15-1823

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,
PLAINTIFF-APPELLANT,

V.

KINGS PARK MANOR, INC. AND CORRINE DOWNING,
DEFENDANTS-APPELLEES,

RAYMOND ENDRES,
DEFENDANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
THE HONORABLE ARTHUR D. SPATT, DISTRICT JUDGE, PRESIDING

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND AFFIRMANCE OF PANEL DECISION ON *EN BANC* REVIEW

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FRAP 26.1 DISCLOSURE STATEMENT

Amicus curiae Lawyers' Committee for Civil Rights Under Law states that it has no parent corporation and there is no publicly traded company that owns ten percent or more of its stock.

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STATEMENT OF *AMICUS CURIAE* INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The Lawyers' Committee works with communities across the nation to combat, protest, litigate and remediate discriminatory housing practices, *see e.g.*, *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016), including after a person acquires or rents a dwelling. The Lawyers' Committee has litigated a number of post-acquisition discrimination claims under the Fair Housing Act, including *Long Island Housing Services v. Village of Mastic Beach*, No. 2:15-CV-00629 (E.D.N.Y), and *Steele v. City of Port Wentworth*, No. CV405-135 (S.D. Ga.).

The Lawyers' Committee submits this *amicus* brief concurrent with a motion for leave under Rule 29 of the Federal Rules of Appellate Procedure.

[1] Pursuant to Rule 29(a)(4)(E), *amicus curiae* Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") states that this brief was prepared by its outside counsel, which represents the Lawyers' Committee on a *pro bono* basis and has incurred the cost of preparing this brief. Neither the Lawyers' Committee nor any other entity contributed to the cost of preparing this brief.

SUMMARY OF ARGUMENT

A primary issue in this appeal is whether the Fair Housing Act ("FHA") [42 U.S.C. § 3601 *et seq*.] prohibits discriminatory action that occurs *after* the sale or rental of housing, commonly referred to as "post-acquisition" discrimination. The panel decision in this appeal held that the FHA prohibits post-acquisition discrimination. *Francis v. Kings Park Manor, Inc*., 944 F.3d 370, 377-78 (2d Cir. 2019). The Lawyers' Committee respectfully submits that the panel decision should be affirmed on *en banc* review.

Applying the two-part test for the interpretation of federal statutes in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the FHA on its face clearly prohibits post-acquisition discrimination. Moreover, the text of the FHA does not contain any temporal limitation, that is, the statute is not limited to prohibiting discrimination that occurs before or at the time housing is acquired. Such a temporal limitation would impermissibly add terms to the statute enacted by Congress. Apart from the plain meaning of the FHA, the United States Department of Housing and Urban Development ("HUD"), the federal agency charged with administering the FHA, interprets the FHA to prohibit post-acquisition discrimination. HUD's reasonable interpretation of the FHA is entitled to controlling weight under *Chevron*. The FHA's coverage of post-acquisition

discrimination is critical in particular to efforts to remedy pernicious municipal services discrimination.

Accordingly, the panel decision holding that the FHA prohibits post-acquisition discrimination should be affirmed on *en banc* review.

ARGUMENT

I. Under Well-Established Principles of Statutory Interpretation, the Fair Housing Act Must Be Interpreted To Prohibit Post-Acquisition Discrimination

A. The *Chevron* Standard

This appeal is focused on the proper interpretation of the FHA, which is administered by HUD. 42 U.S.C. § 3608(a); 42 U.S.C. § 3614a. The Supreme Court outlined a two-part test to interpret federal statutes that are administered by a federal agency. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007).

The first step of the *Chevron* two-part test is to determine whether Congress has directly spoken to the exact question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *Shi Liang Lin v. Dept. of Justice*, 494 F.3d 296, 304 (2d Cir. 2007) (holding under *Chevron* step 1 that meaning of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is clear). However, if the court determines Congress has not directly addressed the precise question at issue, the court determines whether the

agency's conclusion is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843; *Cohen,* 498 F.3d at 126 (under *Chevron*, deferring to HUD's permissible interpretation of Real Estate Settlement Procedures Act). When Congress delegates authority to a federal agency to administer the statute and adopt regulations, the agency's regulations interpreting the statutory scheme must be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844 (deferring to EPA's permissible construction of Clean Air Act Amendments).

