescription medications for his back and leg pain, as well as his high blood pressure and high cholesterol. Add. 6; App. 24.

Since before moving to Astralis, García-Guillén has used some kind of assistive device to help him walk. From the time he moved in until his hip operation in April 2007, he used crutches. Add. 5; App. 22-23. For three weeks after his operation, he used a walker. Add. 5-6. After that, he started using a cane. Add. 6; App. 22, 27.

Because of his disabilities and the assistive devices he must use as a consequence of those disabilities, García-Guillén has a great deal of difficulty getting in and out of his car. Add. 5. Indeed, it is when García-Guillén is getting in and out of the car that his disabilities affect him the most. App. 25. His knee pain is most severe when his knee is flexed while getting in and out of the car. Add. 5. In order to get into his car, García-Guillén has to open his car door wide and enter the car backwards with his assistive device in front of him. Add. 6; App. 25. He must get into the car slowly without raising his left leg higher than waist level. Add. 6; App. 25-27.

The parking spaces assigned to García-Guillén and Vélez-Avilés are very narrow. App. 26. They are not wide enough for García-Guillén to open his car door completely. Add. 5. This makes getting in and out of his car even more difficult. Add. 6. Indeed, when neighbors park next to him, García-Guillén has often had to ask his daughter to back his car up so he can open the car door wide enough to get in. App. 26.

Vélez-Avilés has a muscular skeletal condition, osteoarthritis of the knees, diabetes-related distal neuropathy, disc protrusions, and other spinal injuries.

Add. 6. She sees numerous doctors for these conditions, takes numerous medications, and requires a cane to walk. App. 13-16. Because of her medical condition, she has extreme knee pain and her entire skeletal system hurts. App. 11. She also experiences numbness in her extremities, especially her legs. App. 11. She has difficulty walking. App. 11. She requires help from her husband to get dressed. App. 11-12. On a bad day, she is confined to the house and required to lie down because of her extreme leg pain. App. 12, 15. On a slightly better day, she is able to leave the house but only by taking more than her normal dose of medication. Add. 6; App. 15. In addition to these maladies affecting her mobility, Vélez-Avilés suffers from severe anxiety, depression, and insomnia. Add. 6.

2. *García-Guillén And Vélez-Avilés Requested An Accommodation*

García-Guillén and Vélez-Avilés requested exclusive use of the two handicapped parking spaces closest to their building. The difference between the parking spaces García-Guillén and Vélez-Avilés were assigned and those they requested as a reasonable accommodation is considerable. When they park in the assigned spaces, they must walk 230 feet to the entrance of their building; the handicapped spaces they requested are 45 feet away. Add. 20. The requested parking spaces also have access aisles that give García-Guillén and Vélez-Avilés the additional maneuvering space they need to get in and out of their cars. Add. 7.

After moving to Astralis, García-Guillén and Vélez-Avilés made their accommodation request both orally and in writing. Add. 7; App. 2. They also offered to convey their assigned parking spaces to the Association in exchange for the handicapped spaces they requested. App. 45.

In the spring of 2006, Dr. César Ortiz-Sorrentini – then president of Astralis’s Board of Directors – met with García-Guillén and Vélez-Avilés three times about their accommodation request. Add. 7. During these meetings, Ortiz-Sorrentini discussed García-Guillén’s and Vélez-Avilés’s medical conditions. Add. 7-8. García-Guillén and Vélez-Avilés showed him medical documents that supported their need for the handicapped parking spaces. Add. 7-8. Ortiz-Sorrentini brought the accommodation request to the Astralis Board for consideration. Add. 8. He told the Board that he was inclined to grant the request. Add. 8. Specifically, he said he thought the Board should allow García-Guillén and Vélez-Avilés to use the handicapped spaces near their building if they would allow the Board to use their assigned spaces for handicapped or visitor parking. Add. 8. The Board did not follow Ortiz-Sorrentini’s recommendation, but instead rejected García-Guillén’s and Vélez-Avilés’s request for accommodation. Add. 8.

On November 22, 2006, García-Guillén and Vélez-Avilés wrote a letter to the Astralis Board complaining that they were being harassed and retaliated against because of their accommodation request. Add. 8. New Board President Angel Ortiz replied. Ortiz indicated that he had not been made aware of the

accommodation request, but said that the request was “in keeping with the norm” established to handle a similar request of another Astralis resident. App. 54; Add. 8.² Ortiz’s letter said that handicapped residents “may have a right to use a space designated as handicapped permanently, as long as they tender a non-blocked parking.” App. 54; Add. 8.

