ORIGINAL

In the

Supreme Court of the United States

GLADSTONE, REALTORS, ET AL.,

PETITIONERS,

V.

VILLAGE OF BELLWOOD, ET AL.,

RESPONDENTS.

No. 77-1493

Washington, D. C.
November 29, 1978

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GLADSTONE, REALTORS, et al., Petitioners, v. VILLAGE OF BELLWOOD, et al., Respondents.	No. 77-1493

Washington, D. C.,

Wednesday, November 29, 1978.

The above-entitled matter came on for argument at 10:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JONATHAN T. HOWE, Jenner & Block, One IBM Plaza, Chicago, Illinois 60611; on behalf of the Petitioners.

F. WILLIS CARUSO, ESQ., 407 South Dearborn Street, Suite 1360, Chicago, Illinois 60605; on behalf of the Respondents.

APPEARANCES (Cont'd):

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 1493, Gladstone Realtors against Village of Bellwood.

Mr. Howe, you may proceed whenever you're ready.

ORAL ARGUMENT OF JONATHAN T. HOWE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HOWE: Mr. Chief Justice, and may it please the Court:

I am Jonathan Howe, representing the petitioner-defendants in these cases of Gladstone Realtors and Hintze Realtors vs. the Village of Bellwood.

This case comes to this Court by way of a writ of certiorari, in which the order granting the writ has stated the question presented as: whether natural persons and municipalities, who are not direct victims of discrimination in the sale or rental of housing, have any right under Article III of the United States Constitution or under Sections 1982, 3604 or 3612 of Title 42 of the United States Code, to bring suit against real estate brokers whom they allege to have engaged in racial steering, on the theory that racial steering interferes with such persons' generalized interest in living in an integrated society.

Our oral argument this morning shall focus upon the statutory construction of Sections 3604 and 3612, which will

require the decision of the Seventh Circuit Court of Appeals to be reversed, because these plaintiffs cannot state a cause of action under 3604 or 3612 of Title 42.

It is our contention that Section 3612, on its face, provides for the enforcement of certain enumerated rights under Section 3604, and that the plaintiffs before this Court possess none of these rights and therefore have no standing to pursue or to bring a cause of action.

Section 3612, it is our contention, must be read as a complementary enforcement provision of the Fair Housing Act, not as an alternative for Section 3610. 3610 has a much broader range of complainants: the person aggrieved concept; those claiming injury or to have been injured as a result of a discriminatory housing practice, is far broader than that provided under Section 3612.

In addition, the legislative history of the Fair Housing Act is not contrary to the position of these defendants.

It is incomprehensible that Congress would provide in Section 3610 for an administrative and agency program and deferral to States and local governments, and then, two sections later, totally abandon and provide a mechanism by which that provision of 3610 could be frustrated and evaded for all claimants.

As to Section 1982, it is the position of the

defendants in this case that plaintiffs have failed to state a claim under that section and that the decision of this Court in Warth vs. Seldin, decided in 1975, is dispositive of the claims raised by the plaintiffs under Section 1982.

These cases were brought by identical plaintiffs in two actions in the United States District Court for the Northern District of Illinois. The plaintiffs that are before this Court include the Village of Bellwood, an Illinois municipal corporation, and six individuals, four of whom are white and all residents of Bellwood, and two blacks, one of whom is a resident of Bellwood and one a resident of another municipality.

The defendants in the first case include Gladstone Realtors, a real estate brokerage firm in Illinois, and six of its sales people. The second case involves Robert A. Hintze, a sole proprietorship, the owner of that firm and two of his sales people.

The plaintiffs allege in their complaint that the defendants had engaged in illegal racial steering, and the defendants are charged that they undertook efforts to influence the choice of prospective home buyers on the basis of race and discouraged prospective black home buyers from purchasing homes in white areas on the basis of race.

Jurisdiction is posited in part upon Section 3612 of Title 42.

In the complaints the plaintiffs sought declaratory relief, injunctive relief, and over $300,000 in damages. The injury that was alleged to have been sustained by the Village of Bellwood was that its housing market had been wrongfully and ilegally manipulated to the economic and social detriment of the citizens of such village. The individual plaintiffs based their injury on two different theories.

Their first theory was that the individual plaintiffs had been denied their right to select housing without regard to race. The second theory, they claimed that they had been deprived of the social and professional benefits of living in an integrated society.

Pursuant to discovery, and as a result of discovery request made by the defendants, the individual plaintiffs admitted that none of them had ever intended during the period at issue to purchase or rent a home in Bellwood or to purchase or rent a home through the services of any of the defendants in this case.

Based upon that discovery, the defendants proceeded to file a motion for a summary judgment in both cases. The plaintiffs, it was contended, had not set forth a cause of action under Section 1982, 3604 or 3612; and, alternatively, that plaintiffs had failed to demonstrate the existence of a case or controversy under Article III.

Subsequently, Judge Decker, in the Gladstone case,

held and ruled in favor of the motion, and held that the individual plaintiffs were only testers and not bona fide home seekers and therefore could not be denied the right to select housing without regard to race. At most, Judge Decker found that the individual plaintiffs had suffered was the indirect or generalized injury of being denied the benefits of living in an integrated society.

Judge Decker relied in large part upon the decision of the Ninth Circuit Court of Appeals in TOPIC vs. Circle Realty. In that case the Ninth Circuit had held that a cause of action under Section 3612 exists only for a direct victim of a proscribed practice under Section 3604. The Court went on to hold that the Village of Bellwood had not suffered any cognizable injury.

Subsequently, Judge Perry, in the Hintze case, adopted Judge Decker's decision, and the case went on appeal to the Seventh Circuit.

There the Seventh Circuit found that the individual plaintiffs themselves had not been denied the right to purchase or rent housing without regard to race, because the plaintiffs did not possess a good-faith interest to enter into the housing market, and that plaintiffs' allegations to the contrary in the complaint had been foreclosed by their admissions through the discovery process.

Therefore, testers as testers did not have a cause

of action.

QUESTION: Mr. Howe, was there a cross-petition for certiorari from that portion of the judgment of the Court of Appeals for the Seventh Circuit?

MR. HOWE: No, sir, there was not. No cross-petition has been filed in this case.

The Seventh Circuit went on, however, to hold that the plaintiffs' claim that they had been denied the right to live in an integrated society was cognizable under Section 3604 and 3612. The Court made no decision as to the claims under Section 1982.

The Seventh Circuit, it is our position, erroneously relied upon the decision of this Court in Trafficante vs. Metropolitan Life Insurance, where this Court held, under Section 3610, that residents of an apartment complex who complained that their landlord's rental practices deprived them of the social and professional benefits of living in an integrated community. The Seventh Circuit, while noting that Trafficante was not technically controlling, felt that its thrust and its rationale suggests that individual plaintiffs have standing to allege deprivation of a right to live in an integrated society under Section 3612.

The Court specifically rejected the decision of the Ninth Circuit in the TOPIC case. As to the Village, the Court went on to find, without any allegations in the complaint

to support the conclusions, that it was apparent that the concrete injury with a substantial nexus to the Village's status as a unit of government could be proved. Based upon that decision of the Seventh Circuit, this writ was granted.

It is the position of the petitioners and the defendants that Section 3612 does not authorize the filing in the United States District Court of a cause of action by the same class of plaintiffs as would be permitted to file a cause of action after the exhaustion of the administrative remedies under Section 3610.

