

# Indiana Law Review

---

Volume 43

2010

Number 2

---

## NOTES

### RECALLING WHAT CONGRESS FORGOT: *LEDBETTER*'S CONTINUING APPLICABILITY IN FHA DESIGN-AND- CONSTRUCTION CASES AND THE NEED FOR A CONSISTENT LEGISLATIVE RESPONSE

LAURA KATHERINE BOREN\*

#### INTRODUCTION

In 1988, Congress made “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream” when it enacted the Fair Housing Amendments Act.<sup>1</sup> The Act amended Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA).<sup>2</sup> The amended FHA requires, among other things, that all new covered multifamily housing be designed and constructed in accordance with seven accessibility features specified in 42 U.S.C. § 3604(f)(3)(C).<sup>3</sup> Twenty years later, the congressional mandate has been largely ignored.<sup>4</sup> Several studies have revealed substantial noncompliance with § 3604(f)(3)(C).<sup>5</sup>

When interpreting the FHA, courts regularly turn to judicial interpretations

---

\* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis; B.S.W., 2006, University of Southern Indiana, Evansville, Indiana. I would like to thank Professor Florence Wagman Roisman for her invaluable input and guidance throughout the process of writing of this Note. I also thank my husband, family, and friends for their patience and support.

1. H.R. REP. NO. 100-711, at 18, 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, 2184. Prior to the passage of the Fair Housing Amendments Act, the FHA prohibited discrimination on the basis of race, color, national origin, religion, and sex. *Id.* at 13. The Fair Housing Amendments Act added “handicap” as well as “familial status” to the list of prohibited bases for discrimination. *Id.* at 18-19. Although the FHA uses the term “handicap” rather than “disability,” its definition of “handicap” is identical to the definition of “disability” in other federal civil rights statutes. Therefore, this Note uses the terms interchangeably. *See* 29 U.S.C. § 705(9) (2006); 42 U.S.C. § 12102(2) (2006); *see also* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in “Design and Construction” Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 753 n.4 (2006) [hereinafter Schwemm, *Barriers*].

2. H.R. REP. NO. 100-711, at 15, 18, *reprinted in* 1988 U.S.C.C.A.N. at 2176, 2179.

3. 42 U.S.C. § 3604(f)(3)(C) (2006).

4. *See* Schwemm, *Barriers*, *supra* note 1, at 768-70.

5. *Id.*

of Title VII of the Civil Rights Act of 1964<sup>6</sup> for guidance.<sup>7</sup> In *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>8</sup> the Supreme Court held that a plaintiff's Title VII wage discrimination claims were time-barred.<sup>9</sup> The Court held that the event that triggered the statute of limitations was the discriminatory pay-setting decision, and the plaintiff's continued receipt of smaller paychecks due to discriminatory decisions made outside the charging period could not revive her expired claims.<sup>10</sup>

Recently, in *Garcia v. Brockway*,<sup>11</sup> the U.S. Court of Appeals for the Ninth Circuit relied heavily on *Ledbetter* to hold that the statute of limitations for FHA design-and-construction claims "is . . . triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued."<sup>12</sup> *Garcia* severely impairs the FHA's accessibility provisions because it totally forecloses private design-and-construction suits two years after a covered multifamily dwelling is built, regardless of whether any interested individual was aware of or harmed by the accessibility deficiencies during that time.<sup>13</sup>

Subsequent to the Ninth Circuit's *Garcia* decision, Congress acted to override *Ledbetter* with respect to wage discrimination claims by passing the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act).<sup>14</sup> The question of whether and to what extent *Ledbetter* will continue to impact nonwage discrimination suits, including FHA design-and-construction suits, remains unanswered. Despite Congress's disapproval of *Ledbetter*, courts are likely to continue to rely on *Ledbetter* to narrowly interpret the FHA's design-and-construction provisions.<sup>15</sup>

---

6. 42 U.S.C. § 2000e (2006).

7. The Supreme Court relied on Title VII precedent in interpreting the FHA in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). The lower courts have followed suit. See, e.g., *DiCenso v. Cisneros*, 96 F.3d 1004, 1008-09 (7th Cir. 1996); *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 n.1 (9th Cir. 1996); *Huntington Branch of the NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 7:4 (2008) [hereinafter SCHWEMM, HOUSING DISCRIMINATION].

8. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

9. *Id.* at 628.

10. *Id.* at 628-29.

11. 526 F.3d 456 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

12. *Id.* at 461-62.

13. *Id.*

14. The Ledbetter Act was signed into law on January 29, 2009. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.). *Garcia* was decided in May 2008. 526 F.3d at 456.

15. See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 516-17 (2009) (noting "the general tendency by courts to construe narrowly the significance of Congress' disapproval of prior holdings and instead rely upon the statutory analysis contained in the overridden decisions").

This Note explores *Ledbetter*'s impact on the statute of limitations analysis in FHA design-and-construction claims both before and after the Ledbetter Act. Part I provides an overview of the FHA's disability discrimination provisions and enforcement mechanisms, its legislative history, and the basic principles that guide its interpretation. Part II discusses the statute of limitations analysis in Title VII wage discrimination claims chronologically, from *Ledbetter* to the Ledbetter Act. Part III explores *Ledbetter*'s impact on FHA design-and-construction claims as manifested in *Garcia*. Part IV analyzes *Garcia* and its shortcomings. Finally, Part V contends that, despite the legislative override, courts will continue to apply *Ledbetter* in FHA design-and-construction cases and argues that Congress should pass a legislative solution to close the enforcement loophole the Ledbetter Act left open.

#### I. BACKGROUND OF DISABILITY DISCRIMINATION UNDER THE FHA

The FHA prohibits housing discrimination on the basis of handicap in many forms.<sup>16</sup> The FHA defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."<sup>17</sup> Federal regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."<sup>18</sup> Courts have determined that a wide variety of impairments constitute handicaps for the purposes of the FHA, including mobility impairments,<sup>19</sup> HIV and AIDS,<sup>20</sup> and past substance abuse.<sup>21</sup>

---

16. See, e.g., 42 U.S.C. § 3604(c) (2006) (making it unlawful to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates . . . discrimination based on . . . handicap"); *id.* § 3605 (making it unlawful to discriminate on the basis of handicap in residential real estate transactions); *id.* § 3617 (making it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment" of rights granted under the FHA).

17. 42 U.S.C. § 3602(h)(1)-(3).

18. 24 C.F.R. § 100.201(b) (2008).

19. See, e.g., *Garcia v. Brockway*, 526 F.3d 456, 460 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

20. See, e.g., *Giebler v. M & B Assocs.*, 343 F.3d 1143, 1147-48 (9th Cir. 2003) (holding that individual with AIDS was handicapped within the definition of the FHA); *Support Ministries for Pers. with AIDS, Inc. v. Vill. of Waterford, N.Y.*, 808 F. Supp. 120, 129 (N.D.N.Y. 1992) (holding that HIV-infected individuals were handicapped for the purposes of the FHA, even though they were capable of caring for themselves).

21. See, e.g., *Reg'l Econ. Cmty. Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-48 (2d Cir. 2002) (holding that recovering alcoholics were handicapped within the meaning of the FHA).

*A. FHA Accessibility Requirements*

Although the FHA prohibits many types of disability discrimination,<sup>22</sup> this Note focuses on 42 U.S.C. § 3604(f).<sup>23</sup> Section 3604(f)(1) of the FHA makes it unlawful “[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap.”<sup>24</sup> Section 3604(f)(2) makes it 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.”<sup>25</sup>

In addition to these general prohibitions, § 3604(f) includes three special provisions.<sup>26</sup> First, § 3604(f)(3)(A) and (B) provide that the “refusal to permit . . . reasonable modifications” to the premises and the “refusal to make reasonable accommodations in rules, policies, practices, or services” necessary to allow a disabled person to use and enjoy the premises are discrimination for the purposes of § 3604(f).<sup>27</sup> Section 3604(f)(3)(C) lays out the FHA’s accessibility requirements, providing that for the purposes of § 3604(f), discrimination also includes:

[I]n connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

- (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
- (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
- (iii) all premises within such dwellings contain the following features of adaptive design:

- (I) an accessible route into and through the dwelling;
- (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
- (III) reinforcements in bathroom walls to allow later installation of grab bars; and
- (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.<sup>28</sup>

For the purposes of § 3604(f)(3)(C), “covered multifamily dwellings” means all units in buildings with elevators and four or more units, as well as ground-floor

---

22. See, e.g., 42 U.S.C. §§ 3604(c), 3605, 3617 (2006).

23. *Id.* § 3604(f).

24. *Id.* § 3604(f)(1).

25. *Id.* § 3604(f)(2).

26. *Id.* § 3604(f)(3)(A)-(C).

27. *Id.* § 3604(f)(3)(A)-(B).