After receiving this letter, García-Guillén and Vélez-Avilés negotiated a contract with Ortiz and several other members of the Board. App. 18. García-Guillén’s and Vélez-Avilés’s mobility impairments were readily apparent and observed by the Board members. App. 18, 30, 38. During the contract negotiations, García-Guillén and Vélez-Avilés provided the Board with copies of their handicapped placards. Add. 8. They did not provide additional medical information because none was requested. App. 17-18.

On January 12, 2007, García-Guillén and Vélez-Avilés and the Astralis Board agreed to a contract. The contract makes several stipulations, including, that: (1) the Astralis Council of Owners owns the handicapped parking spaces that

² This previous request resulted in a complaint filed by HUD that was resolved in a conciliation agreement. The conciliation agreement required Astralis to retrofit portions of the condominium complex. See App. 82-83; Appendices A, B, and C. The agreement also states that, while handicapped parking spaces are generally common areas, “a qualified handicapped owner whose conditions or circumstances make it necessary to have the exclusive use of a handicapped space, may petition the Owners Association for such exclusive use, for a stated period of time.” App. 82-83. The agreement provides further that “[i]n exchange for such exclusive use, the owner must grant to the Association the exclusive use of one of the unblocked private parking spaces belonging to such handicapped owner for use by the Association as it sees fit.” App. 82-83.

García-Guillén and Vélez-Avilés requested; (2) García-Guillén and Vélez-Avilés own two other private parking spaces; (3) García-Guillén and Vélez-Avilés have both been issued handicapped placards by the Commonwealth of Puerto Rico and that those placards are “in effect”; (4) García-Guillén and Vélez-Avilés have “requested as a reasonable accommodation from the Council” the exchange of their private parking spaces for the handicapped spaces near their residence. App. 58-63; see also Add. 8. The contract then provides that García-Guillén and Vélez-Avilés will have exclusive use of the handicapped spaces for one year and that the Council will in turn have exclusive use of the spaces assigned to García-Guillén and Vélez-Avilés. App. 58-63; Add. 8. It provides further that the period may be renewed while García-Guillén and Vélez-Avilés are handicapped and handicapped parking spaces are available. App. 58-63.

On January 31, 2007, a new Board of Directors was elected. Add. 8. On February 13, 2007, the new Board Vice-President, José Londoño, sent García-Guillén and Vélez-Avilés a letter repudiating the contract executed just a month before. Add. 8. In the letter, Londoño maintained that Ortiz did not have authority to bind the Condominium Association because he did not get approval from the “Owners Council.” Add. 9. The letter said the Owners Council would consider the matter during its next meeting. Add. 9. The letter also instructed García-Guillén and Vélez-Avilés to “remove [their] vehicles from [the

handicapped] spaces immediately and use solely the [assigned] parking spaces.”

Add. 9.

Beginning on February 15, 2007, Astralis security guards began placing violation stickers on the driver’s side window of García-Guillén’s and Vélez-Avilés’s cars when they parked in the handicapped spaces. Add. 9; App. 3-6. The security guards told Vélez-Avilés that the Astralis Board of Directors ordered them to do this. Add. 9; App. 4. These stickers covered large portions of the car windows and prevented people in the car from effectively seeing out. Add. 9. The stickers covered more than three quarters of the side windows of the vehicles, Add. 9, and were glued in place, App. 2a. García-Guillén and Vélez-Avilés had to use razor blades to remove them – a process that took hours. Add. 9; App. 7. During the hours García-Guillén and Vélez-Avilés spent removing the stickers, they felt humiliated and ashamed. Add. 9; App. 7. They were embarrassed that their neighbors were witnessing the spectacle of their treatment and were concerned their reputation was being tarnished. Add. 25; App. 7.

On February 20, 2007, García-Guillén and Vélez-Avilés sent a letter to the Astralis Board. Add. 9. In the letter, García-Guillén and Vélez-Avilés urged the Board to honor the contract, and pointed out that they “have been medically evaluated” and issued “the proper handicapped identifications.” App. 114. The letter then cataloged the numerous violation stickers that were placed on García-Guillén’s and Vélez-Avilés’s vehicles immediately after they received the letter