Section 3612 provides that "The rights granted by sections ... 3604 ... may be enforced ... in an appropriate United States District Court." Thus, 3612, it is our position, limits the rights that can be enforced to those under 3604. 3604 provides five distinct categories of rights and practices which it declares to be unlawful. Not one of those five categories includes a right or a generalized interest to live in an integrated society, nor do any of the five categories provide any generalized right or interest to protect the economic and social interests of citizens from manipulation by racial steering.

QUESTION: Mr. Howe, you do concede, I guess, don't you, that the practices alleged by -- that were carried on by the realtors in this case, known, colloquially at least, as racial steering were violative of the substantive provisions

of the Act?

MR. HOWE: For the procedural process of this case, Your Honor, that is correct.

QUESTION: And what section of the Act do you concede they may violate, Section 3604?

MR. HOWE: It is arguable, and there is substantial case law in the lower courts, that racial steering as to a direct victim of such a racial practice does have a cause of action. There are some other cases which would --

QUESTION: I'm not asking about who has the cause of action. Do you or do you not agree that if the allegations are true, there was a violation of 3604?

MR. HOWE: If the allegations are true, there is a violation of 3604.

QUESTION: At least for the purposes of your argument.

MR. HOWE: For the purposes of our argument today, that is correct.

QUESTION: But your submission is that the steeree has to be the plaintiff under 3612?

MR. HOWE: That is correct. That is correct, Your Honor.

We also note that 3612, by limiting access to the federal courts to those five categories, is part of a broader base of the entire statute. We must look at the entire Fair

Housing Act to determine and to see whether the sections, as divined by Congress, provide a harmonious whole.

The Seventh Circuit disregarded this argument, did not even address it. It is our suggestion in our argument that we must compare Section 3610 with 3612, and we must read them together.

Now, Section 3610 addresses itself to the concept of injury sustained as a result of housing discrimination by a person aggrieved.

In Warth vs. Seldin, this Court characterized the decision in Trafficante and Section 3610 as giving residents of housing facilities an actionable right to be free from adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others. Because they were persons aggrieved, which is a term of art, we submit, to give broad opportunity to a class of claimants.

3612, as noted, addresses itself to rights, not to injury. Purely for sake of example, this Court has held in several cases that even if a person is injured as the result of an invasion of a constitutional right of another person, that injured person cannot seek redress of the constitutional rights of an absent third party. In fact, in the Alderman decision, you stated that "The established principle is that suspension of the product of a Fourth Amendment violation /sic/ can be successfully urged only by those whose rights were

violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."

And thus, 3610 does provide a cause of action, however, to these people who have sustained some injury. They are persons aggrieved.

And, consistent with the decision in Trafficante, which does provide for the concept of the private attorney general, we have to look at this word of art of "person aggrieved". It does have significance. Congress has used that terminology only when it has wanted to expand the jurisdiction of courts to hear claims. It has a well-defined meaning in the case law of this country, and, as Trafficante showed, the concept is to extend the broadest and possible standing under Article III for the injury sustained.

We don't need to look at the legislative history for the Fair Housing Act in this case, because, as this Court stated in the Kepner case, "It is a well-settled rule that the construction of language in a statute which has a well-settled and well-known meaning, sanctioned by judicial decision, is" --

QUESTION: Mr. Howe, if I may interrupt you once more.

MR. HOWE: Surely.

QUESTION: Do you concede that the -- these plaintiffs do allege that they suffered harm themselves, and do you concede that they are persons aggrieved within the meaning of Section

3610?

MR. HOWE: Your Honor, I think that the answer to that question would have to depend upon the extent to which the decision of this Court in Trafficante would be extended or broadened to cover the class of plaintiffs in this particular litigation.

QUESTION: Let me change it: do you argue that they are not persons aggrieved within the meaning of --

MR. HOWE: We take no position because no action has been raised under 3610 for these plaintiffs.

QUESTION: I see. But they are not -- but you do concede, don't you, that they are suing for an injury to themselves rather than to third parties?

MR. HOWE: The injury that they allege to have occurred to them is a result of an alleged unlawful housing practice directed to third parties. They have claimed -- they did claim that they had been injured in their personal right to select housing.

QUESTION: Right.

MR. HOWE: But the district court and the Court of Appeals both held that this was not the case, that they were not bona fide home seekers.

QUESTION: I understand. But they also allege that -- they make the Trafficante allegation that they were denied the opportunity to live in an integrated community.

MR. HOWE: That is correct. That is correct, Your Honor. But under 3612 as opposed to 3610.

QUESTION: And your submission, I gather, is in the alternative: either that's not enough to make them persons aggrieved, because there's a little difference between this case and Trafficante, or, alternatively, even if they are persons aggrieved, 3612 somehow or other has less broad coverage.

MR. HOWE: Our contention, Your Honor, is that 3612 in no way includes the definition of persons aggrieved as being a person who can bring an action.

QUESTION: I understand. It doesn't have that language in it, but --

MR. HOWE: None whatever.

QUESTION: -- it also doesn't have any limiting language in it, either.

MR. HOWE: It does not have limiting language, but our concept of the statutory scheme is that in order to give meaning to the statutory scheme we must hold that 3610 does have a broader class of claimants that can bring an action or bring the process into force than that which would be allowed under 3612.

If, on one hand, if we establish a right to go forward as a person aggrieved in 3610, and then two sections later we say, "Well, you can bypass that administrative

process, you can bypass the State and local remedies that are available, you can bypass the exemption or the deferral to a State court by filing under 3612", the whole concept of two separate, distinct, complementary enforcement sections, it's our contention, is lost.

QUESTION: Of course, the Court of Appeals said there were alternative remedies.

MR. HOWE: That is the position of the Court of Appeals, --

QUESTION: Yes.

MR. HOWE: -- to which, of course, we take exception.

QUESTION: But isn't it also in the congressional history?

MR. HOWE: No, Your Honor, it is not. Because in the --

QUESTION: Representative Celler, the floor manage, said so, didn't he?

MR. HOWE: You have to understand that --

QUESTION: Didn't the floor manager say so?

MR. HOWE: Yes, he did, Your Honor. He stated -- the floor manager stated that as far as they were concerned, based upon an opinion that they received from the Attorney General, that 3610 and 3612 were alternative remedies. We agree with that for a direct victim, a person whose rights have been infringed. But as to a person as an indirect victim,

who is asserting the rights of absent third parties by virtue of having suffered some kind of injury themselves, we submit that was not considered whatsoever during any of the legislative debates.

QUESTION: Is there any language in the legislative history that shows that?

MR. HOWE: There's no language whatsoever, Your Honor, that the Congress of the United States ever considered or gave thought to an indirect victim bringing an action under this Act.

QUESTION: My question was: Is there any language in the legislative history that said when Congressman Celler was talking he was talking about the aggrieved person? Which is what you just said.

MR. HOWE: Yes, Your Honor, he --

QUESTION: Well, do you have any language in the history to back you up, or is that your statement?

MR. HOWE: Our statement, Your Honor, is that Congressman Celler, when he was working with the bill, looked at 3610 and 3612 as being alternatives for a direct victim. We do not find anywhere in the legislative history of the Fair Housing Act that Congress ever gave consideration to the class of plaintiffs that are before the Court today.

We think that this Court, however, properly construed in Trafficante the concept of person aggrieved of

being a broader base area for a person to bring a claim. But when it came to 3612, that was not the intention of Congress.