28. *Id.* § 3604(f)(3)(C).

units in buildings without elevators that contain four or more units.<sup>29</sup>

### B. FHA Enforcement Mechanisms

The FHA provides three enforcement mechanisms.<sup>30</sup> First, the Attorney General may commence a civil action upon belief that a defendant “is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA]” or if “any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance.”<sup>31</sup> The FHA does not prescribe a statute of limitations for suits under this section, but courts have held that the limitations period depends on the type of relief sought.<sup>32</sup> Courts have held that the statute of limitations for § 3614 actions seeking damages is three years and that the statute of limitations for actions seeking civil penalties is five years.<sup>33</sup> Actions seeking injunctive relief are not subject to any statute of limitations.<sup>34</sup>

Second, an “aggrieved person” may initiate an administrative complaint with the Department of Housing and Urban Development (HUD).<sup>35</sup> The FHA defines an “aggrieved person” as a person who “(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”<sup>36</sup> In order to be timely, a plaintiff must file an administrative complaint within one year after the discriminatory housing practice occurs or terminates.<sup>37</sup>

Finally, “[a]n aggrieved person may commence a civil action . . . not later than [two] years after the occurrence or the termination of an alleged discriminatory housing practice.”<sup>38</sup> Thus, determining which event triggers the statute of limitations comes down to identifying what constitutes a discriminatory housing practice.<sup>39</sup> The FHA defines a “discriminatory housing practice” as “an

---

29. *Id.* § 3604(f)(7).

30. *See id.* §§ 3610, 3613, 3614.

31. *Id.* § 3614(a).

32. *See, e.g.,* *Garcia v. Brockway*, 526 F.3d 456, 460 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

33. *Id.*

34. *Id.* Injunctive relief for violations of the FHA’s design-and-construction provisions includes retrofit orders. Schwemm, *Barriers*, *supra* note 1, at 836. When enforcing its rights, the United States is not subject to the affirmative defense of laches. *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *see also* *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 756, 761 (E.D.N.C. 2003). Therefore, the possibility always remains that the Attorney General could bring suit to have a noncompliant covered dwelling brought into compliance. Schwemm, *Barriers*, *supra* note 1, at 767-68.

35. 42 U.S.C. § 3610(a)(1)(A)(i) (2006).

36. *Id.* § 3602(i).

37. *Id.* § 3610(a)(1)(A)(i).

38. *Id.* § 3613(a)(1)(A).

39. Though this Note focuses on identifying the discriminatory housing practice in the

act that is unlawful under section 3604 . . . of this title.”<sup>40</sup> The courts are divided as to what actions constitute unlawful discriminatory housing practices under the FHA in the design-and-construction context.<sup>41</sup>

### C. Legislative History

The legislative history of the Fair Housing Amendments Act provides insight into the legislative intent behind the accessibility requirements.<sup>42</sup> The House Report indicates that the purpose of the design-and-construction provisions was to end the exclusion of individuals with disabilities from mainstream society.<sup>43</sup> Congress deemed the design-and-construction provisions necessary “to avoid future de facto exclusion of persons with handicaps.”<sup>44</sup> Congress came to this conclusion “[b]ecause persons with mobility impairments need to be able to get into and around a dwelling unit (or else they are in effect excluded because of their handicap).”<sup>45</sup> Congress believed that the accessibility provisions would remove the barriers individuals with disabilities had encountered in the search for equal housing opportunities.<sup>46</sup>

Additionally, the legislative history reveals a congressional intent to expand enforcement of the FHA by private civil actions.<sup>47</sup> The House Report stated that private enforcement of the FHA had been undermined by a short limitations period and that Congress sought to remedy that deficiency by expanding the limitations period from 180 days to two years.<sup>48</sup> The House Report also indicated that Congress removed previously existing limitations on punitive damages and attorney’s fees awards because they created disincentives for private individuals

---

context of the private civil action, that determination would also control in administrative proceedings under § 3610(a) because they must be filed within a year of the occurrence or termination of a discriminatory housing practice. *Id.* § 3610(a). On the other hand, there is no explicit requirement that a “discriminatory housing practice” must take place for the Attorney General to bring suit under § 3614. *Id.* § 3614(a).

40. *Id.* § 3602(f).

41. *See, e.g.* *Garcia v. Brockway*, 526 F.3d 456, 461 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008) (holding that the conclusion of the design-and-construction phase triggered the statute of limitations); *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 F. App’x 469, 479-80 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008) (holding that the sale or rental of the last nonconforming unit in a development triggered the statute of limitations); *Mont. Fair Hous., Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (holding that bringing the building into compliance with FHA accessibility requirements triggered the statute of limitations).

42. *See* H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

43. *Id.* at 18, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

44. *Id.* at 27, *reprinted in* 1988 U.S.C.C.A.N. at 2188.

45. *Id.* at 18, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

46. *Id.* at 27-28, *reprinted in* 1988 U.S.C.C.A.N. at 2188-89.

47. *Id.* at 39-40, *reprinted in* 1988 U.S.C.C.A.N. at 2200-01.

48. *Id.* at 16, 39, *reprinted in* 1988 U.S.C.C.A.N. at 2177, 2200.

wishing to bring suit.<sup>49</sup> These amendments evince the congressional intent to encourage individuals to enforce the FHA by allowing them broader access to the courts.

#### *D. Supreme Court Precedent*

When interpreting the FHA, the courts follow several guiding principles initially set forth by the Supreme Court.<sup>50</sup> First, courts have long interpreted the FHA consistently with Title VII precedents.<sup>51</sup> In *Trafficante v. Metropolitan Life Insurance Co.*,<sup>52</sup> the Supreme Court first used judicial interpretation of Title VII as a source of guidance for construing the FHA.<sup>53</sup> In *Trafficante*, the Court quoted a Title VII case holding that the words of the statute indicated a congressional intent to broadly define standing under Title VII.<sup>54</sup> The Court went on to reach the same conclusion with respect to suits brought under the FHA.<sup>55</sup> Numerous lower courts have followed the Supreme Court's example by relying on Title VII precedents to construe the FHA.<sup>56</sup>

Second, in *Trafficante* and many subsequent decisions, the Supreme Court has held that courts should construe the FHA broadly.<sup>57</sup> In *Trafficante*, the Court reasoned that "[t]he language of the Act is broad and inclusive"<sup>58</sup> and that the Court could only give vitality to the important policies behind the FHA by according it "a generous construction."<sup>59</sup> Similarly, in *City of Edmonds v. Oxford House, Inc.*,<sup>60</sup> the Court recognized the FHA's "'broad and inclusive' compass, and therefore accord[ed] a 'generous construction.'"<sup>61</sup>

Finally, in *Trafficante*, the Supreme Court held that HUD's consistent administrative construction of the FHA is "entitled to great weight."<sup>62</sup> HUD is

---

49. *Id.* at 40, reprinted in 1988 U.S.C.C.A.N. at 2201.

50. See SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7.1.

51. *Id.* § 7:4.

52. 409 U.S. 205 (1972).

53. *Id.* at 209.

54. *Id.*

55. *Id.*

56. See generally SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4 (citing, inter alia, *DiCenso v. Cisneros*, 96 F.3d 1004, 1008-09 (7th Cir. 1996) (analyzing hostile environment sex discrimination claims in the FHA context by analogy to Title VII); *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 n.1 (9th Cir. 1996) (noting that in an FHA familial status discrimination case, "[w]e may look for guidance to employment discrimination cases")).

57. *Trafficante*, 409 U.S. at 211-12; see also *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). See generally SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:2.

58. *Trafficante*, 409 U.S. at 209.

59. *Id.* at 212.

60. 514 U.S. at 725.

61. *Id.* at 731 (quoting *Trafficante*, 409 U.S. at 209, 212).

62. 409 U.S. at 210.

the agency responsible for administering the FHA.<sup>63</sup> When Congress passed the Fair Housing Amendments Act, it required HUD to issue rules to implement the amended FHA.<sup>64</sup> HUD responded by promulgating a number of regulations<sup>65</sup> and publishing various guidelines and manuals.<sup>66</sup>

The administrative regulations HUD promulgates are entitled to deference under the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>67</sup> Under *Chevron*, courts engage in a two-step analysis to determine whether to defer to a government agency's construction of a statute it administers.<sup>68</sup> First, the court will determine whether the language of the statute addresses the issue.<sup>69</sup> If so, the court will not defer to the administrative agency's interpretation.<sup>70</sup> However, if Congress has not addressed the issue or if the statute is ambiguous, the court will proceed to the second step of the analysis, determining whether the agency's interpretation is permissible.<sup>71</sup> If the interpretation is reasonable, courts must give deference.<sup>72</sup> Thus, HUD regulations are entitled to considerable deference.

On the other hand, HUD's interpretations embodied only in guidelines, manuals, and policy statements are not entitled to *Chevron*-style deference.<sup>73</sup> Nevertheless, these interpretations are "entitled to respect" under *Skidmore v.*

---

63. 42 U.S.C. § 3608(a) (2006).

64. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636.

65. See, e.g. 24 C.F.R. § 100.201 (2008); *id.* § 100.205.

66. See, e.g. Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991); Supplement to Fair Housing Accessibility Guidelines, 59 Fed. Reg. 33,362 (June 28, 1994); OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL: A MANUAL TO ASSIST DESIGNERS AND BUILDERS IN MEETING THE ACCESSIBILITY REQUIREMENTS OF THE FAIR HOUSING ACT (1998) [hereinafter DESIGN MANUAL]; OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK 3-5 (1995) [hereinafter COMPLAINT HANDBOOK].