from Londoño. Specifically, the letter states that Londoño's letter was slipped under their door on February 14, 2007, and, thereafter: on February 15, a parking sticker was affixed to each of their cars; on February 16, two parking stickers were affixed to each of their cars; on February 17, two more parking stickers were affixed to one of their cars; on February 18, a total of five more parking stickers were affixed to their cars – two on one and three on the other; and on February 19, six parking stickers were affixed to their cars – four on one car and two on the other. App. 115. García-Guillén and Vélez-Avilés asserted that they had a contractual right to park in those spaces and had already given up the spaces they were previously assigned. App. 116. Finally, the letter begged the Board to stop harassing them, stating that the Board's actions had caused Vélez-Avilés to refuse to leave the house because of the public humiliation she was experiencing and for fear that she would have nowhere to park upon her return. App. 116. These actions also caused, the letter states: Vélez-Avilés's blood pressure to go "out of control, even when she is taking her medications"; sleep deprivation; and a worsening of her depression. App. 116.

On February 22, 2007, Astralis Board President Ernesto Sgroi wrote a letter responding to García-Guillén's and Vélez-Avilés's February 20, 2007, letter. Sgroi asserted that "it has always been the intention of this Board to provide a reasonable accommodation to your specific needs of disabled parking." Add. 10; App. 117. His letter also stated that "[w]e have always made clear that we have no

objection in reaching an agreement allowing you to use the [handicapped] space.”

App. 118. Sgroi maintained, however, that the Board did not have the power to grant García-Guillén and Vélez-Avilés exclusive use of the parking spaces. Add. 10; App. 117. The letter said that a meeting to consider García-Guillén’s and Vélez-Avilés’s accommodation request would be held in mid-March. App. 118. The letter did not request any medical documents or other information about García-Guillén’s and Vélez-Avilés’s disabilities. App. 117-118.

Also at the end of February 2007, García-Guillén and Vélez-Avilés filed a complaint with HUD. Add. 10. After receiving the complaint, HUD investigator Diana Ortiz contacted Sgroi to express concern about Astralis’s conduct. Add. 10; App. 32. Sgroi said that he would schedule a meeting of the Condominium Association to rule on García-Guillén’s and Vélez-Avilés’s accommodation request. App. 33. Ortiz in turn said she would delay processing the complaint until after the meeting was held. Add. 10; App. 37. She also told Sgroi that it was “important that the Association understands their duties under the Fair Housing Act.” App. 33. Specifically, she said that the owners need to be informed that they are not free to simply “choose to vote against giving handicapped parking to people who are disabled.” App. 33. She offered to attend the meeting in order to explain the Association’s Fair Housing Act obligations to the condominium owners directly. Add. 10; App. 33. She was not invited to attend the meeting. App. 33.

The Condominium Association meeting was held on March 15, 2007. Add. 10. But before the meeting was held, Londoño told Vélez-Avilés that he was not going to allow her to have the handicapped parking spaces. App. 28-29. According to the minutes of the March 15, 2007, meeting, before García-Guillén and Vélez-Avilés made their accommodation request, Astralis's attorney, Roberto Rivera-Ruiz, advised the condominium owners not to grant it. Add. 11; App. 70-73. Specifically, Ruiz said that in a similar case involving a different condominium complex, it was decided that the handicapped parking space would be available on a first-come-first-served basis. Add. 11; App. 72. After Vélez-Avilés petitioned for exclusive use of the handicapped parking spaces, another resident moved that no resident be allowed exclusive use of handicapped parking spaces "until some court or superior forum determines the contrary." Add. 11; App. 72. The motion passed with 42 residents in favor, two against, and six abstentions. Add. 11; App. 72.

Soon after the meeting, on March 23, 2007, Sgroi filed – in his capacity as President of the Board – a lawsuit against García-Guillén and Vélez-Avilés to prevent them from using the disabled parking spaces. Add. 11. The case was withdrawn three months later after García-Guillén and Vélez-Avilés agreed not to park in the handicapped spaces and not to sue Astralis. Add. 11; App. 8-9, 20-21. García-Guillén and Vélez-Avilés made this agreement after they had to go to court four times and, during one of those times, had to sit on a bench for six hours

waiting for a judge. App. 19. The case was interfering with their medical appointments and causing more health problems. App. 19-20. During this time, Astralis security guards continued to place violation stickers on García-Guillén's and Vélez-Avilés's cars when they parked in the handicapped spaces. Add. 9; App. 9-10. Astralis also put up a large sign indicating that the handicapped parking spaces García-Guillén and Vélez-Avilés had requested were for "Visitors." App. 10.