We've got to remember that the Fair Housing Act was an Act that came through great compromise, it did not have the benefit of any committee hearings, it was hammered out on the Floors of Congress without committee hearings or committee reports. And thus, much of what may be said on the Floor of Congress relative to what was intended by the legislation, we would submit, Your Honor, may not be worth much for purposes of interpreting a statutory scheme which we think on its face is relatively clear.

QUESTION: Of course, Congressman Celler was also Chairman of the Judiciary Committee, wasn't he?

MR. HOWE: That's correct, Your Honor.

QUESTION: You're not saying he didn't know what he was talking about?

MR. HOWE: No, I'm certainly not. I'm not suggesting that for one minute. I'm suggesting that when he was speaking, however, he was speaking solely of people who were direct victims, not indirect victims. And therefore, based upon that theory, I think you can see a pattern between the two. And then when this Court, in Trafficante, took the concept of person aggrieved for a Section 3610 case and extended it to the broadest limits permitted by Article III, that was

consistent with the word of art of "person aggrieved".

QUESTION: Wasn't the Trafficante suit under both sections?

MR. HOWE: Your Honor, that question has been raised by the respondents, and while it is true that there had been an intervention filed in the court below under 3612, the decision of this Court addresses itself solely to Section 3610. It does mention, as part of the statutory enforcement scheme, the existence of not only Section 3612 but also 3613.

QUESTION: Well, we certainly didn't put Section 812 aside, did we?

MR. HOWE: You did not put it aside, but you did not address it, and Justice Douglas, in his decision, stated that in all other issues there was no opinion of the Court, and that the Court was not going to address them.

In the Warth decision and in other decisions of this Court, and other courts which have looked at the Trafficante decision, they have viewed them as being a decision under Section 3610. And the language contained there, it states that only can you give vitality to Section 3610 by a generous construction which goes to standing to sue to all in the same housing unit who are injured by the management of that particular housing unit, and that that can be within the ambient of the statute under Section 3610.

We've got to look at --

QUESTION: Mr. Howe, --

MR. HOWE: Yes, sir?

QUESTION: -- while you're interrupted again, I take it there is no definition or distinction in the statute of this term "direct victim"?

MR. HOWE: No, Your Honor, there --

QUESTION: There is a definition of "person aggrieved".

MR. HOWE: There is, indeed.

QUESTION: But you would say this claim to have been injured by the housing practice, that is a broader concept than the direct victim concept?

MR. HOWE: When you talk of injury, you talk about something that somebody has incurred as a result of a housing discrimination. Maybe that housing discrimination was not directed at them, but they do sustain some injuries.

QUESTION: Well, --

MR. HOWE: Whereas, with a right, we contend, Your Honor, that that's individual --

QUESTION: I understand your argument. But maybe I'm just repeating what Mr. Justice Marshall asked, but is there anything in the legislative history, the language of the statute that you can point to that says there is this distinction between direct victim and indirect victim?

MR. HOWE: No, Your Honor, and we submit the reason

that we can't do that is because Congress never considered the distinction between a direct and indirect victim, but rather throughout the thread of the legislative history was that they were talking about people who were barred access to housing. They were talking of direct victims. I don't think you will find anywhere in the legislative history anything which would indicate that an absent -- that a party has a right to assert rights of an absent third party, in the legislative history.

And also in the legislative history, the difference between --

QUESTION: Well, if most of what they're thinking of is direct victims, then most applications of Sections 810 and 812 were expected to be alternative remedy applications?

MR. HOWE: As far as the direct victim, yes, Your Honor. We concede that.

QUESTION: Yes. Well, the most that they ever thought about it.

MR. HOWE: That is correct, Your Honor.

QUESTION: There's nothing to indicate that they thought about this narrow category of indirect victims that could sue under one section and not the other.

MR. HOWE: That is correct, Your Honor. That is correct. Until the decision of this Court in Trafficante, which extended the concept of person aggrieved.

QUESTION: I see.

MR. HOWE: But prior to that, there's nothing in the legislative history at all which would support any finding that the concept of an indirect victim was to have any kind of rights under either 810 or 812.

And I think that --

QUESTION: Which suggests that, if you're right, Trafficante was wrong.

MR. HOWE: Your Honor, that's not a decision that has to be reached by this Court. I think that the legislative history, while not addressing it, but by using that term "person aggrieved" in 810, that you could sustain the decision that you reached in Trafficante.

Personally, we might take a different position than that, but I think that as far as the decision of this Court in Trafficante, in construing the traditional concept of "person aggrieved" --

QUESTION: But in so far as the silence of Congress is concerned about indirect victims, it's no more meaningful here than it was in Trafficante, I would think.

MR. HOWE: I would concur that the silence of Congress and as Mr. Justice Douglas suggested, the legislative history of the Fair Housing Act is of very little help in trying to interpret what the Act was intended to cover.

I think that the impact of Congress, again looking

at the basic statutory scheme, shows that under 3610 that the concept was of having some kind of ameliorating process, of requiring a person to file a complaint with the Secretary of HUD, to have 30 days for conciliation, and if there were State or local agencies which had substantially equivalent remedies and rights, that there should be a deferral to the State and local governments. So that there could be a conservation of judicial time, that those people who were perhaps in a broader position than those who would be having their rights infringed under 3612 would first go through that administrative process. Because 3612 has no preconditions to invoking federal jurisdiction, and we would consider that part of the pattern again, the intention of Congress was to provide these two vehicles for enforcement: one, of a less adversary context under 3610, with a broader spectrum of individuals who could bring a complaint under 3610, and that they could also do that without having to go into a court for purposes of achieving their rights.

QUESTION: You don't think that under that Trafficante indicated that the people who had exhausted their administrative remedies could then sue under 812?

MR. HOWE: No, Your Honor, I don't think we can construe it that way because it provides specifically in 810 how a person may go to court after having instituted the process of filing their complaint with the Secretary, the

referral to a State agency, the unsatisfactory solution to that problem, and then allowing a person to go into a United States District Court. We think that's a pattern that flows through 810. There is no --

QUESTION: But when he gets there, what section is he under?

MR. HOWE: He is under Section 810. 810(d).

QUESTION: And is that where the cause of action is given?

MR. HOWE: The cause of action was given in the 810(a), which states that any person who is harmed, any person aggrieved by an unlawful housing discrimination may file a complaint. And then we follow through the process.

QUESTION: But that doesn't give him a cause of action in court.

MR. HOWE: It gives him cause of action after they have exhausted their administrative remedy; then they proceed to file a case in court.

QUESTION: Well, then, I suppose the -- Trafficante says: "Moreover, these rights may be enforced by civil action in appropriate United States District Courts without regard to the amount in controversy if brought within 180 days after the alleged discriminatory housing practice has occurred." These rights, referring to the 810 rights, after citing 810(d). And then the Court cites Section 812(a), that's

at page 209, 409 U.S. 209.

Perhaps the Court was just wrong there; is that it?

MR. HOWE: The Court could be wrong, Your Honor, but you don't have to reach that decision in this case.

QUESTION: Well, I would suppose, if the Court was right, it was saying that these very rights that were rejected in the administrative process could be brought into court under 812, and that would include indirect purchases.

MR. HOWE: We would disagree, Your Honor, on the basis that in order for a person, first of all, under Section 810 to be able to proceed under 810, if they are a person aggrieved, it's much broader.

