No. 18-10053

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,
Plaintiffs-Appellants,
v.
CITY OF LAGRANGE, GEORGIA
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia
Case No. 3:17-cv-00067-TCB

BRIEF FOR *AMICI CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL FAIR HOUSING ALLIANCE, INC., CENTER FOR FAIR HOUSING, INC., CENTRAL ALABAMA FAIR HOUSING CENTER, INC., FAIR HOUSING CENTER OF NORTHERN ALABAMA, FAIR HOUSING CONTINUUM, INC., FAIR HOUSING CENTER OF GREATER PALM BEACHES, INC., HOUSING OPPORTUNITIES PROJECT FOR EXCELLENCE, INC., METRO FAIR HOUSING SERVICES, INC., SAVANNAH-CHATHAM COUNTY FAIR HOUSING COUNCIL, INC., THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND EQUAL JUSTICE SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLANTS

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AMICI CURIAE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1-1, undersigned counsel for *amici curiae* the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), National Fair Housing Alliance, Inc., Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Fair Housing Center of Greater Palm Beaches, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., Savannah-Chatham County Fair Housing Council, Inc., The Leadership Conference on Civil and Human Rights ("The Leadership Conference"), Equal Justice Society ("EJS"), certifies that they believe that the certificate of interested persons and corporate disclosure statement accompanying the brief of Plaintiffs-Appellants filed on February 27, 2018, is complete with the following exceptions:

A. Interested Parties

NAACP Legal Defense and Educational Fund, Inc. (*amicus curiae*)

National Fair Housing Alliance, Inc. (*amicus curiae*)

Center for Fair Housing, Inc. (*amicus curiae*)

Central Alabama Fair Housing Center, Inc. (*amicus curiae*)

Fair Housing Center of Northern Alabama (*amicus curiae*)

Fair Housing Continuum, Inc. (*amicus curiae*)

Fair Housing Center of Greater Palm Beaches, Inc. (*amicus curiae*)

Housing Opportunities Project for Excellence, Inc. (*amicus curiae*)

Metro Fair Housing Services, Inc. (*amicus curiae*)

Savannah-Chatham County Fair Housing Council, Inc. (*amicus curiae*)

The Leadership Conference on Civil and Human Rights (*amicus curiae*)

Equal Justice Society (*amicus curiae*)

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Ajmel Quereshi (counsel for *amici curiae*)

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B. Corporate Disclosure Statement

LDF is a non-profit, non-partisan corporation. LDF has no parent corporation and no publicly held corporation has any form of ownership interest in the LDF.

The National Fair Housing Alliance, Inc., Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Fair Housing Center of Greater Palm Beaches, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., and Savannah-Chatham County Fair Housing Council, Inc. are non-profit, non-partisan corporations. They have no parent corporations and no publicly held corporation has 10% or greater ownership in any of them.

The Leadership Conference is a non-profit, non-partisan corporation. The Leadership Conference has no parent corporation and no publicly held corporation has any form of ownership interest in The Leadership Conference.

EJS is a non-profit, non-partisan corporation. EJS has no parent corporation and no publicly held corporation has any form of ownership interest in EJS.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. Throughout its history, LDF has challenged policies and practices that deny housing opportunities to African Americans. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Davis v. City of New York*, 902 F. Supp. 2d

[1] The parties consent to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici*, *amici's* members, and their counsel, contributed money intended to fund preparing or submitting this brief.

405 (S.D.N.Y. 2012) (racial discrimination in policing public housing residences); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Consent Decree*, *Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also* NAACP Legal Defense & Educ. Fund, Inc., et al., *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008).

Amicus curiae National Fair Housing Alliance, Inc. ("NFHA") is a national organization dedicated to ending discrimination in housing. NFHA is a consortium of private, non-profit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. NFHA and its members have undertaken important fair housing enforcement initiatives in cities and

states across the country; those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

As part of its enforcement activities, NFHA participates in federal and state court litigation involving claims under the Fair Housing Act ("FHA"). With its extensive involvement in fair housing cases across the country, NFHA stands in a unique position to comment on the potential harmful effects of a narrow interpretation of the FHA that the District Court applied in this case.