67. 467 U.S. 837 (1984). Administrative interpretations of statutes are entitled to *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in . . . notice-and-comment rulemaking." *Id.* at 227. Congress delegated such authority to HUD when it passed the Fair Housing Amendments Act. Fair Housing Amendments Act, § 13(b), 102 Stat. at 1636 ("[HUD] shall . . . issue rules to implement . . . this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.").

68. *Chevron*, 467 U.S. at 842.

69. *Id.*

70. *Id.* at 842-43.

71. *Id.*

72. *Id.* at 844.

73. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).



*Swift & Co.*<sup>74</sup> Under *Skidmore*, the level of deference courts pay to an administrative interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>75</sup>

## II. WAGE DISCRIMINATION UNDER TITLE VII: FROM *LEDBETTER* TO THE LEDBETTER ACT

Title VII makes it “an unlawful employment practice” to “discriminate against any individual with respect to his compensation . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>76</sup> Under Title VII, before an individual can challenge an unlawful employment practice in court, he or she must first file a charge with the Equal Employment Opportunity Commission (EEOC).<sup>77</sup> If the employee fails to file the charge within the statutory charging period (either 180 or 300 days, depending on the state) after the occurrence of an unlawful employment practice, the employee’s claims are time-barred.<sup>78</sup> Therefore, the timeliness of an employee’s claim depends on what events constitute unlawful employment practices.<sup>79</sup>

### A. *Ledbetter v. Goodyear Tire & Rubber Co.*

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held in a 5-4 decision that the 180-day charging period for Title VII wage discrimination claims ran from the date the employer made the discriminatory pay-setting decision.<sup>80</sup> The Court rejected the plaintiff’s argument that each paycheck she received that was lower due to past sex discrimination constituted a separate, actionable violation of Title VII.<sup>81</sup> The Court reasoned that “[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”<sup>82</sup>

1. *Facts and Procedural History.*—Lilly Ledbetter worked as a supervisor

---

74. See *id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Garcia v. Brockway*, 526 F.3d 456, 476 (9th Cir.) (Fisher, J., dissenting), *cert. denied*, 129 S. Ct. 724 (2008).

75. 323 U.S. 134, 140 (1944).

76. 42 U.S.C. § 2000e-2(a)(1) (2006).

77. *Id.* § 2000e-5(e)(1).

78. *Id.*; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623-24 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

79. See *Ledbetter*, 550 U.S. at 624 (noting that, when determining whether EEOC charges are timely filed, the Supreme Court has “stressed the need to identify with care the specific employment practice that is at issue”).

80. *Id.* at 628.

81. *Id.*

82. *Id.*

at the Gadsden, Alabama Goodyear Tire & Rubber plant in from 1979 to 1998.<sup>83</sup> During most of her nearly twenty years of employment at Goodyear, Ledbetter worked as an area manager, a position occupied mostly by men.<sup>84</sup> When she first began working at Goodyear, Ledbetter's salary was commensurate with that of her male colleagues; however, by the time she took retirement, Ledbetter was being paid significantly less than all of the male employees performing similar work at the plant.<sup>85</sup> Ledbetter made \$3,727 per month, while the lowest paid male area manager made \$4,286 per month, and the highest paid male area manager made \$5,236 per month.<sup>86</sup>

In July 1998, Ledbetter filed a formal EEOC charge alleging that Goodyear had discriminated against her because of her sex.<sup>87</sup> Ledbetter took early retirement in November 1998 and filed a Title VII wage discrimination claim against Goodyear.<sup>88</sup> Ledbetter alleged that over the course of her employment, her supervisors had repeatedly given her poor performance evaluations because she was a woman.<sup>89</sup> As a result of these discriminatory evaluations, Goodyear did not increase her pay to the extent that it would have had her supervisors evaluated her fairly.<sup>90</sup> Moreover, the discriminatory pay decisions continued to affect the pay Ledbetter received throughout her employment and compounded over time.<sup>91</sup>

At trial, Goodyear claimed Ledbetter's evaluations had been nondiscriminatory and that the pay disparity was a result of Ledbetter's poor performance.<sup>92</sup> However, a supervisor admitted Ledbetter had received a "Top Performance Award" in 1996.<sup>93</sup> Ledbetter presented abundant evidence of widespread sex-based discrimination.<sup>94</sup> For example, the jury heard testimony that a supervisor who evaluated Ledbetter "was openly biased against women," and two women who had worked as managers at Goodyear testified that they "were paid less than their male counterparts."<sup>95</sup> In fact, one of the women testified that she was paid less than the men she supervised.<sup>96</sup> Additionally, a supervisor testified that one year, Ledbetter's pay dipped below the established

---

83. *Id.* at 643 (Ginsburg, J., dissenting).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 621 (majority opinion).

88. *Id.* at 621-22.

89. *Id.* at 622.

90. *Id.*

91. *Id.* at 649 (Ginsburg, J., dissenting) (noting that "Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments").

92. *Id.* at 659.

93. *Id.*

94. *Id.* at 659-60.

95. *Id.*

96. *Id.* at 660.

minimum amount for her position.<sup>97</sup> Also, Ledbetter testified that not long before she retired, a plant official told her that the “‘plant did not need women, that [women] didn’t help it, [and] caused problems.’”<sup>98</sup>

The jury found for Ledbetter, and the district court awarded her back pay and damages as well as counsel fees and costs.<sup>99</sup> The Court of Appeals for the Eleventh Circuit reversed, holding that Ledbetter’s cause of action was time-barred because the discriminatory pay decisions on which she based her claims took place outside the EEOC charging period.<sup>100</sup>

The Supreme Court granted Ledbetter’s petition for certiorari to determine whether Ledbetter could maintain an action for wage discrimination under Title VII based on the disparate pay she received during the EEOC charging period as a result of Goodyear’s intentionally discriminatory pay decisions made outside the charging period.<sup>101</sup> Justice Alito authored and Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined the majority opinion affirming the Eleventh Circuit’s judgment.<sup>102</sup> Justice Ginsburg authored a vigorous dissent that Justices Stevens, Souter, and Breyer joined.<sup>103</sup>

2. *Majority Opinion.*—In the majority opinion, Justice Alito first noted that, when determining whether an EEOC charge was timely filed, the Court “ha[s] stressed the need to identify with care the specific employment practice that is at issue.”<sup>104</sup> The Court relied on its earlier decision in *National Railroad Passenger Corp. v. Morgan*<sup>105</sup> for the proposition that, when a plaintiff alleges discrete acts of discrimination, such as termination, refusal to hire, and failure to promote, the EEOC charging period begins when the discriminatory act occurs.<sup>106</sup> The Court held that the discriminatory pay-setting decisions were similar discrete acts, and the charging period thus ran from the dates Goodyear made the decisions.<sup>107</sup>

Ledbetter argued that Goodyear’s pay-setting decisions were not the only unlawful employment practices at issue.<sup>108</sup> She contended that each paycheck she received during the charging period which was affected by Goodyear’s previous discriminatory pay decisions was a separate violation of Title VII.<sup>109</sup> She also argued that Goodyear’s decision in 1998 to deny her a raise was an unlawful employment practice because it perpetuated Goodyear’s previous

---

97. *Id.* at 659.

98. *Id.* at 660 (alterations in original).

99. *Id.* at 644.

100. *Id.* at 622-23 (majority opinion).

101. *Id.* at 623.

102. *Id.* at 620-21.

103. *Id.* at 643 (Ginsburg, J., dissenting).

104. *Id.* at 624 (majority opinion).

105. 536 U.S. 101 (2002).

106. *Ledbetter*, 550 U.S. at 621 (quoting *Morgan*, 536 U.S. at 114).

107. *Id.*

108. *Id.* at 624.

109. *Id.*

intentional discrimination.<sup>110</sup> The Court rejected these arguments, reasoning that they would require it to abandon the fundamental component of a Title VII disparate impact claim, discriminatory intent.<sup>111</sup> According to the Court, because Ledbetter did not claim that Goodyear officials acted with intent to discriminate when they issued the paychecks or when they denied her a raise in 1998, Ledbetter was essentially complaining of the current effects of past discrimination.<sup>112</sup> The Court held that Supreme Court precedent foreclosed Ledbetter's argument,<sup>113</sup> reasoning that "current effects alone cannot breathe life into prior, uncharged discrimination."<sup>114</sup>

3. *Dissenting Opinion.*—In her dissent, Justice Ginsburg argued that the majority's holding ignored the realities of pay discrimination.<sup>115</sup> Pay disparities are often initially small, so employees may not have reason to suspect their employer has discriminated against them.<sup>116</sup> According to Justice Ginsburg, "[i]t is only when the disparity becomes apparent and sizeable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain."<sup>117</sup> Also, Justice Ginsburg argued that information regarding coworkers' salaries may not be available to employees, noting that employees often keep their salary information private and that employers often refuse to publish employee salary levels and even have rules requiring employees to refrain from discussing their salaries.<sup>118</sup>

Justice Ginsburg argued that each paycheck that perpetuated past discrimination was a fresh instance of unlawful discrimination.<sup>119</sup> Relying on *Morgan*, Justice Ginsburg reasoned that pay discrimination is different from the discrete acts of discrimination identified by the majority.<sup>120</sup> Unlike the one-time, easily identifiable acts of discrimination at issue in the cases the majority cited,<sup>121</sup>

---

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 625-28 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107; Del. State Coll. v. Ricks, 449 U.S. 250 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)).