If they go to 812, there's no similar language in 812 for a person aggrieved. Thus, if they were found to be a person aggrieved under 810, that's --

QUESTION: So you are arguing that this reference to 812 then is just wrong.

QUESTION: No, no.

MR. HOWE: I think the reference is correct, because --

QUESTION: I understood, Mr. Howe, that your argument was that the opinion of the Court by Mr. Justice Douglas was simply summarizing these provisions of the statute.

MR. HOWE: That's right. It's really a summarization more than it is --

QUESTION: Because he also goes on to talk about 813, which gives the Attorney General authority to grant civil action in any appropriate United States District Court.

MR. HOWE: That's correct.

QUESTION: In that passage on page 209.

MR. HOWE: That is correct, that top paragraph.

QUESTION: But he refers to "these rights".

MR. HOWE: I think that "these rights" reference, Your Honor, would be to --

QUESTION: Having just left Section (d), 810(d).

MR. HOWE: The rights --

QUESTION: Well, never mind, I just wondered what your position was.

MR. HOWE: Basically it is that it would be the individual rights, but that you could proceed, if you're a direct victim, under 810 or 812; indirect would only be able to go through 810, and the action would be brought pursuant to 810.

QUESTION: Mr. Howe, having in mind that there appears to be considerable ambiguity, a question about it, how much in the scales should there be weighed the ultimate objectives of the legislation as a whole?

MR. HOWE: The preamble of the Fair Housing Act states "as an objective of this country to provide for free and open access to housing." As to how far the scales should

be weighed or challenged or changed, I think that with the statutory scheme as it presently is set forth, with allowing an indirect victim who meets the standing requirements as set forth in the Trafficante decision to proceed under 810, gives relief to those indirect victims, whereas we reserve in 812 the opportunity to those people who suffer an immediate and direct violation of their rights under Section 3604 to immediately have access to a federal court. If they need an injunction to stop the sale of property, which they have had an interest in and have been deprived of because of some kind of discriminatory act, then I think we have protected the interest of those people who suffer a direct and immediate injury by letting them go immediately into federal court.

Whereas those who may have a broader spectrum of a complaint, they may go through the administrative process, it allows for that amelioration, it allows for that conciliation, and many times may result in a remedy which would be far better than a remedy that might be obtained in court.

And we would suggest, Your Honor, that the two sections are not alternatives. Because if we are to treat them as alternatives and you allow a person to immediately go to 3612 who is an indirect victim, you dislocate the whole administrative scheme. And I think also because the reference in 810 to State and local governmental bodies and their ability to promulgate fair housing laws, that this would

destroy the incentive for them to go forward. Because if everything is going to be decided in a federal district court, then what should they do, or why should they proceed?

The scheme of Congress was to share that responsibility with the State and local governments, and, in fact, during the debate --

QUESTION: Mr. Howe, I notice one other difference on this very point. Maybe I'm wrong in my reading, but 812 authorizes suits in State courts as well as federal courts.

MR. HOWE: That's right, Your Honor.

QUESTION: In other words, 810 only authorizes federal action.

MR. HOWE: That's correct.

QUESTION: Well, how does that cut? I don't -- is there any inference to be drawn from that?

MR. HOWE: No, I don't think any inference should be drawn from that at all, except to allow or to create and say that the rights given under this statute may be enforced alternatively in a State court, by a direct victim.

QUESTION: And 812 provides for a stay if there's a pending administrative action.

MR. HOWE: That is correct also, Your Honor.

QUESTION: In the State court.

QUESTION: The TOPIC case on which you so heavily rely, and on which the district court relied in this case,

in that case Judge Kennedy's opinion says that the court holds -- "We hold that the language of Section 3612 does not authorize lawsuits to vindicate the rights of third parties." And that's characterized as the holding of the court. Here the plaintiffs don't make very clear that they are not trying to assert the rights of third parties, but their own personal rights.

MR. HOWE: Your Honor, we go back to the concept again of injury versus right. The rights that they have asserted are those rights which are contained in Sections 3604 and 1982.

QUESTION: Well, on the injury, they have asserted an injury, as did the plaintiff in Trafficante, to themselves, resulting from these practices made illegal by the statute.

MR. HOWE: Yes, and that injury that they claim was the deprivation of a right to live in an integrated society.

QUESTION: Right.

MR. HOWE: And there's nowhere in 3604 any corollary right to the right to live in an integrated society.

QUESTION: But you would concede, at least, that their allegations are not those of somebody asserting the rights of third parties?

MR. HOWE: Their allegation is that as a result of their having been some injury to third parties --

QUESTION: What you are saying is that the rights that they assert are rights that simply are not created by the statute?

MR. HOWE: That is correct, Your Honor.

And that the rights that they say, or the rights that they say were infringed was racial steering against absent parties; --

QUESTION: Right.

MR. HOWE: -- that as a result of that steering against those third parties, which would be made unlawful under 3604, they suffered injury because they have been deprived of that right to live in an integrated community.

QUESTION: Do you think Trafficante helps you very much on that?

MR. HOWE: Well, I think the concept of Trafficante does show that this Court did consider Section 810 to confer broad standing of the person aggrieved concept. And we would suggest to the Court that its absence of any "person aggrieved" language in Section 812, this Court should not imply "person aggrieved" in Section 812. If there is to be broader jurisdiction under Section 812, it should be Congress and not the Court that grants it by virtue of letting Congress put in the term of art, "person aggrieved", if that is their intention, to allow direct access to indirect victims of racial discrimination.

I'd like to reserve my remaining time, if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Howe.

Mr. Caruso.

ORAL ARGUMENT OF F. WILLIS CARUSO, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CARUSO: Mr. Chief Justice, and may it please the Court:

We would like to cover four main topics in our discussion.

First, that the individuals here, the individual homeowners, are very much individual people who have been injured and are being injured; and it is an immediate injury.

Secondly, that the Village is suing to protect the village fisc, and that is an immediate and a very much felt injury right now;

Third, that the legislative history shows that these two sections, 3610 and 3612, are alternative methods of enforcement.

And, finally, that Trafficante is very applicable to this situation, and that the injury here indicates an even more stronger situation of injury to individuals in taking away rights guaranteed under 3604.

The homeowners, Mr. Powell and the others -- Mr. Powell happens to be white -- found that there was steering going on in the Village of Bellwood, and that the impact was

to create fear and problems, and so they tried to do something about it. And Mr. Powell wanted to live in Bellwood, in an integrated society, in integrated schools, in a normal, stable kind of situation, and he wanted to do something about it, so he went to the Village and he went to the Leadership Council, the fair housing group in Chicago, to work on this.

Miss Perry is black, and she lives in Bellwood, and she wanted to continue to live in this community which was a normal, integrated community, and she wanted it to stay that way, where her children could live and deal with people of the same kind of living situation on the normal basis; and have a healthy real estate market, free from fear and constant pressure by the real estate community.

At the same time, the Village here received complaints, both the Mayor's office and the police department, of real estate people out steering in the neighborhood and creating fear and problems among the people in the community. And the Village Board voted to ask for help from a fair housing organization, the Leadership Council.

Some of the plaintiffs and other people then went out to find out what the practices were. What they found out was that when a white person went in and asked for a certain kind of housing and a certain value, they were sent to certain areas considered to be protected and set aside for whites. When blacks went out and gave the same kind of

information, "We want a $45,000 house" or whatever the figure was, so many bedrooms and so forth, they were steered mainly to two particular areas, where they were trying to change the area from white to black.