Amici curiae Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Fair Housing Center of Greater Palm Beaches, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., and Savannah-Chatham County Fair Housing Council, Inc. constitute NFHA's fair housing organization members in the three States in this Circuit. Their missions include resisting all forms of housing discrimination and ensuring equal and affordable housing opportunities for all people within their operating areas, including through private FHA enforcement in their own names and on behalf of individuals.

Amicus curiae The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957, including the Fair Housing Act. Its sister organization, The Leadership Conference Education Fund, was a founding member of the National Commission on Fair Housing and Equal Opportunity, a bipartisan commission created in 2008 to examine the nature and extent of illegal housing discrimination, its origins, its connection with government policy and practice, and its effect on communities across the nation. The Leadership Conference believes that it is crucial to fully address the continuing problem of housing discrimination in the United States in order to become a nation as good as its ideals.

Amicus curiae Equal Justice Society ("EJS") is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. EJS uses a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. EJS's legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience. EJS has submitted multiple amicus briefs to the U.S. Supreme Court in housing discrimination cases on behalf of social scientists whose research examines the role of implicit bias, associations between race and space, and stereotyping in present-day discrimination in housing decisions. EJS strongly believes that the

broad remedial purpose of the FHA demands protection against the discriminatory provision of post-acquisition municipal services.

STATEMENT OF THE ISSUES

1. Does the Fair Housing Act, 42 U.S.C. § 3604(b) prohibit housing discrimination solely against prospective residents and not also against current residents?
2. Does § 3604(b) prohibit discrimination in the post-acquisition provision of vital municipal utility services?

SUMMARY OF ARGUMENT

This year marks the 50th anniversary of the Fair Housing Act ("FHA"), which Congress passed one week after the assassination of Dr. Martin Luther King Jr. in 1968. Despite progress in certain areas, the need for FHA enforcement has not waned. Racial discrimination in housing and housing-related policies continues to thwart the FHA's purpose: "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

Consistent with this explicit purpose, the U.S. Supreme Court has declared the FHA to be "broad and inclusive," *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 209 (1972), and has rejected "wooden application[s]"

of the Act, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). Nevertheless, contrary to the Supreme Court's proscriptions, the District Court here created a wooden rule that restricts the protections of § 3604(b) to prospective tenants and homeowners. The District Court's restrictive interpretation of § 3604(b) is in conflict with the statutory language, as well as regulatory guidance from the U.S. Department of Housing and Urban Development and the purpose of the FHA. *Amici* therefore respectfully urge this Court to reverse the District Court's decision.

ARGUMENT

I. The Statutory Language of § 3604(b) Prohibits Municipal Utilities from Discriminating Against Existing Tenants and Homeowners in the Provision of Housing-Related Services.

The text of § 3604(b) makes clear that it protects current housing residents, in addition to individuals acquiring housing, from racial discrimination. That conclusion is particularly clear because the Supreme Court has held that the FHA must be interpreted broadly. This Court should likewise hold in this case that § 3604(b) protects LaGrange housing residents from discrimination in the provision of post-acquisition services, including services provided by municipal utilities.

A. Section 3604(b) Protects Residents from Housing Discrimination While Occupying Their Homes.

When analyzing § 3604(b), this Court must first examine the language of that statute. *See Montgomery Cty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1255 (11th Cir. 2015) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake*, 484 U.S. 49, 56 (1987)). Section 3604(b) states that it is unlawful:

> To 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 therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(b).