114. *Id.* at 628.

115. *Id.* at 645 (Ginsburg, J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.* at 649-50.

119. *Id.* at 648.

120. *Id.*

121. *Id.* at 651-52 (citing Lorance v. AT&T Tech., Inc., 490 U.S. 900, 902 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107 (involving the adoption of a discriminatory seniority system); Del. State Coll. v. Ricks, 449 U.S. 250, 252 (1980) (involving a denial of tenure); United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977) (involving a discharge)).

the pay discrimination Ledbetter faced was cumulative and concealed.<sup>122</sup> Therefore, according to Justice Ginsburg, the Court should have concluded that the payment of a wage affected by the discriminatory pay-setting decision constituted an unlawful employment practice.<sup>123</sup>

Finally, Justice Ginsburg argued that the majority's decision was "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."<sup>124</sup> She noted that "the ball is in Congress' court" and that the legislature could act to override the decision.<sup>125</sup>

*B. Congress's Response: The Lilly Ledbetter Fair Pay Act of 2009*

As Justice Ginsburg's dissent adumbrated, Congress reacted to *Ledbetter* by passing a legislative override of the Supreme Court's decision.<sup>126</sup> The Ledbetter Act amends Title VII and provides:

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.<sup>127</sup>

Thus, the Act does not expand the statute of limitations for wage discrimination claims; rather, it clarifies what events trigger the statute of limitations.

The Act goes on to provide that in addition to any other relief provided, an aggrieved person may recover up to two years of back pay "where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge."<sup>128</sup> By allowing back pay extending for a limited time beyond the charging period, the Act strikes a balance between ensuring that employees have a chance to enforce their Title VII rights and encouraging them to file claims promptly.<sup>129</sup>

The congressional findings included in the Ledbetter Act<sup>130</sup> and the House

---

122. *Id.* at 650.

123. *Id.* at 646.

124. *Id.* at 660.

125. *Id.* at 661.

126. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

127. *Id.* § 3, 123 Stat. at 5-6 (to be codified at 42 U.S.C. § 2000e-5(3)(A)).

128. *Id.* § 3, 123 Stat. at 6 (to be codified at 42 U.S.C. § 2000e-5(3)(B)).

129. See H.R. REP. NO. 110-237, at 10 (2007).

130. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5 note).

Report accompanying an earlier version of the Ledbetter Act<sup>131</sup> indicate that Congress embraced Justice Ginsburg's dissent. The legislative findings state that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."<sup>132</sup> The findings further provide that "[t]he limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."<sup>133</sup> Like Justice Ginsburg's dissent, the House Report differentiates between discrete discriminatory acts and pay discrimination, indicating that *Ledbetter*'s result is unfair to victims of pay discrimination whose claims may be barred even though the discrimination is ongoing and concealed.<sup>134</sup>

The Ledbetter Act does not apply to Title VII wage discrimination alone.<sup>135</sup> Rather, Congress explicitly extended its provisions to include wage discrimination claims under the Age Discrimination in Employment Act (ADEA),<sup>136</sup> the Americans with Disabilities Act (ADA),<sup>137</sup> and the Rehabilitation Act (RA).<sup>138</sup> Thus, the Ledbetter Act makes it clear that *Ledbetter* is no longer good law with respect to wage discrimination claims under Title VII and certain related statutes. But the Act is silent whether and to what extent *Ledbetter* should continue to influence courts interpreting the FHA.

### III. *GARCIA V. BROCKWAY*: *LED BETTER*'S EFFECT ON FHA DESIGN-AND-CONSTRUCTION SUITS

*Garcia* is currently the leading case construing the statute of limitations in FHA design-and-construction suits.<sup>139</sup> In the en banc decision, the U.S. Court of Appeals for the Ninth Circuit relied heavily on *Ledbetter* to hold that the completion of construction triggers the statute of limitations in FHA design-and-construction cases.<sup>140</sup> Under the court's holding, the date that a plaintiff actually

---

131. H.R. REP. NO. 110-237. The 2007 Act was virtually identical to the 2009 Act. *See id.* at 1-3.

132. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5 note).

133. *Id.*

134. H.R. Rep. No. 110-237, at 6.

135. Lilly Ledbetter Fair Pay Act, § 5, 123 Stat. at 6-7 (to be codified at scattered sections of 29 and 42 U.S.C.).

136. 29 U.S.C. § 621 (2006).

137. 42 U.S.C. § 12111 (2006).

138. 29 U.S.C. § 791 (2006).

139. Currently, the only other circuit court case addressing the statute of limitations issue in Title VII design-and-construction suits is an unpublished decision out of the Sixth Circuit. *See Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. App'x 469 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008).

140. *Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724

becomes aware of the violation and whether a building continues to be noncompliant is irrelevant to the statute of limitations determination. This approach “forever immunizes developers and landlords of FHA-noncompliant buildings from disabled persons’ private enforcement actions once two years have passed since the buildings’ construction.”<sup>141</sup>

#### *A. Facts and Procedural History*

The facts of the two cases consolidated on appeal illustrate the problems facing plaintiffs attempting to enforce design-and-construction claims through private civil actions.<sup>142</sup> The first defendant, Brockway, built an apartment complex in Boise, Idaho, and sold the last unit in 1994.<sup>143</sup> The individual plaintiff in that case, Garcia, who used a wheelchair, leased an apartment in the complex in 2001.<sup>144</sup> Garcia found that the apartments did not comply with the FHA design-and-construction requirements, and management ignored his requests for improvements.<sup>145</sup> Garcia filed a private civil action for FHA design-and-construction violations against the builder and the architect within two years of leasing the apartment.<sup>146</sup> The district court granted summary judgment in favor of the defendants, holding that the statute of limitations barred the claim.<sup>147</sup>

In the second consolidated case, Gohres Construction built the North Las Vegas, Nevada Villas at Rancho del Norte in 1997.<sup>148</sup> After Gohres received a final certificate of occupancy, the property was sold in 2001 through foreclosure.<sup>149</sup> In 2004, Thompson, a member of the Disabled Rights Action Committee (DRAC), “tested” the Villas and found violations of the FHA’s design-and-construction requirements.<sup>150</sup> Within one year, Thompson and DRAC commenced a suit asserting an FHA design-and-construction claim.<sup>151</sup> The district court granted defendants’ motion to dismiss, holding that the claim was

---

(2008).

141. *Id.* at 475 (Fisher, J., dissenting).

142. *See id.* at 459 (majority opinion).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 459-60.

148. *Id.* at 460.

149. *Id.*

150. *Id.* “Testers” are individuals who, having no genuine interest in buying or renting a dwelling, pose as potential buyers or renters for the purpose of collecting evidence of unlawful housing practices. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1102 (9th Cir. 2004). DRAC initially filed a complaint with HUD in 1997, which HUD dismissed in 2001 because it determined that testers lacked standing. *Garcia*, 526 F.3d at 460. In a later case, the Ninth Circuit held that testers have standing to sue under the FHA. *Id.*

151. *Garcia*, 526 F.3d at 460.

time-barred.<sup>152</sup> In an opinion authored by Chief Judge Alex Kozinski, the Ninth Circuit panel affirmed the district courts' decisions.<sup>153</sup> Judge Raymond Fisher dissented.<sup>154</sup> Subsequently, the Ninth Circuit reheard the case en banc.<sup>155</sup>

### B. Majority Opinion

The en banc court adopted the panel decision with only minor changes.<sup>156</sup> Because the statute of limitations runs from the occurrence or termination of a discriminatory housing practice, both the majority and the dissent agreed that identifying the discriminatory housing practice at issue was integral to the decision.<sup>157</sup> The majority held,

Here, the practice is the “failure to design and construct” a multifamily dwelling according to FHA standards. The statute of limitations is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued. In both cases, this triggering event occurred long before the plaintiffs brought suit.<sup>158</sup>

The plaintiffs argued that the design-and-construction violations were continuing and would not terminate until the defendants remedied the accessibility deficiencies.<sup>159</sup> The court noted that Congress codified the continuing violations doctrine by inserting the word “termination” in § 3613(a)(1)(A).<sup>160</sup> The plaintiffs argued that the word “‘termination’ would be meaningless” if the court did not read it to mean the termination of the FHA design-and-construction violations.<sup>161</sup> Quoting *Ledbetter*, the court rejected this argument, reasoning that “termination” refers to the termination of a

---

152. *Id.*

153. *Garcia v. Brockway*, 503 F.3d 1092, 1094, 1101 (9th Cir. 2007), *aff'd on reh'g en banc*, 526 F.3d 456 (9th Cir. 2008).

154. *Id.* at 1101 (Fisher, J., dissenting).

155. *Garcia*, 526 F.3d at 456.

156. *Id.* at 459.

157. *Id.* at 462, 468 (Fisher, J., dissenting).

158. *Id.* at 461 (majority opinion) (quoting 42 U.S.C. § 3604(f)(3)(C) (2000)) (footnote and citation omitted).