The Village, after seeing this information from the audits, both from people who are plaintiffs in this case as well as other testers or auditors or investigators, or whatever they may be called, the Village then voted to take action in the federal district court and requested again assistance in filing that case in the federal district court.

They sought direct relief under 3612, and this was an immediate problem, this was something that had to be solved quickly, and it was something that had to be done and get into court right away. And they sought that 3612 remedy because, among other things, under 3614 there is a provision that these cases are supposed to be expedited; and in many cases they are.

Defendants here acknowledge that there is a violation of 3604(a), and that they think that a plaintiff, a person who is affected by a violation of the Fair Housing Act, must, under these circumstances, go through the route of going to HUD and the administrative process, and only after that could they sue.

That seems to indicate that they see, and in fact they say they see a system here. Well, clearly, if the Congress meant to have that kind of a system, they could have followed

the Title VII approach, and they didn't do that. Congress knew how to make that exhaustion necessary, and they didn't do it.

The legislative history --

QUESTION: Let me test out how far you would carry this. Suppose someone living in Springfield or Peoria came in and said, in a complaint, alleged that they didn't like the kind of life they had wherever it was they were living, and they wanted to move into a totally integrated community, and they were thinking about coming into this particular complex, but this situation that has been described in the pleadings existed, and therefore they bring a suit under 3612 in federal court immediately.

What would you say about that?

MR. CARUSO: Well, I think that this case does not extend anywhere near that far -- anywhere near that far.

QUESTION: I'm just trying to see how long the arm is, how far you would carry it.

MR. CARUSO: All right. The first thing is that in the complaint the area involved is specifically delineated by streets, a very specific area where this steering activity was taking place is delineated, it starts from there.

QUESTION: Well, I'm assuming in my hypothetical that that's the same.

MR. CARUSO: And the people involved suing here

are the Village itself, where this area is all included within the Village, and the people who live in the community, all but one of whom live right in the municipality. Miss Sharp lives in Maywood, which is a budding community, subject to the same kind of problems and in the same marketplace.

QUESTION: Do they need to live in the same community to get relief?

MR. CARUSO: I think as a practical matter the experience is, and it seems that the experience would be, and the violation in the future would be, people living either in that community or very close by. Because they are affected by the damage that we allege, the manipulation of the marketplace.

Now, it could be -- I don't think it extends to Springfield, Your Honor, because I don't think that the marketplace extends to Springfield. But the marketplace under some circumstances might include two or three communities all being subject to a steering practice.

QUESTION: The fact is that the Trafficante opinion in at least two places during the course of the opinion emphasized that the plaintiffs were occupants of a precise and limited apartment complex, doesn't it?

MR. CARUSO: Yes, it does.

I think that in this instance --

QUESTION: At least one of those references would seem to pretty clearly limit the standing in that case to

people so situated. Wouldn't you agree?

MR. CARUSO: I would agree that it is very limited and would be limited. I clearly would not include Springfield, and if, as we move in from Springfield, I think it would not include a lot of other things. But I would say that from experience the real estate marketplace extends beyond sometimes a specific community and that is --

QUESTION: There were 8200 people in the Trafficante apartment complex, how many people are there in Bellwood?

MR. CARUSO: There were about 22,000 at this time, Your Honor. And Bellwood, interestingly enough, was a very built-up community. I mean, it was a community which developed kind of the same kind of time and a lot of people of the same kind of background, same kind of homes, who had lived there for quite some time. It had a lot of the indices of a very close-knit community, with people of similar interests and similar backgrounds.

QUESTION: You would agree, wouldn't you, Mr. Caruso, that you have to go beyond the holding in Trafficante in order to sustain your position, because of the fact that the plaintiffs in Trafficante were tenants or occupants of the apartment complex in question?

MR. CARUSO: I think that the case is different than Trafficante in that respect; that Trafficante was a particular apartment complex, although a very, very big one.

And Bellwood is different because it is homeowners, it is a community itself, and it is different because the Village is involved trying to protect the value of the homes from being depreciated by this process and thereby limiting the tax base.

So there are those differences.

It seems to me there is one thing that is stronger here, and that is that these homeowners are being damaged directly by an attempt to change the process, in other words, to change it from an integrated community to an all-black community. And it seems to me that that is even a stronger injury than the situation where in Trafficante they were trying to keep blacks out, and the whites wanted to make it an open community.

Here the community and the municipality have worked to make it an open community. And, as a result of that, the real estate industry now is trying to turn on them and change it to an all-black segregated community. So I think it's a little stronger in that regard. But it is broader than Trafficante, it includes more people.

QUESTION: But even if Trafficante has limits, which it certainly does, and even if this exceeds those limits, that's a long ways from taking the position that only direct purchasers have a cause of action under 3612.

MR. CARUSO: The position that only direct purchasers would have a cause of action doesn't seem to follow

anything in the Act or any of the existing decisions. And particularly in looking at 3604, for example, on advertising, clearly the people have to bring a suit to prevent that kind of advertising, 3604(c) and 3604(e), among other things, contemplate the kind of action that is set forth here.

And, in addition, all of the district courts and Courts of Appeals -- most of the Courts of Appeals have dealt with situations where many different kinds of parties have been allowed standing under 3612 when there has been an injury as a result of a violation of the Fair Housing Act.

The legislative history, as indicated previously in some discussion on questions, and the Dirksen involvement in that indicates that 3612 was meant to be a strong enforcement tool.

And it is in fact necessary to make this Fair Housing Law work. HUD is very busy, and HUD is doing more and more. But it is important and the legislative history indicates that it was intended that individual people, local people like the people in this community, would have a right to act, to work together to try to protect their community and do something about a problem that they see as being very important.

We think that the situation here presented represents individuals and a municipality who are directly injured, who have -- need the activity here locally to protect their community and to try to maintain a healthy, viable local

community.

That the legislative history supports the position that these two acts should be enforced separately and concurrently, as necessary, along with other ways of enforcing these laws as necessary, and that the case should be allowed to go forward, and that the proof should be allowed to come in, and that the plaintiffs should be allowed to show these steering practices, to show what these realtors do to try to change the neighborhoods, with all of the things that can result from that, like the problems with the school segregation and so forth. If these communities can be kept integrated, then healthy schools can be maintained, the other problems of segregation can be helped and prevented by integrated communities.

And we respectfully request that the plaintiffs here be allowed to proceed to show these violations, to present the evidence, to do the discovery, and to proceed with this case.

I would like, with the indulgence of the Court, to pass on what remaining time I may have to the United States.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Caruso.

Mr. Wallace.

Of course, as usual, there's no obligation on you to consume all that time.

[Laughter.]

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. WALLACE: Yes, Mr. Chief Justice, and may it please the Court:

The first thing I want to emphasize about this case is that contrary to some impressions that some may have of it, it is not, in our view, a case about whether testers have standing to sue under Section 812. Testers do provide important evidence, particularly in racial steering cases. It's very difficult to prove racial steering in our experience; and, in the absence of evidence of this kind, occasionally you can get evidence from a former employee of the company.

But, by and large, this has been the most probative kind of evidence in steering cases. But it's just coincidental that the complainants in this case also happen to be the witnesses, the potential witnesses who have been doing the testing.

Their interest here is an interest in the way their community has been affected by the cumulative effects of the steering practices. And it's in its cumulative effects that the steering practices have their pernicious effects on the community.