Further, because this provision is part of the FHA, it must be interpreted broadly. As this Court has explained: "[t]he Supreme Court has repeatedly instructed us to give the Fair Housing Act a 'broad and inclusive' interpretation." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008) (quoting *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

Notwithstanding this clear precedent, here, the District Court applied precisely the kind of narrow and "wooden" approach to

interpreting the FHA that the Supreme Court has rejected. *Havens Realty*, 455 U.S. at 380. Specifically, the District Court reasoned that "[b]ecause no Plaintiff with standing pleads discriminatory conduct that precedes or is contemporaneous with acquisition of housing, Plaintiffs fail to state a claim under the Fair Housing Act . . . ." Doc. 27 at 5. As courts around the country have recognized, that interpretation cannot be reconciled with the text of § 3604(b) or with Supreme Court precedent requiring a broad interpretation of that text. On the contrary, § 3604(b) prohibits racial discrimination in housing that postdates the acquisition of the dwelling. *See, e.g.*, *Comm. Concerning Cmty. Improvement v. City of Modesto ("CCCI")*, 583 F.3d 690, 713 (9th Cir. 2009); *see also Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997) (holding landlord liable under § 3604(b) for sexual harassment against tenant).

As the Ninth Circuit explained in *CCCI*, § 3604(b)'s "inclusion of the word 'privileges' implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling." 583 F.3d at 713. In the words of another court explaining why § 3604(b) encompasses post-acquisition discrimination, "it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of

residing therein." *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004); *see also* Webster's Third New International Dictionary 1805 (14th ed. 1961) (defining "privilege" as "a right or immunity granted as a particular benefit, advantage, or favor: special enjoyment of a good or exemption from an evil or burden: a particular or personal advantage or right esp. when enjoyed in derogation of common right"). The words "terms" and "conditions" also suggest ongoing conduct, since the terms and/or conditions of a sale or rental may relate to property upkeep, access to facilities, community rules, etc. The privilege of quiet enjoyment of a dwelling is, of course, necessarily dependent on the existence of habitable conditions, including vital utility services such as running water, gas, and electricity.

Moreover, as the *CCCI* court explained, the language "services or facilities in connection therewith" in § 3604(b) must refer to ongoing conduct that affects the "dwelling" because "[t]here are few 'services or facilities' provided at the moment of sale, but there are many 'services or facilities' . . . associated with the occupancy of the dwelling." 583 F.3d at 713*; see also Davis v. City of New York*, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012); *United States v. Avatar Props.*, No. 14-cv-502-LM, 2015 WL

2130540, at *3 (D.N.H. May 7, 2015); *Concerned Tenants Ass'n of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 525 (N.D. Ill. 1980) (holding that "there need be no argument when the statutory language is so clear" that § 3604(b) prohibits race-based discrimination in services provided post-acquisition of housing).

Although a Seventh Circuit panel held that § 3604(b) covers only activities "that prevent people from acquiring property," *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328-29 (7th Cir. 2004), the *en banc* Seventh Circuit later made clear that § 3604(b) is not limited to only prospective residents, *see Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009). The *Bloch en banc* court ruled that current homeowners could pursue a § 3604(b) claim against their condominium association for discriminatory conduct that occurred after the homeowners acquired their condominium. 587 F.3d at 781. *See also Mehta v. Beaconridge Improvement Ass'n*, 432 F. App'x 614 at 616-17 (7th Cir. 2011) (reversing dismissal of 3604(b) claim challenging discriminatory provision of services to current residents (citing *Bloch*, 587 F.3d at 780-81; *CCCI*, 583 F.3d at 713)).