3. *Investigation And Hearing*

HUD began its investigation in October 2007. Add. 11. HUD investigator Ortiz met with the new Astralis Board President, Sebastián Echeandía-Rabel, the Board's attorney and an Astralis resident, Manny Suárez, and other members of the Association. Add. 11. Before the meeting, Ortiz provided Board members with materials about the reasonable accommodation requirements of the Fair Housing Act. Add. 12; App. 34. At the meeting, she asked Suárez if he had any questions about those materials. Add. 12; App. 34. He replied that the accommodation request "creates a personal problem" for him because he liked his parents to use the handicapped spaces García-Guillén and Vélez-Avilés requested. Add. 12; App. 34-35.

As part of its investigation, HUD also asked Astralis whether it had a reasonable accommodation policy. Astralis responded that it did not. App. 36.

On September 11, 2008, HUD filed a Charge of Discrimination against Astralis. Add. 1. The Charge alleged that Astralis denied Complainants García-Guillén and Vélez-Avilés reasonable accommodations in violation of the FHA. HUD alleged specifically that Astralis “denied Complainants exclusive use of handicapped accessible parking spaces, though such spaces were available close to their condominium unit and were rarely used by handicapped residents or visitors.” Add. 1. “HUD also alleged that [Astralis] harassed, intimidated and threatened Complainants when they exercised or tried to exercise their right to a reasonable accommodation.” Add. 1-2.

In early 2009, an ALJ held an administrative hearing. Add. 2. The ALJ heard testimony from García-Guillén and Vélez-Avilés, the HUD investigator, and several Astralis Board members.

4. ALJ’s Initial Decision And Order

On September 10, 2009, the ALJ issued an Initial Decision and Order, which became HUD’s final administrative decision. See p. 4, *supra*.

The ALJ concluded that Astralis violated 42 U.S.C. 3604(f)(2)(A) and 42 U.S.C. 3604(f)(3)(B). The ALJ rejected Astralis’s contention that García-Guillén and Vélez-Avilés are not disabled. Add. 14. The ALJ concluded that Astralis’s brief intentionally created a misleading impression about Complainants’ physical conditions. Add. 14. In fact, the ALJ found, “[t]he record shows that Complainants were substantially limited in their ability to walk – when they

moved to Astralis and through the date of the hearing.” Add. 15. Specifically, “[b]oth Complainants have and continue to use various ambulatory devices to assist them in their walks, and experience severe pain and restricted movement when attempting to ambulate.” Add. 15.

The ALJ found surprising Astralis’s claim that Complainants failed to initiate the interactive process – *i.e.*, failed to request accommodation. Add. 17. This claim was in direct conflict with the overwhelming evidence and the representation of Astralis’s counsel during the hearing. Add. 17. The ALJ found that “Complainants’ request for a reasonable accommodation was never at issue.” Add. 17. The ALJ found that Complainants’ numerous accommodation requests triggered Astralis’s “responsibility to explore Complainants’ needs.” Add. 18. Given “all of the attempts Complainants made to have their request heard,” they were not required to argue in favor of their need for accommodation in front of “what could only have been a hostile audience” at the Association assembly. Add. 22. The ALJ determined further that Astralis’s contention that Complainants refused to provide information about their disabilities at the meeting was “unsupported by the record.” Add. 18 n.8.

The ALJ found that Astralis did not dispute Complainants’ disabilities when they made their accommodation request, and never requested additional medical information from them. Add. 18. The ALJ noted that the Board member who did see Complainants’ medical documentation, Dr. Ortiz-Sorrentini, recommended

that the Board grant their accommodation request. Add. 18. The ALJ determined that Astralis had a legal duty to “engage in further inquiry” if they questioned the necessity of the accommodation, and concluded that “[i]n failing to request *any* information from Complainant, [Astralis] failed in its duty.” Add. 20.

The ALJ found that “[t]he record demonstrates that accommodating Complainants’ handicaps is necessary to afford them an equal opportunity to use and enjoy their residence.” Add. 20. Specifically, the ALJ determined that Complainants’ disabilities made necessary the significant reduction in travel distance between their cars and residence and the access aisles that allow them to get in and out of their cars. Add. 20-21.

The ALJ noted that “[i]t is undisputed that Respondent refused to make the requested reasonable accommodations.” Add. 21. The ALJ also rejected Astralis’s claim that it did not have a sufficient opportunity to engage in the interactive process: “[Astralis’s] unhappiness with settlement proposals that were rejected is not a sufficient allegation to establish that Complainants ‘prevented’ [Astralis] from participating in the process that [Astralis] had a duty to conduct.” Add. 21. The ALJ also rejected Astralis’s “undue hardship argument,” pointing out that (1) Astralis did not claim undue hardship even when it repudiated its contract with Complainants; and (2) the evidence showed that the handicapped and visitor parking spaces at Astralis were not heavily used. Add. 21-22. The

ALJ concluded that Astralis failed to show a handicapped parking shortage. Add. 23.