159. *Id.*

160. *Id.* at 461-62. In *Havens Realty Corp. v. Coleman*, a unanimous Supreme Court held that “where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the specified time period, running from] the last asserted occurrence of that practice.” 455 U.S. 363, 380-81 (1982). When Congress passed the Fair Housing Amendments Act, Congress indicated that it inserted the word “termination” into the FHA’s statute of limitations provisions for the purpose of codifying this holding. H.R. REP. 100-711, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194.

161. *Garcia*, 526 F.3d at 462.



discriminatory housing practice and that “[t]he Supreme Court has ‘stressed the need to identify with care the specific [discriminatory] practice that is at issue.’”<sup>162</sup> Because the court held that the discriminatory practice at issue was the “‘failure to design and construct,’ which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase[,]” it did not qualify as a continuing violation.<sup>163</sup> Instead, the existence of the FHA design-and-construction defects was a continuing effect of a past violation, and the court again quoted *Ledbetter* for the proposition that “‘current effects alone cannot breathe life into prior, uncharged discrimination.’”<sup>164</sup>

The court justified its holding on policy grounds.<sup>165</sup> The court stated that a contrary conclusion would impose a severe hardship on builders because it “‘would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid . . . liability.’”<sup>166</sup> The court reasoned that by enacting the two-year statute of limitations, Congress indicated a contrary intent.<sup>167</sup>

The court rejected the plaintiffs’ two other theories to extend the statute of limitations.<sup>168</sup> First, the plaintiffs argued that the statute of limitations should not begin to run until the injured party *encounters* the defect by visiting the property.<sup>169</sup> Professor Robert G. Schwemm advanced this theory in a recent article.<sup>170</sup> The theory is based on the Supreme Court’s guidance that unless the statute contains contrary instructions, courts are to interpret the FHA in accordance with ordinary tort principles.<sup>171</sup> Under ordinary tort principles, the statute of limitations does not begin to run until a plaintiff’s claim accrues, which occurs when the defendant’s negligent act has harmed the plaintiff.<sup>172</sup> Therefore, in FHA design-and-construction cases, the statute of limitations would not begin to run until the plaintiff personally encountered the accessibility deficiencies because the encounter constitutes the injury.<sup>173</sup> The court rejected Professor Schwemm’s theory, reasoning that it “ma[d]e too much” of the Supreme Court’s “passing reference to tort law” and that such an approach undercut the language

---

162. *Id.* (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007)) (second alteration in original).

163. *Id.* (quoting 42 U.S.C. § 3604(f)(3)(C) (2000)).

164. *Id.* at 463 (quoting *Ledbetter*, 550 U.S. at 628).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 463-66.

169. *Id.* at 465.

170. Schwemm, *Barriers*, *supra* note 1, at 849-55.

171. *See Meyer v. Holley*, 537 U.S. 280, 285-91 (2003); *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974); Schwemm, *Barriers*, *supra* note 1, at 779.

172. Schwemm, *Barriers*, *supra* note 1, at 850.

173. *Id.*

the FHA's statute of limitations.<sup>174</sup> The court noted, as did Professor Schwemm, that where testers have standing to sue, the theory creates equitable problems with regard to the liability of developers because testers could continually restart the statute of limitations clock simply by revisiting the property.<sup>175</sup>

Additionally, Garcia argued that under the discovery rule and equitable tolling, the statute of limitations should only begin to run when the plaintiff discovers the design-and-construction defect.<sup>176</sup> The discovery rule generally provides that the statute of limitations will not begin to run until the plaintiff knows he has been injured and his injury's cause.<sup>177</sup> Equitable tolling may apply to extend the statute of limitations in cases where the plaintiff knows of his injury but lacks other information necessary to decide whether the injury is caused by another's wrongdoing.<sup>178</sup> The court rejected both of these theories, holding that they would make the clear language of the statute meaningless by indefinitely tolling the limitations period.<sup>179</sup>

### C. Dissenting Opinions

Judges Harry Pregerson and Stephen Reinhardt dissented in the en banc decision and also adopted Judge Fisher's panel dissent.<sup>180</sup> Judge Fisher's dissent took a different approach to what the majority called the statute's "clear" language.<sup>181</sup> Judge Fisher argued that by classifying the "failure to design and construct" as the discriminatory housing practice, the majority "commit[ted] a crucial error that underlies the rest of its decision."<sup>182</sup> According to the dissent, the failure to design and construct a covered multifamily dwelling in accordance with the FHA's accessibility requirements is not itself a discriminatory housing practice that can trigger the statute of limitations.<sup>183</sup> Instead, § 3604(f)(3)(C) is merely a definitional provision.<sup>184</sup>

Judge Fisher's approach closely tracks the FHA's statutory language.<sup>185</sup> The analysis began with the statute of limitations provision, which provides that "[a]n aggrieved person may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged *discriminatory housing practice*."<sup>186</sup> The FHA defines a "discriminatory housing practice," in pertinent part, as "an

---

174. *Garcia*, 526 F.3d at 464.

175. *Id.* at 465 (citing Schwemm, *Barriers*, *supra* note 1, at 859).

176. *Id.*

177. *Id.* at 464.

178. *Id.*

179. *Id.* at 466.

180. *Id.* (Pregerson & Reinhardt, JJ., dissenting).

181. *Id.* at 466-67 (Fisher, J., dissenting).

182. *Id.* at 468.

183. *Id.*

184. *Id.* at 470.

185. *See id.* at 468-74.

186. 42 U.S.C. § 3613(a)(1)(A) (2006) (emphasis added).

act that is unlawful under section 3604 . . . of this title.”<sup>187</sup> The only relevant actions § 3604 makes *unlawful* are listed as § 3604(f)(1)-(2).<sup>188</sup> These sections make it “unlawful— . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap” and “[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.”<sup>189</sup> Section 3604(f)(3)(C) does not provide that failure to design and construct in accordance with the accessibility requirements is *unlawful*; rather, it provides that “[f]or the purposes of this subsection, discrimination includes— . . . failure to design and construct” covered multifamily dwellings in accordance with the accessibility requirements.<sup>190</sup> According to Judge Fisher, § 3604(f)(3)(C) is merely an example of the kind of discrimination that becomes actionable only when it occurs in the context of the sale or rental of a dwelling.<sup>191</sup>

Moreover, the FHA defines an “aggrieved person” as “any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”<sup>192</sup> However, the majority’s reading of the statute would in many instances start the clock running long before a building’s design-and-construction deficiencies caused anyone to become aggrieved.<sup>193</sup> Accordingly, Judge Fisher maintained that the most logical reading of the FHA’s statute of limitations is that it begins to run when a person is injured by one of the actions that § 3604(f) prohibits, which occurs when an individual attempts to buy or rent or tests a unit.<sup>194</sup> Until that point, the building’s owner has not committed a discriminatory housing practice, and the disabled individual has not been aggrieved.<sup>195</sup>

Judge Fisher went on to argue that the majority’s interpretation conflicted with the legislative history of the FHA and Supreme Court precedent.<sup>196</sup> He noted that the legislative history accompanying the Fair Housing Amendments Act evinced Congress’s intent to allow greater access to the courts and encourage private enforcement and that the Supreme Court has approved of these goals by repeatedly holding that courts must construe the FHA flexibly to effectuate its broad remedial purpose.<sup>197</sup> Judge Fisher argued that the majority ignored these instructions by interpreting the statute of limitations in a manner that thwarted

---

187. *Id.* § 3602(f) (quoted in *Garcia*, 526 F.3d at 498 (Fisher, J., dissenting)).

188. *Garcia*, 526 F.3d at 468-69 (Fisher, J., dissenting).

189. 42 U.S.C. § 3604(f)(1)-(2) (2006).

190. *Id.* § 3604(f)(3)(C).

191. *Garcia*, 526 F.3d at 470-71 (Fisher, J., dissenting).

192. 42 U.S.C. § 3602(i).

193. *See Garcia*, 526 F.3d at 461 (majority opinion) (holding that the completion of construction triggers the statute of limitations).

194. *Id.* at 469 (Fisher, J., dissenting).

195. *Id.* at 470-71.

196. *Id.* at 475.