Indeed, this Circuit has already endorsed the viability of post-acquisition § 3604(b) claims by reaching the merits of such claims. For example, in *Woodard v. Fanboy*, 298 F.3d 1261, 1265 (11th Cir. 2002), this Court reversed judgment as a matter of law against a plaintiff raising a § 3604(b) claim based on familial status discrimination, noting that "[§] 3604(b) . . . operates to prohibit landlords . . . from evicting a person because that person has children living with them." The fact that the claim was brought by a current tenant, as opposed to a prospective tenant, did not prevent this Court from allowing a jury verdict for the plaintiff to stand. As this Court stated in *Woodard*, this is precisely how § 3604(b) "operates." Moreover, in the instances when this Court has found a § 3604(b) claim to be invalid, the ruling was based on grounds other than the housing status of the plaintiff. *See*, *e.g.*, *Dixon v. Hallmark Co.*, 627 F.3d 849, 858 (11th Cir. 2010) (holding that residents' claim failed because it concerned space "separate from their personal dwelling"—not because they were current residents); *Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n,* 682 F. App'x 768, 789 (11th Cir. 2017) (upholding verdict against current

residents on proximate causation grounds—not because they were current residents).

District courts in this Circuit likewise have repeatedly recognized the viability of § 3604(b) claims brought by existing homeowners and renters. *See, e.g.*, *Fair Hous. Ctr. of the Greater Palm Beaches v. Sonoma Bay Cmty. Homeowners Ass'n*, 136 F. Supp. 3d 1364, 1372-74 (S.D. Fla. 2015) (holding that tenant-behavior policies violated §3604(b) as a matter of law); *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (denying motion to dismiss claim of discriminatory conduct against renters); *Smith v. Zacco*, No. 5:10-cv-360-TJC-JRK, 2011 WL 12450317, at *7 (M.D. Fla. Mar. 8, 2011) (recognizing § 3604(b) claim where alleged discrimination occurred after purchasing home); *United States v. Morgan*, No. CV 407-125, 2010 WL 11537561, at *4 (S.D. Ga. Mar. 30, 2010) (concluding that post-acquisition claim under § 3604(b) should be recognized); *Jackson v. Comberg*, No. 8:05-cv-1713-T-24TMAP, 2007 WL 2774178 at *4 (M.D. Fla. Aug. 22, 2007) (finding that § 3604(b) applies to "discriminatory conduct during the rental of the property"); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *4 (M.D. Fla. May 2, 2005) (holding § 3604(b) "prohibit[s] unlawful

discriminatory conduct after a tenant has taken possession of the dwelling").

Here, the District Court relied on a single case, *Paulk v. Ga. Dep't of Transp.*, No. CV 516-19, 2016 WL 3023318 (S.D. Ga. May 24, 2016), for the proposition that § 3604(b) does not cover post-acquisition conduct. However, *Paulk* is both unpersuasive and inapposite. First, although *Paulk* erroneously concluded that § 3604(b) does not extend to post-acquisition discrimination, the court illogically based its ruling, in part, on the "tenuous connection" between the alleged discriminatory conduct in that case and the plaintiff's housing. *Id.* at *9. The *Paulk* court suggested that "services generally provided by local governmental units, such as police protection and garbage collection" *would* be covered by § 3604(b). *Id.* Yet, what the *Paulk* court failed to appreciate is that municipal services, such as police protection and garbage collection, are necessarily *post-acquisition* services. Second, the *Paulk* court relied on cases that, contrary to its ultimate ruling, recognized post-acquisition discrimination claims and claims for discriminatory provision of utilities. *See id.* at 9 (citing *Gourlay v. Forest Lake Estates*, 276 F. Supp. 2d 1222, 1233 at n.20 (M.D. Fla. 2003), a case which acknowledges that "3604(b)

would likely extend past the initial rental of a dwelling"); *Steele v. City of Port Wentworth*, No. CV405-135, 2008 WL 717813 at *12 (S.D. Ga. Mar. 17, 2008), a case that implies a municipality's discriminatory provision of utilities to residents may be actionable under § 3604(b)).

The Supreme Court has instructed that the FHA should be given a "broad and inclusive" interpretation, *Trafficante*, 409 U.S. at 209, and "wooden application[s]" of the Act should be rejected, *Havens Realty Corp.*, 455 U.S. at 380. When read in the "broad and inclusive" manner instructed by the Supreme Court, § 3604(b) of the FHA prohibits housing-related discrimination, including discrimination that occurs after housing has been acquired.