The ALJ also rejected Astralis's argument that the Puerto Rico Condominiums Act, 31 L.P.R.A. 1291 *et seq.*, provides them with a defense. Noting that Astralis devoted more than six pages of its brief to this so-called "preemption" argument, the ALJ said that "HUD does not argue that the FHA preempts the Condominiums Act." Add. 2 n.2. The ALJ agreed with HUD that Astralis cannot use the Condominiums Act to "ignore its obligations under the FHA." Add. 2 n.2 (internal quotations omitted). The ALJ concluded that "the Condominiums Act does not compel [Astralis] to violate resident's fair housing rights." Add. 2 n.2. The ALJ determined that the procedural requirements of the Condominiums Act "cannot be used as an excuse for the denial of a reasonable accommodation." Add. 3 n.2. The ALJ held that a reasonable accommodation that is denied by a vote of a condominium association's members is a violation of the law. Add. 3 n.2.

The ALJ also ruled that Astralis retaliated against García-Guillén and Vélez-Avilés in violation of 42 U.S.C. 3617 because they engaged in protected activity – *i.e.*, they requested accommodation and filed a complaint with HUD. Specifically, Astralis: (1) placed numerous violation stickers on Complainants' cars; (2) filed suit against them; (3) erected a large sign stating that the handicapped parking spaces they requested were for "Visitors"; (4) forced

Complainants to appear before a hostile assembly; and (5) made disparaging remarks about Complainants. Add. 23-24.

The ALJ ordered the Association to pay \$25,000 in damages to García-Guillén and Vélez-Avilés to compensate them “for the humiliation, embarrassment and emotional distress they suffered as a result of [Astralis’s] actions.” Add. 27, 29. The ALJ assessed a civil penalty of \$10,000. Add. 28-29. The ALJ also ordered the Association to provide García-Guillén and Vélez-Avilés with exclusive use of the parking spaces they requested, refrain from further discrimination on the basis of disability, and undergo disability training to be provided by HUD. Add. 29.

STANDARDS OF REVIEW

The federal courts of appeals review HUD’s final agency order using the standard set out in 5 U.S.C. 706(2). See, e.g., *Pfaff v. United States Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 747 (9th Cir. 1996) (citing 5 U.S.C. 706(2)); *Jancik v. HUD*, 44 F.3d 553, 555 (7th Cir. 1995) (same). Accordingly, this Court “may only set aside agency actions, findings, and conclusions if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” *Administracion Para El Sustento De Menores of Dept. of Family of Commonwealth of Puerto Rico v. Department of Health and Human Servs.*, 588 F.3d 740, 744-745 (1st Cir. 2009) (quoting 5 U.S.C. 706(2)). “Review under the arbitrary and capricious standard is narrow and this Court may not substitute its

judgment for that of the agency, even if it disagrees with the agency's conclusions." *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009). The ALJ's factual findings are reviewed for "substantial evidence," which means "more than a mere scintilla" or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006) (citation omitted). This Court should not "decide the facts anew, reweigh the evidence, or substitute [its] judgment for that of the agency." *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 894 (7th Cir. 1996). Indeed, "[w]hen exposed to judicial review, HUD's decisions are entitled to 'great deference' and are presumed valid." *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 26 (1st Cir. 1998) (citation omitted), cert. denied, 527 U.S. 1035 (1999).

SUMMARY OF ARGUMENT

This Court should deny Astralis's petition for review, and grant the Secretary's cross-application for enforcement of HUD's final order.

The ALJ correctly applied the FHA's reasonable accommodation standard in this case. His decision follows a regulatory interpretation of the FHA and two courts of appeals cases that apply the accommodation requirement to factual scenarios materially identical to that present in this case. His findings are clearly supported by substantial evidence in the record. And the Puerto Rico

Condominiums Act presents no impediment to enforcing the FHA's requirements against Astralis.