197. *Id.*

the FHA's purpose.<sup>198</sup>

Finally, Judge Fisher supported his interpretation with a number of policy arguments. He argued that, under the majority's interpretation, builders would be able to disregard the FHA's accessibility requirements and shield themselves from lawsuits simply by waiting two years before looking for tenants.<sup>199</sup> Judge Fisher also noted that because there is no intent requirement in FHA design-and-construction cases, extending the period for filing suit would not create difficult evidentiary issues; instead, "defendant's architectural plans and apartment complexes can themselves speak to the alleged construction violations."<sup>200</sup> Finally, he reasoned that under his approach, real estate developers and builders would not face such dire consequences as the majority predicted because they are capable of shifting their liability contractually and because a variety of individuals may be named as defendants in FHA design-and-construction suits.<sup>201</sup>

Judges Pregerson and Reinhardt joined Judge Fisher's panel dissent but also dissented separately to "emphasize the extent to which the majority's holding perverts the purpose and intent of the statute."<sup>202</sup> They argued that the majority, to the detriment of disabled individuals, construed the statute of limitations for the sole benefit of the housing construction industry.<sup>203</sup> According to Judges Pregerson and Reinhardt, "[Congress] did not intend to invite the developer to assume the risk of non-compliance, in order to save construction costs, by taking the chance that his violation of the law would remain undiscovered by the disabled community for a period of two years."<sup>204</sup>

#### IV. *GARCIA*'S SHORTCOMINGS

The majority's decision in *Garcia* severely undermines plaintiffs' ability to enforce their rights under the FHA because the statute of limitations will often expire before any disabled individual becomes aware of the design-and-construction deficiencies.<sup>205</sup> The majority's approach suffers from several shortcomings. First, the majority adheres to an illogical reading of the statutory language.<sup>206</sup> Second, the court's construction conflicts with Supreme Court precedent.<sup>207</sup> Third, the court's reading of the statute conflicts with the legislative purpose behind the FHA.<sup>208</sup> Fourth, the court gives no deference to

---

198. *Id.*

199. *Id.*

200. *Id.* at 477 (quoting *Silver State Fair Hous. Council, Inc. v. ERGS, Inc.*, 362 F. Supp. 2d 1218, 1222 n.1 (D. Nev. 2005)).

201. *Id.*

202. *Id.* at 466 (Pregerson & Reinhardt, JJ., dissenting).

203. *Id.*

204. *Id.* at 467.

205. *See id.* at 461 (majority opinion).

206. *See id.* at 470-71 (Fisher, J., dissenting).

207. *Id.* at 475.

208. *Id.*

HUD's interpretations.<sup>209</sup> Finally, the court bases much of its decision on unconvincing policy arguments.<sup>210</sup>

#### A. Statutory Construction

The *Garcia* majority contends that the language of the statute of limitations is "clear."<sup>211</sup> This proposition is difficult to accept given the sharply divergent manners in which courts have interpreted § 3613(a)(1)(A).<sup>212</sup> Although some courts have taken the majority's approach,<sup>213</sup> other courts and commentators have adopted the dissent's reasoning.<sup>214</sup> Still other courts have held that the statute of limitations begins to run only when the building is brought into compliance, reasoning that the failure to design and construct a covered multifamily dwelling in accordance with § 3604(f)(3)(C)'s requirements is a continuing violation.<sup>215</sup> Therefore, the *Garcia* majority's contention that the statute of limitations provision is unambiguous in the context of design-and-construction suits is unconvincing. In reality, the *Garcia* majority "[f]ound] an ambiguity in the statute and then resolv[ed] that ambiguity contrary to the overall purpose and structure of the FHA and its legislative and judicial history."<sup>216</sup>

The majority addressed Judge Fisher's convincing statutory construction argument in footnotes, contending that because § 3604(f)(3)(C) is coordinate to §§ 3604(f)(1) and (2), "treating (f)(3)(C) as subordinate makes no structural sense."<sup>217</sup> Although the sections are coordinate, they are framed differently. The introductory language of §§ 3604(f)(1) and (2) provides that "it shall be unlawful" to do the specified acts.<sup>218</sup> On the other hand, § 3604(f)(3)(C)'s introductory language only provides that for the purposes of the subsection, "discrimination includes" the acts listed.<sup>219</sup> The majority gave no support for its

---

209. *Id.*

210. *See id.* at 476-78.

211. *Id.* at 466 (majority opinion).

212. *See* cases cited *supra* note 41.

213. *See, e.g.,* *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1141 (D. Idaho 2003); *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 501 (E.D. Va. 2002).

214. *See, e.g.,* *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 F. App'x 469, 481 (6th Cir. 2006); Schwemm, *Barriers*, *supra* note 1, at 851.

215. *See, e.g.,* *E. Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 213 (E.D.N.Y. 2001) (Plaintiff "does not complain of a discrete violation of the FHA, but instead describes an unlawful practice that . . . has continued to the present day. As such, [Plaintiff] alleges a continuing violation which, therefore, is timely made."); *Montana Fair Hous., Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (holding that the FHA is "clear" that the statute of limitations did not begin to run until the design-and-construction defects were cured).

216. *Garcia*, 526 F.3d at 467 (Fisher, J., dissenting).

217. *Id.* at 461 n.1 (majority opinion).

218. 42 U.S.C. § 3604 (2006).

219. *Id.* § 3604(f)(3).

perplexing conclusion that the coordinate placement of the sections should control, given the subsections' divergent statutory language.

Instead of pursuing the statutory construction argument, the majority attempted to defend its reading of the statute by resorting to a results-based analysis. The court reasoned that "under the dissent's interpretation, only the party that actually does the selling or renting would be liable, not the party that designed or constructed and FHA-noncompliant unit[.]"<sup>220</sup> However, according to Professor Schwemm, "any entity who contributes to a violation of the FHAA would be liable."<sup>221</sup> Original builders and developers may continue to be liable even after they sell noncompliant units.<sup>222</sup> Furthermore, the majority's holding would protect builders of noncompliant units from private suits even if they retained ownership and control over their buildings.<sup>223</sup>

The majority also argued that the dissent's reading of the statutory language "would make it impossible, or at least more difficult, for the Attorney General to bring a design-and-construction claim against builders under 42 U.S.C. § 3614(a), because design and construction of an FHA-noncompliant building alone would not . . . be actionable under the FHA."<sup>224</sup> A reading of § 3614(a) reveals the court's error: No discriminatory housing practice needs to occur for the Attorney General to file suit against a noncompliant builder.<sup>225</sup> Under § 3614(a), the Attorney General may bring a civil suit when "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA]" or when "any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance[.]"<sup>226</sup> Even if construction alone does not amount to a discriminatory housing practice, it would amount to "a pattern or practice of resistance," and the people living in FHA-noncompliant units would be a "group of persons denied rights" under the FHA.<sup>227</sup> The Attorney General could thus file suit immediately when a builder began construction of an FHA-noncompliant dwelling even though the construction alone does not amount to a discriminatory housing practice.

Even if the dissent's reading of the statute did somehow limit the Attorney General's ability to bring suit, the court did not take into consideration the

---

220. *Garcia*, 526 F.3d at 461 n.1.

221. Schwemm, *Barriers*, *supra* note 1, at 778 (quoting *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998)).

222. *Id.* at 781-90.

223. Under the majority's approach, all parties are immunized from private suit once two years have passed after the completion of construction. See *Garcia*, 526 F.3d at 461. This is the case regardless of whether the original builder maintains ownership of the property.

224. *Id.* at 461 n.1.

225. 42 U.S.C. § 3614(a) (2006). The plaintiffs in *Garcia* made this argument in their petition for certiorari. Petition for Writ of Certiorari at 13-14, *Thompson v. Turk*, 129 S. Ct. 724 (2008) (No. 08-140).

226. 42 U.S.C. § 3614(a).

227. Petition for Writ of Certiorari at 13-14, *Thompson*, 129 S. Ct. 724.

relative “importance of private enforcement” of the FHA.<sup>228</sup> In *Trafficante*, the Supreme Court reasoned that “since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits[.]”<sup>229</sup> If a court must choose between limiting either the Attorney General’s or private persons’ ability to bring suits, the private persons’ interests should take priority.

#### B. Conflict with Supreme Court Precedent

*Garcia*’s holding conflicts with long-standing Supreme Court precedent requiring courts to construe the FHA broadly.<sup>230</sup> Specifically with regard to statutes of limitation, in *Havens Realty Corp. v. Coleman*,<sup>231</sup> a unanimous Supreme Court cautioned that a “wooden application” of the FHA’s statute of limitations “only undermines the broad remedial intent of Congress embodied in the Act[.]”<sup>232</sup> In *Garcia*, the Ninth Circuit applied the statute of limitations as rigidly as the ambiguous statutory language would allow, contrary to the Supreme Court’s instructions in *Havens*.<sup>233</sup>

#### C. Conflict with Legislative Purpose

The legislative history of the Fair Housing Amendments Act demonstrates Congress’s intent that all new covered multifamily dwellings be accessible to individuals with disabilities.<sup>234</sup> *Garcia* undercuts this purpose by protecting builders from liability for their noncompliance. Immunizing noncompliant parties from suit in all cases two years after they complete construction can only breed contempt for the FHA’s accessibility requirements among builders.

The legislative history also indicates that Congress intended to expand individuals’ access to the courts in enforcing their FHA rights.<sup>235</sup> Again, *Garcia*’s holding thwarts this purpose by starting the statute of limitations clock running so early that it may expire before any interested individual becomes aware of the design-and-construction deficiencies in a covered multifamily dwelling.

#### D. No Deference to HUD Manuals

Despite Supreme Court guidance counseling otherwise, the majority in

---

228. *Id.* at 14.

229. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

230. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:2.

231. 455 U.S. 363 (1982).

232. *Id.* at 380.

233. *See Garcia v. Brockway*, 526 F.3d 456, 461 (9th Cir.) (en banc), *cert. denied*, 127 S. Ct. 724 (2008).

234. *See* H.R. REP. NO. 100-711, at 18, 27-28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, 2188-89.

235. *See id.* at 16, 39-40.