B. Section 3604(b) Prohibits Discrimination in the Post-Acquisition Provision of Municipal Utility Services.

Even though it reasoned that Plaintiffs could not state a claim because they had not pleaded "discriminatory conduct that precedes or is contemporaneous with acquisition of housing," Doc. 27 at 5, the District Court appeared to acknowledge that some post-acquisition discrimination claim *is* actionable under § 3604(b). Specifically, the District Court did not disagree with a number of cases recognizing claims for post-acquisition discrimination cited by Plaintiffs, but held those

cases were inapplicable because they involved claims against either a homeowners' association or a landlord. *See id.* at 9-10.

But that distinction is untenable. There is no basis for limiting § 3604(b) claims based on who is engaged in the discriminatory conduct. The plain language of § 3604(b) makes no reference to landlords or homeowners' associations. It prohibits specific conduct rather than conduct by specific individuals or entities. Post-acquisition discrimination by homeowners' associations and landlords is prohibited under § 3604(b) because, in light of the ongoing relationship between the homeowner and homeowners' association or landlord and tenant, it constitutes discrimination with respect to the provision of services in connection with a dwelling. *See Richards*, 2005 WL 1065141, at *5 (applying § 3604(b) to post-acquisition sexual harassment by landlord because of the ongoing relationship between landlord and tenant); *Smith*, 2011 WL 12450317, at *7 (holding that § 3604(b) prohibits homeowners' associations from discriminating in the enforcement of their rules); *cf. Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners Ass'n*, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005) (finding that "the FHA can

apply to some post-acquisition provision of services in the planned community context where the services are an incident of ownership").

Like landlords and homeowners' associations, municipal utility providers have an ongoing relationship with both renters and homeowners wherein the utility provider retains the power to render the home uninhabitable. As stated by the Supreme Court, "[u]tility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978). In fact, that is the heart of the issues in this case. *See*, *e.g.*, Doc. 1 ¶¶ 169-70 ("[T]he City disconnected Ms. Walton's gas and electricity. Without utilities, Ms. Walton, her three children, and her disabled mother could not live in their home.").

So central are these services that many states—including states within this Circuit—consider homes without running water, light, and heat to be uninhabitable. *See, e.g.*, Ala. Code § 35-9A-204(a) (2018) (requiring landlords to maintain electrical and heating facilities, and to supply running and hot water); Fla. Stat. § 83-51 (2017) (requiring landlords of multi-unit residences to maintain functional heat, running

water, and hot water). Georgia considers these services so vital to habitability that landlords are explicitly prohibited from disconnecting heat, light, or water service until after the final disposition of an eviction case. O.C.G.A. § 44-4-14.[2]

The inextricable link between vital municipal services and one's ability to occupy a home supports liability under § 3604(b) for discrimination in the provision of those services to housing residents. *See, e.g.*, *CCCI*, 583 F.3d at 715 (reinstating residents' claims regarding the timely provision of law-enforcement personnel). As explained by the Fourth Circuit, "[t]he [FHA's] services provision simply requires that such things as garbage collection and other services of the kind usually provided by municipalities not be denied on a discriminatory basis." *Jersey Heights Neighborhood Ass'n v. Glenending*, 174 F.3d 180, 193 (4th Cir. 1999) (internal quotation marks omitted); *see also Cox v. City of Dallas*, 430 F.3d 734, 745 n.36 (5th Cir. 2005) (acknowledging that

[2] In addition to basic habitability requirements, gas, electricity, and running water touch nearly every aspect of domestic life. For example, the U.S. Department of Health and Human Services Office on Child Abuse and Neglect lists lack of heat and/or running water as risk factors for child neglect. Diane Depanfilis, Office on Child Abuse and Neglect, *Child Neglect: A Guide for Preventions, Assessment, and Intervention* 13, 66, 89 (2006).