ARGUMENT

GARCÍA-GUILLÉN AND VÉLEZ-AVILÉS ARE ENTITLED TO THE REASONABLE ACCOMMODATION OF ASSIGNED PARKING SPACES NEAR THEIR RESIDENCE

A. The FHA Applies Straightforwardly In This Case

The Fair Housing Act prohibits housing discrimination on the basis of disability. 42 U.S.C. 3604(f).³ See pp. 2-3, *supra*. Section 3604(f)(3)(B) of the Act “requires an accommodation for persons with handicaps if the accommodation is (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing.” *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 603 (4th Cir. 1997) (cited in *Colon-Jimenez v. GR Management Corp.*, 218 F. App'x 2 (1st Cir. 2007)).⁴ This obligation to accommodate extends to

³ The FHA also prohibits retaliation against persons who exercise their rights under Section 3604. See p. 3, *supra* (quoting 42 U.S.C. 3617). The ALJ ruled that Astralis retaliated against García-Guillén and Vélez-Avilés in violation of Section 3617. Add. 23-24. Astralis does not raise any argument challenging that ruling in this appeal.

⁴ Astralis's brief discusses a number of cases that deal with claims of discriminatory intent or disparate impact. See Br. 25-28, 30-31, 34. These cases do not apply here because the only claim at issue is the claim that Astralis failed to reasonably accommodate Complainants. See *Tsombanidis v. West Haven Fire Dep't.*, 352 F.3d 565, 573 (2d Cir. 2003) (explaining that “[t]o establish discrimination under * * * the FHAA, * * * plaintiffs have three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation” and explaining further the
(continued...)

“public and common use areas.” 24 C.F.R. 100.204(a). In a regulation interpreting the FHA’s “reasonable accommodation” requirement, HUD illustrates the proper application of the requirement with the following example:

Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of § 100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

24 C.F.R. 100.204(b), Example (2).

Under this standard, Astralis clearly violated the FHA. The ALJ has determined that García-Guillén and Vélez-Avilés are substantially limited in their ability to walk; that they requested assigned parking spaces near their residence; that this accommodation “is necessary to afford them an equal opportunity to use and enjoy their residence,” Add. 20; and that Astralis refused to make the requested accommodation. Indeed, this case is indistinguishable from the example provided in the regulation. 24 C.F.R. 100.204(b), Example (2); see Add. 21 n.12.

⁴(...continued)
different tests that apply under these three separate theories).

The facts here are also almost identical to those in *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891 (7th Cir. 1996). In that case, the Seventh Circuit determined that the Complainant was disabled, that petitioners knew this, and that the Complainant “informed Petitioners that he required a parking space close to his building because of his handicap and * * * requested an assigned parking space as a reasonable accommodation.” *Jankowski Lee*, 91 F.3d at 895. Given these facts, the court determined that “Petitioners had a duty to make a reasonable accommodation,” and, because they failed to make a reasonable accommodation, “they violated the FHA.” *Ibid.*

Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995), is also on all fours with this case. The defendant apartment complex in *Shapiro* had fewer parking spaces than tenants and a waiting list for tenants who wanted a space. *Id.* at 330-331. A disabled tenant sought a space as a reasonable accommodation and was denied. *Id.* at 331. Determining that the defendant’s appeal was not reasonably likely to succeed, the Second Circuit deferred to the example set out in 24 C.F.R. 100.204(b). *Id.* at 335. The court concluded that HUD’s regulatory interpretation of the FHA is reasonable and that the right to a reasonable accommodation for parking applies even where there is a shortage of parking spaces. *Ibid.* (citing *Chevron v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984)). This case is more clear-cut than *Shapiro* because there is no shortage of parking spaces at Astralis. See Add. 5; App. 36 (There are 210 apartments and

499 parking spaces at Astralis: 442 parking spaces are assigned to residents; 41 are for visitors, six are for contractors; and ten are for individuals who are handicapped.).

HUD's decision in this case follows the regulatory guidance in 24 C.F.R. 100.204(b) and two court of appeals decisions directly on point. It is manifestly a correct application of Section 3604(f)(3)(B) and is neither arbitrary nor capricious. This Court should not overturn it.

B. The ALJ's Findings Are Supported By Substantial Evidence

Astralis attacks three of the ALJ's findings. Specifically, it contends that: (1) García-Guillén and Vélez-Avilés failed to prove that they are disabled, Br. 40; (2) they never made an accommodation request that triggered any duty on its part, Br. 42; and (3) they failed to engage in the "interactive process." As Astralis recognizes, Br. 21, the ALJ's findings can be overturned only if they are not supported by substantial evidence. See *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006). Review of the record reveals that the ALJ's findings are well supported and that Astralis's contrary factual contentions are baseless.