In so far as the statute deals with steering, its focus is not really as an antifraud provision, about a particular individual. Very often the individual who has been

steered, who is a willing purchaser of a home or renter, is quite satisfied with the property that he has settled into. It's the cumulative effect that causes the injury to the community and the people living in the community.

QUESTION: Mr. Wallace, --

QUESTION: What substantive rights -- oh, excuse me.

QUESTION: -- the government's brief, on page 6, in its introduction and summary of the argument, says, "We submit that the individual respondents have standing to challenge petitioners' racial steering practices under the Fair Housing Act."

Now, as I understand the Court of Appeals opinion, it held that both the city and the individual respondents have standing. Does the government take a position on the standing of the city?

MR. WALLACE: We have not taken a position in our brief, Mr. Justice Rehnquist, but we have no disagreement with the opinion of the Court of Appeals on this subject; and, indeed, HUD has entertained complaints from municipal corporations similarly situated, and initiated investigations, in response to such complaints.

So while we didn't brief the question, because we thought that the case was pretty clearly controlled by Trafficante with respect to the individual complainants, we have no disagreement with the holding of the Court of Appeals,

or indeed with any aspect of Judge Powell's opinion. We think it's a fine opinion.

QUESTION: My question, Mr. Wallace, is simply this: Let me begin by expressing my understanding with which I will ask you if you agree, that up until the enactment of this federal legislation, so far as federal statutory law went -- forgetting for a moment 1982 -- there was nothing wrong about racial steering, so far as federal statutory law went.

Therefore, any rights that are asserted by the plaintiffs in this case have to be based upon this statute. Limiting again, forgetting the constitution of 1982. What substantive rights are these plaintiffs asserting? Those created by 3602 or 3 or 4 or what?

MR. WALLACE: It's 3604, what we call Section 804 of Title VIII. 3604(a). It's set forth quite completely in the brief for the petitioners.

QUESTION: Yes.

MR. WALLACE: And our theory right along, and we've brought about 80 cases of our own in the course of the Act, alleging racial steering of one kind or another, has been that it's a violation of that portion of 3604(a) which refers to "or otherwise made unavailable or deny, a dwelling to any person". The first part of 3604(a), which includes the qualification of the bona fide offer, --

QUESTION: Right.

MR. WALLACE -- focuses on a violation by the seller himself, or the renter himself. And they wanted to afford the protection, to make sure there was a bona fide offer made to that individual in many instances, rather than a company engaged in the business, before there would be a violation of that kind.

But the remainder obviously has principal reference to people engaged in the real estate business or to big renters of property and the like.

QUESTION: Well, have any of these plaintiffs been rendered unavailable to housing as a result of the actions of these defendants?

MR. WALLACE: No, there, as I look at it, as we look at the rights that they are asserting under the statute, it's not a right,as counsel for the petitioners has expressed it, to live in an integrated society. Congress couldn't guarantee that.

QUESTION: No.

MR. WALLACE: And didn't purport to guarantee that. But it's a right not to be injured by the effect of practices that are proscribed under the statute. And it's a right not to be affected by the racial steering that the statute prohibits.

It's very similar to the right asserted by the plaintiffs in the Trafficante case. There was, as the Court

noted in its opinion in Trafficante, considerable focus in the legislative history on the dangers to the community of discriminatory practices in housing, and the benefits to all members of the community of adherence to the requirements that were being proposed in the Fair Housing Act.

And one of the telling things about steering cases, and we reviewed every decided case yesterday rather hastily, every decided case under Title VIII. One of the telling things is that we didn't find a single instance of a case in which an individual had sued solely because he had been steered and claimed an injury as a result of that.

There were a few cases in which an individual claimed that he was illegally denied access to a particular house that he wanted to buy or a particular apartment that he wanted to go into, and was seeking that, and additionally alleged that there was steering done. But --

QUESTION: Well, that's a result of steering.

MR. WALLACE: That could be a result of steering, but if --

QUESTION: Yes. That is the hoped-for result of steering.

MR. WALLACE: Yes. Often the result is that he was shown something else, and he liked it, and he moved in, and he never knew about the other, and wasn't trying to get into the other.

QUESTION: Not that it matters in this case, but what's the difference between this and "red lining"?

MR. WALLACE: Red lining is usually used in reference to credit practices by lending institutions, in areas like --

QUESTION: Well, it's lending on property, though.

MR. WALLACE: Yes, that's right. In areas where it's harder to get a mortgage from even a --

QUESTION: Well, here they had lines, without saying whether they were red or blue. Don't they?

MR. WALLACE: Well, here there were areas where steering of customers by the real estate companies, that was done on the basis of race.

QUESTION: No, I didn't use the words "black and white" in this instance.

MR. WALLACE: But what we have found is that the cases where private suits have been brought alleging steering, and attempting to enjoin steering, or claiming damages from steering, have typically been cases by community fair housing organizations, where the plaintiffs would be a number of individuals who banded together because of the effects the steering had had on their community. And it may well be that some of these plaintiffs have actually dealt with these companies and been steered themselves; but you don't ordinarily see that alleged in the complaint, because it's very difficult for them to prove what was available that they were

not shown.

In the absence of the testing evidence, which is something gathered separately -- in other words, if you have someone who was himself a victim of steering as a plaintiff in one of these cases, it's more or less coincidental and it's his similarity to the other plaintiffs that we have in this case that is his real motivation for being a plaintiff, rather than the difference which he doesn't even allege typically.

So that tell us something about what it is that's the incentive to sue here, and that has something to do with realistically where the standing should be recognized.

QUESTION: Just let me be sure I fully understand you. That the plaintiffs' entire substantive claim, substantive statutory claim -- forgetting again about 1982 -- is based upon the second half of 3604(a), beginning "or otherwise made unavailable". Is that correct?

MR. WALLACE: Well, that is our theory that we've operated on about where steering is proscribed in the statute.

QUESTION: Yes. And what the injury is to these plaintiffs.

MR. WALLACE: Yes. No, there are other provisions there that some have looked toward in the literature as bearing on the steering question.

QUESTION: Yes, but I'm asking you, what you --

MR. WALLACE: Well, we relied on 3604(a) and no court

has ever expressed doubt that steering is prohibited by the statute.

QUESTION: Well, surely, I think that's been conceded by your brother.

MR. WALLACE: Yes, it has been conceded for purposes of this case.

QUESTION: Yes.

MR. WALLACE: So we're dealing here with the typical, the typical kind of private complainant about racial steering, and the injury that is typically alleged in a racial steering case. And I think that is of some importance, in concomitance with the concerns that were being expressed in Congress about the community interest that would be served by this legislation.

Now, as a matter of fact, as Mr. Justice White was suggesting earlier in the argument, there were claims made under Section 812 in Trafficante, which is the section that the suit is being brought under here, and indeed there were complainants in Trafficante, complainants in intervention, who had not exhausted their administrative remedies with HUD, who had not complained to HUD at all.

And the sole basis for their suit in intervention was Section 812. And there is significance, in our view, to the statement that he quoted from page 409 of the opinion, that individuals could sue directly under Section 812, because

those were among the complainants who were seeking not only injunctive relief, but they often made damage claims. And on remand the case was settled, but the district court and everyone else thought that their claim had been upheld along with the claims of the two tenants who had first gone to HUD and were suing under Section 810.

QUESTION: Well, do you understand the challenge here to be a case or controversy challenge?

MR. WALLACE: Well, there has been --

QUESTION: Solely or what?