*Garcia* dismisses HUD's interpretations of the statute of limitations.<sup>236</sup> HUD has not promulgated regulations addressing what event triggers the statute of limitations in design-and-construction claims. The agency has, however, spoken to the issue in a manual and a handbook.<sup>237</sup> In its Design Manual, HUD states that with respect to the FHA's design-and-construction requirements, "complaints could be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice—failure to design and construct the building in compliance—does not terminate."<sup>238</sup> Similarly, in its Complaint Handbook, HUD provides that "[a] complainant aggrieved because an otherwise covered multifamily dwelling unit was not designed and constructed to meet the Fair Housing Accessibility Guidelines, may allege a continuing violation regardless of when construction of the building was completed."<sup>239</sup> Under the applicable *Skidmore* standard, these interpretations are entitled to deference only to the extent that they are persuasive, but the interpretations are "persuasive and dovetail[] with both the statutory text and nontextual considerations."<sup>240</sup>

#### *E. Unconvincing Policy Arguments*

Another problem with the majority's opinion in *Garcia* is that it relies on unconvincing policy arguments. For example, the court was concerned that the dissent's more expansive reading of the statute would allow disabled individuals to sue builders and real estate developers who failed to comply with § 3604(f)(3)(C)'s requirements years after they ceased to have any control over the building.<sup>241</sup> This argument is unimpressive for several reasons. First, the majority's approach immunizes builders and developers from suit two years after they complete construction even if they retain ownership of and control over their buildings.<sup>242</sup> Second, it is unclear why courts should be concerned with protecting developers from liability they have incurred due to their own failure to comply with the law. Third, even if protecting builders is a legitimate concern, that interest should not supersede the interests of disabled individuals, for whom the legislation was designed to protect. Fourth, the Fair Housing Amendment Act's legislative history shows that Congress did not share this concern for developers.<sup>243</sup> Finally, developers could seek to protect themselves contractually by requiring purchasers to indemnify them against design-and-

---

236. *Garcia*, 526 F.3d at 462.

237. See COMPLAINT HANDBOOK, *supra* note 66, at 3-5; DESIGN MANUAL, *supra* note 66, at 22.

238. DESIGN MANUAL, *supra* note 66, at 22.

239. COMPLAINT HANDBOOK, *supra* note 66, at 3-5.

240. *Garcia*, 526 F.3d at 476 (Fisher, J., dissenting).

241. *Id.* at 463 (majority opinion).

242. See *id.* at 477.

243. See *id.* at 476-77 (Fisher, J., dissenting).



construction liability.<sup>244</sup>

The *Garcia* majority was also concerned that the dissent's reading would render the statute of limitations meaningless by tolling it indefinitely.<sup>245</sup> This is simply not true. Under the dissent's approach, plaintiffs' suits would be time-barred two years after they encountered the violations.<sup>246</sup> Even under HUD's more expansive approach, builders would be immune from suit two years after they remedied their design-and-construction violations.<sup>247</sup> In any event, defendants could invoke the equitable doctrine of laches to defend against stale claims.<sup>248</sup>

Moreover, the fundamental policies justifying statutes of limitation are "at a low ebb here."<sup>249</sup> Statutes of limitations serve to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."<sup>250</sup> However, evidentiary issues are not a major concern in design-and-construction cases because liability does not turn on intent.<sup>251</sup> A covered multifamily dwelling either meets the accessibility requirements or it does not.<sup>252</sup> Nor is an interest in preventing plaintiffs who sleep on their rights from bringing stale suits implicated.<sup>253</sup> Here, no one can accuse plaintiffs who are unaware of the design-and-construction violations until they rent or buy a dwelling of impermissible delay.

For the foregoing reasons, the Ninth Circuit's stance in *Garcia* is untenable. Although the court could have possibly reached the same result without relying on *Ledbetter*, it is telling that the majority relies on and quotes from *Ledbetter* much more heavily than any other Supreme Court case.<sup>254</sup> Other courts are also likely to find *Ledbetter* controlling in FHA design-and-construction suits given that courts interpret the FHA in light of Title VII precedents.<sup>255</sup> Therefore, it is necessary to explore to what extent *Ledbetter* continues to be applicable in FHA design-and-construction suits after the Ledbetter Act. Even if *Garcia* is not a direct result of *Ledbetter*, the multiple shortcomings of the Ninth Circuit's approach necessitate a legislative response.

---

244. *Id.* at 477.

245. *Id.* at 463 (majority opinion).

246. *Id.* at 476 (Fisher, J., dissenting).

247. *Id.*

248. *See id.* at 470 n.2.

249. *Id.* at 477.

250. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

251. *Garcia*, 526 F.3d at 477 (Fisher, J., dissenting).

252. *Id.*

253. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

254. *Garcia*, 526 F.3d at 462-64 (majority opinion).

255. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

V. *LEDBETTER*'S CONTINUING APPLICABILITY IN FHA CASES  
AND THE NEED FOR A CONSISTENT LEGISLATIVE RESPONSE

When Congress overrides precedent, the common assumption may be that courts will no longer rely on the overridden precedent.<sup>256</sup> However, in a recent article, Deborah A. Widiss demonstrated that this is not the case; instead, courts very often construe legislative overrides narrowly and continue to rely on the overridden precedent in other contexts.<sup>257</sup> Widiss calls such overridden precedent "shadow precedents."<sup>258</sup> Because the Ledbetter Act will not prevent courts from applying *Ledbetter* as shadow precedent, Congress should pass a legislative response making it clear that *Ledbetter* no longer applies in FHA design-and-construction suits.

A. *Legislative Overrides and Shadow Precedent*

Widiss explores the courts' reactions to legislative overrides of several Title VII precedents and the resulting application of shadow precedent.<sup>259</sup> As one example, Widiss cites *Lorance v. AT&T Technologies, Inc.*,<sup>260</sup> where the Supreme Court held that a plaintiff's claim of discrimination under Title VII was time-barred.<sup>261</sup> The plaintiff sued when she was laid off, alleging that the employer had originally adopted its seniority system for a discriminatory purpose.<sup>262</sup> The Court held that the discriminatory act at issue was the adoption of the seniority system and that the plaintiff's claims were untimely because she had not filed within 180 days after the initial adoption of the system.<sup>263</sup>

Congress overrode the decision in the 1991 Civil Rights Act, which provided that an unlawful employment practice occurs when a discriminatory seniority system is adopted, when a person becomes subject to such a system, or when a person is injured by such a system.<sup>264</sup> In the legislative history of the bill, Congress conveyed its disapproval of courts' application of *Lorance* in other contexts.<sup>265</sup> Nevertheless, courts continue to apply *Lorance* "as a shadow precedent."<sup>266</sup> In fact, the Supreme Court relied heavily on *Lorance* and other cases that had cited *Lorance* in *Ledbetter*.<sup>267</sup>

---

256. Widiss, *supra* note 15, at 511.

257. *Id.* at 512.

258. *Id.*

259. *Id.* at 536-56.

260. *Id.* at 542 (citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107).

261. *Lorance*, 490 at 907-08.

262. *Id.* at 902-03.

263. *Id.* at 907-08.

264. Widiss, *supra* note 15, at 543.

265. *Id.* at 544.

266. *Id.*

267. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625-26, 627 n.2 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be

As another example of shadow precedent, Widiss cites *Price Waterhouse v. Hopkins*.<sup>268</sup> In *Price Waterhouse*, the Supreme Court held that a defendant in a Title VII action could avoid liability for discrimination by showing that it would have made the same employment decision even if it had not taken into consideration the plaintiff's status as a member of a group protected under Title VII.<sup>269</sup> In the 1991 Civil Rights Act, Congress also overrode this decision by amending Title VII to provide that an unlawful employment practice occurs if the plaintiff's status as a member of a protected class is a motivating factor in an employment decision.<sup>270</sup> Although the statutory language did not address related statutes such as the ADEA and the ADA, the legislative history indicated that courts should interpret laws modeled after Title VII in a consistent manner.<sup>271</sup> Despite Congress's clear repudiation of *Price Waterhouse*, many courts continue to apply its reasoning in ADA and ADEA cases.<sup>272</sup>

As Widiss's analysis makes clear, a congressional override of a Supreme Court case does not preclude courts from continuing to follow its reasoning, even when the legislative history indicates a contrary intent.<sup>273</sup> In fact, some courts have continued to apply shadow precedent even after the Supreme Court declared that a congressional override fully superseded the case.<sup>274</sup> Therefore, it is likely that courts will continue to apply *Ledbetter* as shadow precedent in FHA suits.

#### B. Ledbetter as "Shadow Precedent"

The legislative history of the Ledbetter Act indicates Congress's intent to repudiate not only *Ledbetter*'s specific holding, but also its underlying reasoning.<sup>275</sup> In the House Report, Congress indicated its understanding that *Ledbetter* was incorrect and that the Ledbetter Act merely clarified the law, rather than changing it.<sup>276</sup> According to the House Report, the Ledbetter Act was "designed to rectify . . . the Supreme Court decision in *Ledbetter*" and to "restore prior law."<sup>277</sup> Nevertheless, courts will most likely continue to rely on *Ledbetter*.<sup>278</sup> This is especially true in FHA cases, given the common

---

codified in scattered sections of 29 and 42 U.S.C.); Widiss, *supra* note 15, at 544.