1. *García-Guillén And Vélez-Avilés Are Substantially Limited In Their Ability To Walk*

The ALJ found that “[t]he record shows that Complainants were substantially limited in their ability to walk – when they moved to Astralis and through the date of the hearing.” Add. 15. Summarizing his findings, the ALJ said “[b]oth Complainants have and continue to use various ambulatory devices to assist them in their walks, and experience severe pain and restricted movement when attempting to ambulate.” Add. 15.

These conclusions are well supported. The record establishes that García-Guillén: has a degenerative hip that causes severe pain in his left knee and his lower back; has strong back pain when he stands; has particularly severe back pain when he stands for a long time and severe knee pain when he flexes his left knee; experiences loss of balance when walking; takes several prescription medications for his back and leg pain; and has long used assistive devices to help him walk. Moreover, these maladies affect him most when he is getting in and out of the car. See pp. 5-7, *supra*. The record also establishes that Vélez-Avilés: has a muscular skeletal condition, osteoarthritis of the knees, diabetes-related distal neuropathy, disc protrusions, and other spinal injuries; sees numerous doctors for these conditions and takes numerous medications; has extreme knee and other skeletal pain; experiences numbness in her extremities, especially her legs; has difficulty walking; requires assistance to get dressed, and requires a cane to walk; is often

confined to the house and required to lie down because of her extreme leg pain; and is able to leave the house only by taking more than her normal dose of medication. See p. 7, *supra*.

Astralis nonetheless contends that “[t]he evidence submitted in this case showed that [García-Guillén and Vélez-Avilés] are not disabled.” Br. 40. It claims specifically – without citation to the record – that the evidence showed that García-Guillén and Vélez-Avilés are capable of walking “long distances” and “regularly” do so. Br. 40. This claim directly contradicts García-Guillén’s and Vélez-Avilés’s testimony, which the ALJ credited, and is wholly unsupported by the record. Astralis made similar claims to the ALJ, and the ALJ determined that Astralis had “taken liberties with its characterizations” of the evidence. Add. 14.

Indeed, many of Astralis’s specific claims are blatant mischaracterizations of the record. A few examples will suffice. Astralis asserts that Vélez-Avilés “strolls regularly at Plaza Las Américas shopping mall without a cane.” Br. 8. Nothing in the transcript pages Astralis cites in any way supports this claim. Astralis also claims that García-Guillén “strolls regularly at Plaza Las Américas shopping mall.” Br. 8. His testimony reveals, however, that he goes to the mall not to walk but to sit on a bench and talk to other retirees. App. 31. Astralis relies on Londoño’s testimony – testimony the ALJ determined “lacks credibility,” Add. 15 n.6 – to claim that García-Guillén washes his cars. García-Guillén’s testimony,

which the ALJ credited, Add. 15, reveals that he does not wash his car; rather his son washes his car or he pays for the service. App. 31.

2. *García-Guillén And Vélez-Avilés Made A Specific Accommodation Request*

Astralis claims that the record fails to show that García-Guillén and Vélez-Avilés made “the direct and specific [accommodation] request that usually triggers the interactive process.” Br. 42. Astralis made the same claim before the ALJ and the ALJ found it surprising, since Astralis’s counsel, as well as several witnesses, admitted during the hearing that García-Guillén and Vélez-Avilés had requested exclusive use of two parking spaces. Add. 17. The ALJ concluded that “Complainants’ request for a reasonable accommodation was never at issue” and that the request was made “several times.” Add. 17-18. This finding is clearly supported by the record. The request was made orally and in writing, and Complainants and the Astralis Board corresponded extensively about it. See pp. 7-15, *supra*. Accordingly, the ALJ correctly concluded that Astralis’s “responsibility to explore Complainants’ needs was triggered.” Add. 18.

3. *Astralis – Not Complainants – Failed To Investigate And Explore Possible Accommodations*

Astralis claims throughout its brief that García-Guillén and Vélez-Avilés failed in their duty to participate in the “interactive process.” Indeed, this appears to be the focal point of Astralis’s entire argument. See, *e.g.*, Br. 2-3, 20, 22, 27, 39-41, 43, 45, 48-49.