MR. WALLACE: I don't think it's solely, I think there is an argument being made under Article III in the petitioners' brief. It seems to me that that challenge is largely foreclosed by the decision in Trafficante, and that if there is an open question here, it's a statutory question.

These people are directly affected in much the same way as the complainants in Trafficante.

QUESTION: The statutory question in the sense that even if there's a case or controversy, Congress didn't intend this particular kind, this class of person to have the right to get into court. Even if he could get into court under 810.

MR. WALLACE: That, it seems to me, that would be the principle --

QUESTION: Although there would be no difference between that person under 812 or 810 as far as case or

controversy goes.

MR. WALLACE: That, in my view, is the principal question in the case. I agree with that formulation.

QUESTION: Mr. Wallace, to get back to 3604, which is apparently the -- (a), which you say is the substantive -- the source of the substantive right. It reads, "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise made unabailable". You do not read the subsequent clause as after "refuse to sell or rent after the making of a bona fide offer" as having required a bona fide offer?

MR. WALLACE: Not at all. Not at all, Mr. Justice Rehnquist.

The motivation behind putting in the bona fide offer requirement, as it's recounted in petitioners' brief, focused on the liability of the particular seller or renter. And there was resistance to making him liable in the absence of a bona fide offer, and the language was carefully placed in the statute. There was no concern about the practices of real estate companies that wouldn't even tell people about the --

QUESTION: But what about an individual seller who refused to negotiate for the sale or rental of property?

MR. WALLACE: Well, he, I think, would be liable as a matter of fact.

QUESTION: In spite of Congress's concern for --

MR. WALLACE: They were concerned that someone should not be claimed to have refused to sell to someone because of his race if that person wasn't a good-faith purchaser who made a bona fide offer.

But if the seller was going to refuse to even show the property or talk to anyone, you know, the concern didn't carry over.

Of course, it's not a question in this case. I think it's clear from the statutory language that the bona fide offer qualification relates only to a refusal to rent or sell; it's that plain.

QUESTION: And not to negotiate.

MR. WALLACE: Well, that's right. I think if you refused to even talk to someone about what's available, it's a violation of the statute as we view it. But that isn't ordinarily the form that violations take.

I mean, it's really unreasonable to expect a bona fide offer to be made for a house that isn't even shown to someone. And that applies to both the steering and the refusal to negotiate.

It's the sensible way to read the statute.

QUESTION: Mr. Wallace, is there any cause of action that may be brought under the Act, under Section 3610, requiring exhaustion of administrative remedies?

In other words, does the option always prevail with respect to every cause of action under the Fair Housing Act, to go directly to 3612?

MR. WALLACE: That is our understanding of the statute, and indeed --

QUESTION: Except for the United States.

MR. WALLACE: Except for the United States, yes.

QUESTION: Yes.

MR. WALLACE: We never can -- well, we have a separate provision.

QUESTION: What are the advantages to using 3610?

MR. WALLACE: There are great advantages, and they are the ones that Congress actually anticipated in providing this as an alternative remedy, and that is, that many matters are informally settled without the expense of litigation through the good offices of HUD, through the conciliation process. HUD is now getting about 3800 complaints per year. A far greater number than are submitted to the courts. And many of them are quite expeditiously, finally resolved, not only in favor of --

QUESTION: It's cheap.

MR. WALLACE: It's cheap. That's right. It's inexpensive. And they did a computer rundown for us this week of their dispositions between October of 1976 and May of 1978, and more than half of the complaints were finally

disposed of within 120 days during that period.

There were -- 11.2 percent were finally disposed of within 30 days. And another 17.2 percent in 30 to 60 days; 16.2 percent in 60 to 90 days, and so on; 13.8 percent in 91 to 120 days.

So many of the complaints can expeditiously be disposed of.

As we point out in our brief, it has been HUD's consistent interpretation of the statute that the alternative remedies are available for any person aggrieved within the meaning of 810. And at every step in the process there are notifications to individuals who have complained to them which include a statement that they have a right to sue under Section 812.

And indeed there is much in the legislative evolution of the two provisions which suggest that this is right.

All of the resistance to the Fair Housing legislation -- and there was a great deal of resistance -- one of the main focal points was on the idea of the federal bureaucrats becoming involved. And indeed the deferral, the main motivation behind the deferral that was required to local fair housing officials was that the federal bureaucracy shouldn't be interfering in areas where local conciliation and mediation efforts are available.

Which suggests that, quite the opposite of what is

being argued today, that the deferral should take place in the absence of HUD's involvement rather than as the statute focuses it in the presence of HUD's involvement; it is HUD itself that is supposed to defer to these processes.

And in looking again at the legislative history, the immediate evolution of 812 is connected with this, and it was recounted in some detail in our brief in the Trafficante case, which I re-read yesterday, and I regret to say some of the pertinent portions of the legislative history were not reproduced in any of the briefs in the present case; but they can be found in our brief in the Trafficante case.

And I would like to just mention rather briefly some of those pertinent aspects of it, in addition to the ones that we have cited in our present brief.

And I have for the convenience of those members of the Court who would like to have it, I have submitted to the Clerk ten copies, Xeroxed, of the pertinent pages of the brief that we filed in Trafficante. And the --

QUESTION: It sounds like you were prepared like the witness yesterday.

MR. WALLACE: [Laughing]. Well, we did recount there in some rather lengthy textual footnotes the immediate derivation of Section 812. And this is principally in Footnote 8 of that brief and in Footnote 12 of that brief.

In Footnoe 8 we pointed out that Section 810 itself

was derived from section 11 of a bill which Senator Mondale had offered as an amendment to a House bill. The House bill that came over at this time, in 1968 -- this is after two years of previous history that we recounted in some detail in our present brief -- the bill that came over at that time from the House did not include any fair housing provisions at all.

And Senator Mondale offered as an amendment a bill that included a provision similar to Section 810, but it also included authority for HUD to issue cease and desist orders that would be enforcible in court. And it was the cease and desist authority, something similar to the way the National Labor Relations Board operates, that was the focal point of controversy, and that resulted in the failure of a number of cloture motions, which we have recounted in that Footnote 8.

And at that point, after these cloture motions had failed, Senator Mondale moved to table his proposed amendment and supported a substitute amendment offered by Senator Dirksen, which is the one that was adopted and later was adopted by the House.

And this retained the Section 810 mechanism for making an administrative complaint, but took the authority to issue cease and desist orders away from HUD, and, in its place, substituted Section 812, an alternative to go directly into State or federal court.

And as we argued then in our Footnote 12 in that brief, because there were, after all, two complainants in that case who were complaining only under Section 812, there's no reason to think that the failure to repeat the definition of "person aggrieved" in Section 812 made any change in the class of complainants who were authorized to pursue either remedy because Section 812 was designed as a substitute for the cease and desist remedy that had originally been proposed for the class of persons aggrieved, defined in what had been Section 11 of Senator Mondale's bill.

There was nothing in this immediate evolution of the alternative remedy that suggests any notion of a different class of complainants. It was a way to ameliorate the objections to a federal administrative remedy for the class of complainants that both proposals were designed to give a right of action to.

And so the additional aspects of the legislative history, which we've recounted in our present brief, indicate that the rationale hypothesized by the Ninth Circuit -- and it was entirely hypothesized, there were no references at all to the legislative history in the TOPIC opinion -- that those do not comport at all with the actual evolution of the provisions at issue or the congressional intention which was, as had been the practice, that it's really the administrative remedy that provides the inexpensive, quick road to relief

in many instances. And the judicial remedy was not reserved for a special class of cases that had to be more expeditiously handled.