services generally provided by municipalities or governmental units can be connected to the sale or rental of a dwelling and thus within the scope of §3604(b)); *Davis*, 902 F. Supp. 2d at 436 (S.D.N.Y. 2012) (concluding that "[§ 3604(b)] is best understood to prohibit post as well as pre-acquisition discrimination in the provision of housing-related services"); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 959-60 (W.D. Tenn 2003) (allowing discrimination claim regarding provision of building permit and water services after purchase of land); *Cooke v. Town of Colorado City*, 934 F. Supp. 2d 1097, 1114-15 (D. Ariz. 2013) (permitting litigation of alleged § 3604(b) violation by municipality in provision of water, electricity, and sewer services); *cf. Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (rejecting claim that County's alleged failure to repair or remove dilapidated buildings violated § 3604(b) as "[t]hat subsection applies to services generally provided by governmental units. . . ."); *Corwin v. B'Nai B'Rith Senior Citizen Hous., Inc.*, 489 F. Supp.2d 405, 410 (D. Del. 2007) (rejecting § 3604(b) claim where allegations did not concern "services generally provided by governmental units"); *Steele,* 2008 WL 717813, at

*12 (implying that discriminatory provision of utilities may be actionable under § 3604(b) where residents have no alternative access to utilities).

The District Court's narrow interpretation of § 3604(b) fails to give effect to its language about privileges, services, and facilities, and arbitrarily permits discrimination that goes to the heart of housing—discrimination that other courts have repeatedly held to be prohibited by the FHA. Under the District Court's interpretation, the discriminatory provision of vital municipal services to housing residents would have no legal remedy—leaving the FHA's promise of fair housing unattainable for countless families within this Circuit. This would be a perverse result, which cannot be reconciled with the plain language and purpose of the FHA.

II. HUD's Interpretation of § 3604(b), Which Recognizes Post-Acquisition Liability, Is Due Great Weight.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). When a court "determines [that] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction

on the statute . . . ." *Id.* at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* More specifically regarding the FHA, the Supreme Court has instructed that HUD's interpretations are to be given "great weight." *Trafficante*, 409 U.S. at 210.

In *Meyer v. Holley*, the Supreme Court noted that HUD is "the federal agency primarily charged with the implementation and administration of the [FHA]," and that the Supreme Court "ordinarily defer[s] to an administering agency's reasonable interpretation of a statute." 537 U.S. 280, 287 (2003) (accepting HUD's interpretation of FHA vicarious liability). In *Massaro v. Mainlands Section 1 & 2 Civic Ass'n,* this Court accorded *Chevron* deference to HUD's construction of the FHA. 3 F.3d 1472, 1480 (11th Cir. 1993).

HUD, as the federal agency charged with implementing and administering the FHA, has promulgated two regulations that make clear § 3604(b) applies to post-acquisition conduct. First, 24 C.F.R. § 100.70(d)(4) prohibits "[r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or

insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."[3] This regulation demonstrates HUD's understanding that § 3604(b) prohibits discrimination in providing vital municipal services for dwellings—not the acquisition of dwellings—which is precisely the issue in this case.

Second, 24 C.F.R. § 100.65(b)(4) prohibits "[l]imiting the use of privileges, services, or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her." Thus, HUD interprets § 3604(b) to cover services or facilities "associated with a dwelling," not just those connected with the sale or rental transaction. In addition, HUD's inclusion of "a person associated" with the owner or tenant further demonstrates that the statute reaches post-acquisition conduct, since "a person associated" with the owner or tenant would not have participated in the pre-acquisition rental or sale transaction.

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[3] Although this regulation falls under the heading of conduct that "otherwise makes unavailable" housing, thereby parroting the language of § 3604(a), HUD has made clear that the regulations in §§ 100.50-100.90 may describe conduct that violates more than one of the subsections of 42 U.S.C. § 3604. *See* 24 C.F.R. § 100.50(a).