But the ALJ found, and the record establishes, that it was Astralis – not the Complainants – that shirked its duty. Once García-Guillén and Vélez-Avilés requested accommodation, Astralis had a duty to provide a reasonable accommodation, or – if Astralis was truly skeptical of the need for accommodation – investigate further. See *Jankowski Lee*, 91 F.3d at 895 (“If a landlord is skeptical of a tenant’s alleged disability or the landlord’s ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.”). Consistent with this framework, the ALJ concluded that Astralis was responsible for requesting medical information from Complainants if its members were skeptical of the need for accommodation. Add. 18. The ALJ determined, however, that “[t]he record is devoid of any such request prior to HUD commencing its investigation.” Add. 18. Indeed, the ALJ found that Astralis “has admitted, on several occasions, that Complainants are handicapped individuals as defined in the FHA.” Add. 20.

The record supports the ALJ’s findings. It shows that García-Guillén and Vélez-Avilés discussed their medical condition with and provided medical records to then-Board-President Dr. Sorentini, and that he recommended that the Board grant the requested accommodation. When they were negotiating a contract providing for accommodation, the Board never asked for medical information but accepted García-Guillén’s and Vélez-Avilés’s valid handicapped placards as sufficient evidence of their disabilities. And finally, even after Astralis repudiated

the contract, Board President Sgroi acknowledged that García-Guillén and Vélez-Avilés are disabled: “[I]t has always been the intention of this Board to provide a reasonable accommodation to your specific needs of disabled parking.” Add. 10; App. 117. Sgroi’s letter did not request any medical information or express any doubt about whether Complainants were truly disabled. Rather, it indicated that the obstacle to honoring the contract was merely procedural – *i.e.*, that the contract had not been authorized by the Owners Council. Finally, when the Association denied the request, the stated justification was that accommodation was not legally required, based on a decision in another case. No question was raised at the meeting about whether García-Guillén and Vélez-Avilés are disabled. Indeed, the resolution the Association passed created a general policy that *no resident* will be allowed exclusive use of handicapped parking spaces without a court order. See pp. 7-15, *supra*.

Accordingly, this Court should conclude that the findings of the ALJ that Astralis challenges are supported by substantial evidence in the record.

C. The Puerto Rico Condominiums Act Does Not Exempt Astralis From Compliance With The FHA

Astralis appears to argue that, in denying García-Guillén’s and Vélez-Avilés’s accommodation request, it acted pursuant to the Puerto Rico Condominiums Act; therefore its action “cannot be labeled as discriminatory.” Br. 61. This argument is devoid of merit.

According to Astralis, the Puerto Rico Condominiums Act requires unanimous consent of the condominium owners in order to assign handicapped spaces to García-Guillén and Vélez-Avilés. See Br. 59; Add. 56. That requirement does not conflict with the FHA. As the ALJ rightly concluded, “the Condominiums Act does not compel [Astralis] to violate residents’ fair housing rights.” Add. 2 n.2. The Act merely defines the procedure by which decisions about “common elements” are to be made. The Act does not say that decisions made in accordance with the defined procedure are sacrosanct and “cannot be labeled as discriminatory.” See Br. 61. Whatever procedure is used to make the decision about a requested accommodation, whether required by law or not, a denial of a reasonable accommodation that is necessary to afford an individual with a disability an “equal opportunity to use and enjoy a dwelling” violates the FHA. See 42 U.S.C. 3604(f)(3)(B).

Astralis devotes much of its brief to a discussion of preemption. See Br. 49-61. HUD does not claim, and has never claimed, that the FHA preempts the Condominiums Act. See Add. 2 n.2. Instead, as explained above, HUD contends that the Condominiums Act does not insulate Astralis from liability under the FHA. In short, the Condominiums Act provides Astralis no defense for its actions in this case. Cf. 42 U.S.C. 3615 (“[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be

invalid.”); *Gittleman v. Woodhaven Condo. Ass’n, Inc.*, 972 F. Supp. 894 (D.N.J. 1997) (holding that the New Jersey Condominiums Act did not exempt the defendant condominium association from the accommodation requirement of the FHA).

CONCLUSION

This Court should deny the petition for review, and grant the Secretary’s cross-application for enforcement of HUD’s final order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE RESPONDENT/CROSS-PETITIONER complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 7,473 words, as calculated by the WordPerfect X4 word-count system. The typeface is Times New Roman, 14-point font.

I further certify that this electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 6.5) and is virus-free.

s/ Nathaniel S. Pollock
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Date: March 8, 2010

CERTIFICATE OF SERVICE

I certify that on March 8, 2010, an electronic copy of the BRIEF FOR THE RESPONDENT/CROSS-PETITIONER was transmitted to the Court by using the appellate CM/ECF system.

I further certify that the following counsel of record are CM/ECF participants and will be served electronically:

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