Our experience is that the hoped-for expedition in Section 812 and Section 813 cases often doesn't come to pass.

And so we really think that this case is, in every pertinent respect, no different from Trafficante. It's true that you have a wider geographic area that these people are concerned about. They don't happen to be people living in an apartment complex, they are living in a suburban community. But they, too, are protected by the intent of Congress and by the protections of the Act.

And as Judge Stern, I think very eloquently, stated in a case in New Jersey that's cited in the brief, Fair Housing Council v. Eastern Bergen County, the fact that the alleged injury, and I'm quoting from Judge Stern now,"affects a large number of people in a large geographic area does not serve to attenuate it, on the contrary it makes the harm more severe. Residents of an all-white housing complex may need only to look to the next residential facility for the inter-racial associations they desire, if the allegations here are true, residents of Bergen County may have to go to an entirely different neighborhood or community.

"Similarly a completely white building is less of a ghetto than a completely white neighborhood or community.

That the cordon sanitaire has been drawn around an entire community rather than a single apartment complex does not render it lawful."

QUESTION: How far does that go, Mr. Wallace? Echoing the Chief Justice's question of a few moments ago, --

MR. WALLACE: Well, it goes to people who --

QUESTION: -- can any resident of Illinois sue and say, "I'm uncomfortable living in a State where there are any communities not fully desegregated"?

MR. WALLACE: Well, we don't think so. We don't think so. We think they have to show a more direct interest, that their own community is affected by the practice they're complaining of.

QUESTION: Well, the State is a community, in a broader sense.

MR. WALLACE: It is. The best --

QUESTION: So is the United States.

MR. WALLACE: The best answer I can give you is that that's not the kind of complaint that HUD has received in every case.

QUESTION: But you just made the point that Trafficante must -- its logic must take us way beyond a single apartment complex. Now, how far beyond?

MR. WALLACE: To the point where the complainants are realistically being affected.

QUESTION: Well, maybe as a resident of Illinois, I don't like having any non-desegregated community in the entire State in which I live.

MR. WALLACE: Well, it isn't their feelings being hurt, it's --

QUESTION: Well, I'm hurt by it. I say I'm hurt.

MR. WALLACE: Well, the question is whether the way they have to live is affected by unlawful practices of someone else; that Congress has proscribed; and that they are complaining of. Not whether their feelings are hurt because the law isn't being observed by everyone in the country or in their State.

It's always difficult to formulate these things with exactitude. I can tell you that HUD does not undertake investigations at the behest of the people who don't in some way allege that they are affected. For example, --

QUESTION: Economically affected or how affected?

MR. WALLACE: No, they don't require a pleading the way a court might, but, for example, if they get a complaint from a former employee of a real estate company that the company was engaging in steering practices, and that employee does not in any way say that he's still in that community and is affected by those practices. HUD does not initiate an investigation. Instead, it will refer that complaint to the Department of Justice, for us to see whether there's a viola-

tion to be investigated.

The same thing is true of an anonymous complaint. It has to be a complaint from someone who shows that something is affecting him and his life and his community, and --

QUESTION: But not necessarily economically, he doesn't have to show that --

MR. WALLACE: Not -- no.

QUESTION: -- the price or the value, the cost or the market price of his house has gone down?

MR. WALLACE: No. No. He just has to show a direct interest of his own.

And we do what we can to enforce the statute. As the Court in Trafficante noted, that the housing section of the Civil Rights Division had less than two dozen lawyers at that time.

QUESTION: And therefore relied on private attorneys general?

MR. WALLACE: That's correct.

QUESTION: And I just wondered how many private attorneys general there are.

MR. WALLACE: Well, we hope enough to enforce the statute. We now have only 21 attorneys in that same section. And it has the additional responsibility of enforcing the equal credit laws as well as the fair housing law.

QUESTION: That's the red line to which brother

Marshall referred.

MR. WALLACE: That is correct, Mr. Justice Stewart.

And so it still has to be private enforcement, that is the primary tool to bring about the congressional purpose here.

QUESTION: Mr. Wallace, on this question of the scope of Trafficante, you know, apparently Bellwood has some 20 or 25 thousand people compared to 8200 in Trafficante. But then I just recalled that the complaint actually concerns a limited area within Bellwood, doesn't it?

MR. WALLACE: Well, they --

QUESTION: Or does that go across into Maywood? I'm not sure.

MR. WALLACE: They specified a limited area to which black customers were being steered. That was part of the specificity of the complaint. But I don't think the complaint specified that as the only area affected by this hearing.

QUESTION: I see. So the relevant number of people, for purposes of comparison, is the population of Bellwood?

MR. WALLACE: I would say so, Your Honor.

Thank you. My time has expired.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

Do you have anything further, Mr. Howe?

REBUTTAL ARGUMENT OF JONATHAN T. HOWE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HOWE: Yes. May it please the Court:

Much has been said about the Trafficante decision in this argument, so I think the Court's attention should be directed to page 212 of the opinion, wherein the Court stated, "We reverse and remand the case to the district court, leaving untouched all other questions."

I think this follows right after the statement by Mr. Justice Douglas, stating, "We can give vitality to Section 810 (a) only by a generous construction."

So I think that all other questions in Trafficante were reserved and untouched by this Court.

One other factual --

QUESTION: Of course, the Court left open the 1982 question, didn't it?

MR. HOWE: That is correct also, Your Honor.

QUESTION: But it didn't mention 812.

MR. HOWE: It did not mention it in the footnote that it dealt with in 1982, but it did in this language at the end, and then taking your concurring opinion too, Mr. Justice White, wherein you stated that you would limit it to the facts of the case presented.

One other fact which is extremely important in the Trafficante decision is that the action was brought against a

single landlord, who alone controlled access to that apartment complex. No one has alleged, nor is there any reason to believe, the two realtors doing business outside of the Village of Bellwood itself have a dramatic impact upon housing patterns within Bellwood.

QUESTION: Well, that would almost go to the merits of the case.

MR. HOWE: It could, Your Honor, but I think that the fact that we'd like to point out is that there is a distinction between the class of defendants in Trafficante as to the class of defendants in this particular case.

The concept of the public policy argument, as advanced by the United States, no showing has been made that by opening an opportunity under Section 3612 to indirect victims, that the policy of the Fair Housing Act would be advanced.

And we would submit that it would be to the contrary, because it would provide a mechanism by which the entire matrix of an administrative remedy through Section 3610 could be avoided and circumvented.

We think that the language of Section 3610 of "person aggrieved" is unique, and the failure of Congress to include that language specifically in Section 3612 indicated a differing view by Congress. And we need only look at the natural meaning of the words contained in the statute to go forward with that.

The fact that the Attorney General's office lacks staff is no reason for this Court to make any consideration as to how it is going to interpret a statute. It must do that solely and exclusively on the basis of what is contained in the statute.

We submit that we know of no other statute in the United States that would allow the systematic circumvention of remedy, if this Court is to adopt the position that has been advanced by the plaintiffs. It is necessary to confine an actionable claim within the limits of the language used by Congress, and consistent with the logic that's embodied in that statutory scheme, rather than allowing it to extend beyond the intentions of Congress.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:24 a.m., the case in the above-entitled matter was submitted.]

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