Other courts have repeatedly deferred to HUD's interpretation of § 3604(b) to include post-acquisition conduct.[4] *See, e.g. CCCI*, 583 F.3d at 713-714 (noting that HUD's FHA implementing regulations support permitting post-acquisition claims under § 3604(b)); *Davis*, 902 F. Supp. 2d at 437 (recognizing that HUD's interpretation of the FHA is entitled to "great weight" and that applying § 3604(b) to post-acquisition discrimination is consistent with HUD's interpretation); *United States v. Avatar Props.*, No. 14-cv-502, 2015 WL 2130540, at *3 (D.N.H. May 7, 2015) (agreeing with *CCCI* that HUD's FHA implementing regulations support post-acquisition claims); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) (according *Chevron* deference to HUD's interpretation of § 3604(b)).

In this case, the District Court erred by not according proper weight to HUD's interpretation of § 3604. After noting that courts have reached

[4] These cases include actions brought by the United States Department of Justice, which has taken the consistent position that § 3604 applies to post-acquisition discrimination. *See e.g. United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004); *United States v. Avatar Props.*, 14-cv-502, 2015 WL 2130540 (D.N.H. May 7, 2015) (holding that § 3604 applies to post-acquisition discrimination); *United States v. Cochran*, No. 4:12-CV-000220-FL, 2013 WL 12158997 (E.D.N.C. May 10, 2013) (holding that United States sufficiently pled violations under the FHA where conduct at issue discriminated against current residents).

different conclusions regarding the construction of the FHA, the District Court proceeded to "simply impose its own construction on the statute," *Chevron*, 467 U.S. at 843. *See* Doc. 27 at 7-8. The District Court did not consider—or even mention—HUD's interpretation, thus failing to accord "great weight" to that interpretation as required by the Supreme Court and this Court. *See Meyer*, 537 U.S. at 287; *Trafficante*, 409 U.S. at 210; *Massaro*, 3 F.3d at 1480.

III. The Broad Remedial Purpose of the FHA Demands Protection Against the Discriminatory Provision of Post-Acquisition Municipal Services to Housing Residents.

Congress enacted the FHA to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Far from being concerned only with the acquisition of housing, Congress sought to create "truly integrated and balanced living patterns." *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422). Then, as now, the vestiges of *de jure* segregation were "intertwined with the country's economic and social life." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). The FHA was enacted as a broad remedy to ameliorate the effects of housing discrimination on not only the direct victims of discrimination, but on the

"whole community." *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 2706); *see also Koch*, 352 F. Supp. 2d at 978 ("To achieve these goals, Congress sought to pass measures that have teeth and meaning, in the eyes of every American, black or white." (quoting 114 Cong. Rec. 2275) (internal quotation marks omitted)).

The District Court's erroneous reading of § 3604(b) prevents this key provision from reaching conduct at the heart of what the FHA is meant to achieve. The economic, social, and psychological damage wrought by segregation and housing discrimination were central themes in the civil rights movement. Dr. Martin Luther King, Jr., explained that segregated housing "confined [Blacks] to a life of noiselessness and powerlessness." Dr. Martin Luther King, Jr., Speech Before the Southern Christian Leadership Conference, Atlanta, Georgia (Aug. 16, 1967).[5] This harm, this "noiselessness and powerlessness," was not simply a feature of where African Americans were allowed to live; the harm was and is

[5] Dr. King's message was not lost on Congress when it passed the FHA. President Johnson called on Congress to pass the FHA as a tribute to Dr. King after his assassination on April 4, 1968, and Congress passed the FHA only six days later. *See* Charles M. Lamb, *Housing Segregation in Suburban America Since 1960: Presidential and Judicial Politics* 42 (2005).

tied to the ongoing conditions of that housing. Indeed, Dr. King spoke of Black families living in "vermin-filled, distressing housing conditions" in his call for racial equity in housing. Dr. Martin Luther King, Jr., The Other America (Mar. 14, 1968).