268. Widiss, *supra* note 15, at 546 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107).

269. *Hopkins*, 490 U.S. at 258.

270. Widiss, *supra* note 15, at 548.

271. *Id.* at 548-49.

272. *Id.* at 549.

273. *Id.*

274. *Id.* at 552-53 (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076).

275. Kathryn A. Eidmann, Comment, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 976 (2008).

276. See H.R. Rep. No. 110-237, at 5-7 (2007).

277. *Id.* at 5-6.

278. See Eidmann, *supra* note 275.

understanding that the FHA should be interpreted in light of Title VII.<sup>279</sup>

In the Ledbetter Act, Congress specifically provided that the override should apply to certain related statutes, including the ADEA and the ADA.<sup>280</sup> This suggests that the legislature may have learned from the disagreement among the lower courts over whether the legislative override of *Price Waterhouse* applied to related statutes.<sup>281</sup> But the Ledbetter Act fails to mention the FHA. Courts are likely to reason that Congress's omission was intentional and continue to apply *Ledbetter* in FHA design-and-construction cases.<sup>282</sup>

### C. The Solution: A Consistent Legislative Response

Four responses to the statute of limitations issue presented in *Garcia* are available. The first response is not to respond; courts could be left to sort out the issue on their own. Second, HUD could promulgate regulations overriding or modifying *Garcia*'s holding. Third, the Supreme Court could address the issue. Finally, Congress could respond legislatively. For the reasons discussed below, a congressional response is the best alternative to ensure that courts will consistently interpret the statute of limitations in design-and-construction suits according to the legislative intent.

1. *Allowing Lower Courts to Develop an Appropriate Response.*—One option is to allow the lower courts to sort out the statute of limitations issue. This approach is undesirable because relevant case law demonstrates that the courts are unable to come to a consensus regarding the issue.<sup>283</sup> This uncertainty is unfair to both plaintiffs and defendants because liability depends not on the violation, but on the locale. Moreover, the instability wastes trial courts' scarce resources. Because there is little binding precedent on point,<sup>284</sup> trial courts must reinvent the wheel each time they are confronted with a design-and-construction timeliness issue.

2. *HUD Regulations.*—Another option is that HUD could promulgate regulations to overturn *Garcia*. As mentioned earlier, HUD regulations are generally entitled to *Chevron* deference.<sup>285</sup> Thus, courts must defer to HUD's administrative regulations to the extent that they are reasonable, as long as they do not violate the statute's plain language.<sup>286</sup> This approach is problematic

---

279. See SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

280. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §§ 4-5, 123 Stat. 5, 6 (to be codified at scattered sections of 29 and 42 U.S.C.).

281. See Widiss, *supra* note 15, at 549.

282. See Eidmann, *supra* note 275, at 974.

283. See *supra* note 41 and accompanying text.

284. See *Garcia v. Brockway*, 526 F.3d 456 (9th Cir.) (en banc), *cert. denied* 129 S. Ct. 724 (2008); *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 F. App'x 469 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008). Because *Village of Olde St. Andrews* is unpublished, it is not binding precedent within the Sixth Circuit. *Id.* at 469.

285. See SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:5.

286. *Id.*

because courts following *Garcia*'s reasoning could conclude that the statutory language mandates a contrary result and disregard the regulations.<sup>287</sup> Thus, even if HUD promulgated regulations to settle the statute of limitations question, in reality, these regulations may have little effect.

3. *A Supreme Court Decision.*—Another way to resolve the confusion around timeliness in FHA design-and-construction suits is a Supreme Court decision. It is unclear whether the Supreme Court would grant certiorari on an FHA design-and-construction case any time soon. Although the Court has denied certiorari in both circuit court cases addressing the issue, those cases have now created a circuit split,<sup>288</sup> which means that future petitions may garner more attention from the Court.

But even if the Supreme Court grants certiorari in a future case, the Court's decision might not reflect the legislative intent behind the FHA. Several commentators have argued that the current Supreme Court has inappropriately weakened the protections of civil rights laws.<sup>289</sup> This proposition finds support in the fact that Congress has recently felt obliged to legislatively override several Supreme Court decisions which constricted the protections of civil rights statutes.<sup>290</sup> Therefore, even though a Supreme Court decision would settle the confusion surrounding FHA design-and-construction claims, it is quite possible that the Court's decision would actually further constrict the FHA's protections.

4. *A Consistent Legislative Response.*—The final and most desirable option is for Congress to pass a legislative response to *Garcia* consistent with its recent legislative response to *Ledbetter*. A clear congressional pronouncement would settle the confusion among the lower courts and allow plaintiffs and defendants to establish realistic expectations regarding their rights and responsibilities.

A legislative response to *Garcia* similar to the Ledbetter Act is desirable because *Garcia*'s shortcomings are similar to *Ledbetter*'s. Much like *Ledbetter* ignored the realities of wage discrimination,<sup>291</sup> *Garcia* ignores the realities of disability discrimination by starting the statute of limitations clock so early that few disabled individuals will even become aware of the design-and-construction deficiencies until the statute of limitations has already run. Similarly, as *Ledbetter* undermined Title VII's protections by unduly restricting the statute of

---

287. See *Garcia*, 526 F.3d at 461, 466 (holding that the statutory language clearly required the statute of limitations to begin running upon the completion of construction).

288. See *id.* at 456; *Vill. of Olde St. Andrews*, 210 F. App'x at 481.

289. See Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 720 (2008); Rochelle Bobroff, *Why We Can't Wait: Reversing the Retreat on Civil Rights: The Early Roberts Court Attacks Congress's Power to Protect Civil Rights*, 30 N.C. CENT. L.J. 231 (2008).

290. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overriding *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (overriding *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)).

291. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5).

limitations,<sup>292</sup> *Garcia* constricts the statute of limitations for, and therefore the rights granted by, the FHA.

A legislative response to *Garcia* would probably meet with less resistance than the Ledbetter Act. Some opponents of the Ledbetter Act argued that it would create serious evidentiary problems for defendants who, to defend against discrimination claims, must be able to explain not only their actions but also their intentions.<sup>293</sup> Employers may not be in a position to present information regarding intent years later, when witnesses may have retired; documents may have been lost; and memories may be hazy.<sup>294</sup> However, intent is not required in FHA design-and-construction cases and these evidentiary concerns do not apply.<sup>295</sup>

To settle the statute of limitations issue for design-and-construction claims, Congress should not expand the FHA's statute of limitations. Rather, the legislature should pass an amendment to the FHA that tracks the language of the Ledbetter Act. The amendment should clarify the definition of "discriminatory housing practice" in § 3602(f).<sup>296</sup> Similar to the Ledbetter Act, Congress should provide that with respect to design-and-construction violations, several events constitute discriminatory housing practices. These events should include the design and construction of a noncompliant dwelling, when a person encounters a noncompliant dwelling, and when a person is injured by the existence of a noncompliant dwelling.<sup>297</sup> This clarification would ensure that courts will interpret the FHA's design-and-construction provisions in a manner consistent with the legislative intent that all new covered multifamily dwellings be constructed in a manner that makes them accessible to individuals with disabilities without rendering the statute of limitations meaningless.<sup>298</sup>

#### CONCLUSION

*Ledbetter's* continuing applicability in FHA design-and-construction suits is symptomatic of a larger issue. It is accepted that courts should construe the FHA

---

292. *Id.*

293. *Impact of Ledbetter Decision on Enforcement of Civil Rights Laws: Hearing on 2831 Before the Subcomm. on the Constitution, Civil Rights, And Civil Liberties and the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Neal D. Mollen, Chair, Washington, D.C. Employment Law Department, Paul, Hastings, Janofsky & Walker LLP).

294. *Id.*

295. *Garcia v. Brockway*, 526 F.3d 456, 477 (9th Cir.) (Fisher, J., dissenting), *cert. denied*, 129 S. Ct. 724 (2008).

296. 42 U.S.C. § 3602(f) (2006).

297. In *Garcia*, the court noted that adopting Professor Schwemm's encounter theory would give rise to equitable issues because testers could always restart the limitations clock by revisiting the property. 526 F.3d at 465. Congress could address this issue by requiring the statute of limitations to run from the date of the first encounter or by limiting tester standing.

298. See H.R. Rep. No. 100-711, at 18, 23 (1988), *reprinted in* 1988 U.S.C.A.N. 2173, 2179, 2184.

with reference to Title VII precedents.<sup>299</sup> However, Congress has not taken the FHA into consideration when passing narrow legislative overrides of Title VII precedent.<sup>300</sup> When Congress fails to address the FHA in its legislative overrides, courts may interpret the legislative silence as approval of the courts' continued application of harmful precedent.<sup>301</sup> Once again, "the ball is in Congress's court."<sup>302</sup> The Ledbetter Act fails to mention the FHA, and courts are likely to continue to apply *Ledbetter* to narrowly construe the statute of limitations in design-and-construction cases. A legislative solution is necessary to rectify *Ledbetter*'s harmful effects on the civil rights protections Congress created in the FHA for individuals with disabilities.

---

299. SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

300. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

301. *See* Eidmann, *supra* note 275, at 974.

302. *See* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5.