Under the District Court's mistaken and narrow reading of the FHA, the statute cannot achieve its purpose of achieving fair housing throughout the United States. As the Ninth Circuit explained in *CCCI*, reading § 3604(b) as limited only to post-acquisition conduct would exempt some of the very discriminatory conduct the FHA is meant to address:

> Under so limited a reading of the statute, it would not violate § 3604(b) for a condominium owner's association to prevent a disabled person from using the laundry facilities or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate § 3604(b) for a landlord to sexually harass a tenant or to raise the rent of only Jewish tenants. It would not violate § 3604(c) for a landlord to use racial slurs to or about existing tenants or to spray-paint such a slur on an occupant's door. Nor would it violate § 3604(c) for a homeowners' association to print up flyers denigrating a particular resident due to her religious faith and post them throughout the neighborhood. All of these behaviors would be beyond the law's purview solely because of when they occurred.

CCCI, 583 F.3d at 714 (quoting Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv.

C.R.-C.L.L. Rev. 1, 32–33 (2008)); *see also Bloch v. Frischholz*, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting) (noting that permitting post-acquisition claims "will ensure that member of protected groups do not win the battle (to purchase or rent housing) but lose the war (to live in their new home free from invidious discrimination)"); *Koch*, 352 F. Supp. 2d at 978 ("[A] broad interpretation of the FHA that encompasses post-possession acts of discrimination is consistent with the Act's language, its legislative history, and the policy to provide . . . for fair housing throughout the United States." (internal quotation marks omitted)).

The discriminatory provision of public services would not only lead to the absurd direct results identified by the Ninth Circuit in *CCCI*, it could also exacerbate other factors contributing to housing segregation, creating a "vicious circle of causation." Richard Thompson Ford, *The Boundaries of Race Political Geography in Legal Analysis*,107 Harv. L. Rev. 1841, 1854 (1994) (citing Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 642-44 (1944)). "The lack of public services would create a generally negative image of poor, black neighborhoods . . . . As a result, both real estate improvement and sale

would often become unfeasible." *Id.* at 1854-55. This Court should not let the District Court's illogical ruling stand. To do so would frustrate the very purpose behind the FHA and allow entrenched forms of housing discrimination to persist without any recourse.

CONCLUSION

The FHA was enacted to "provide for fair housing throughout the United States," 42 U.S.C. § 3601. Discriminatory practices that disproportionately prevent African Americans from having habitable homes are at war with that purpose. Nevertheless, the District Court held that such practices were not actionable, because the FHA does not protect current residents from discrimination in receiving vital utility services like water, electricity, and gas. This result runs contrary to instructions from the Supreme Court and is inconsistent with the text, purpose, and history of the FHA. *Amici* therefore respectfully urge this Court to reject the District Court's erroneous interpretation and confirm that the FHA reaches post-acquisition discrimination, including discrimination in the provision of vital municipal utility services.

Respectfully submitted on March 6, 2018,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(1)

The undersigned certifies that this brief complies with the applicable type-face and volume limitations of Federal Rules of Appellate Procedure 29(a)(5). This brief contains 5,589 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system used to prepare this brief (Microsoft Word). This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using font size 14 Century Schoolbook.

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on March 6, 2018, I served seven true and correct copies of the *Amici Curiae* brief of NAACP Legal Defense and Educational Fund, Inc., National Fair Housing Alliance, Inc., Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Fair Housing Center of Greater Palm Beaches, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., Savannah-Chatham County Fair Housing Council, Inc., The Leadership Conference on Civil and Human Rights, and Equal Justice Society, via overnight delivery to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and electronically filed the same using the Court's CM/ECF system, which will automatically send electronic copies to the following counsel of record:

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