Here, as explained in more detail below, the FHA on its face prohibits post-acquisition discrimination. Moreover, HUD has reasonably interpreted the FHA to prohibit post-acquisition discrimination, which is entitled to "controlling weight" under *Chevron*. Thus, whether this Court applies only step 1 or both steps 1 and 2 of the *Chevron* test, the Court should affirm the panel decision holding that the FHA prohibits post-acquisition discrimination.

B. Congress Clearly Intended the FHA to Prohibit Post-Acquisition Discrimination

Congress expressly stated that its policy is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. To that end, the FHA reflects Congress's intent to prohibit post-acquisition discrimination. *See* 42 U.S.C. §§ 3604, 3617. Section 3604(b) explicitly prohibits discrimination against "any person in the *terms, conditions, or privileges* of sale or rental of

a dwelling…." (Emphasis added). As recognized in the panel decision, "the FHA's use of the terms 'privileges' and 'conditions' refers not just to the sale or rental itself, but to certain benefits or protections flowing from and following the sale or rental." *Francis*, 944 F.3d at 376 (citation omitted). In addition, § 3604(f)(2) explicitly prohibits discrimination against "any person in the *terms, conditions, or privileges* of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of (A) that person; or (B) *a person residing in or intending to reside in that dwelling* ***after*** *it is so sold, rented, or made available*…." (Emphasis added). The terms "residing in" and "after it is sold, rented, or made available" clearly show Congress's intent that the FHA prohibit post-acquisition discrimination. As the panel decision aptly observed, "it would make no sense for Congress to require landlords to rent homes without regard to race but then permit them to harass or otherwise discriminate against tenants because of race." *Francis*, 944 F.3d at 378.

Furthermore, § 3617 explicitly provides that it is "unlawful to coerce, intimidate, threaten, or interfere with any person in the *exercise or enjoyment of* . . . any right granted or protected by [the FHA]" (emphasis added). The "exercise or enjoyment" of a person's leasehold or property necessarily occurs *after* such property is acquired. The panel decision recognized that "§ 3617 also applies to at least some post-acquisition conduct." *Francis*, 944 F.3d at 377. The panel decision

concluded that the FHA on its face prohibits post-acquisition discrimination, without the need to consider HUD's interpretation of the FHA. *Id*. at 378.

Finally, it is critical to note that the FHA does not contain any language limiting the scope of the statute to discrimination that occurs at or before the time that housing is acquired. *Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 632 (11th Cir. 2019) ("The statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental"). Under traditional principles of statutory interpretation, a court should not add terms to a statute enacted by Congress. *Mei Xing Yu v. Hasaki Restaurant, Inc*., 944 F.3d 395, 408 (2d Cir. 2019) ("[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"), *quoting Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 341 (2005); *O&G Industries, Inc. v. Nat'l R.R. Passenger Corp*., 537 F.3d 153, 161 (2d Cir. 2008) (declining to impose limitation on statute not expressed by Congress), *cert. denied*, 556 U.S. 1182 (2009). Restricting the FHA to "pre-acquisition" discrimination would improperly add judicially-created limitations to the FHA that were not articulated by Congress when it enacted the statute.

Thus, the Court may complete its interpretation of the FHA at the first step of the *Chevron* test because Congress has expressed its clear intent that the FHA

prohibit post-acquisition discrimination. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

C. Apart from Congress's Clear Intent that the FHA Prohibits Post-Acquisition Discrimination, HUD Has Reasonably Interpreted the FHA to Prohibit Post-Acquisition Discrimination

Under the *Chevron* standard, the Court could end its analysis based on the discussion above demonstrating that the FHA on its face prohibits post-acquisition discrimination. Nonetheless, even assuming *arguendo* that the Court were inclined to reach *Chevron's* second step, HUD has reasonably interpreted the FHA to prohibit post-acquisition discrimination.

Congress designated HUD as the federal agency responsible for administering the FHA upon enactment of the statute in 1968. 42 U.S.C. § 3608(a) ("The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development"). Furthermore, in 1988, Congress passed the Fair Housing Amendments Act ("FHAA"). Among other things, the FHAA authorized HUD to issue regulations interpreting the FHA. 42 U.S.C. § 3614a; *see also* 24 C.F.R. § 100.1. Pursuant to that Congressional delegation of authority, HUD adopted a set of regulations for enforcing the FHA. *See* 24 C.F.R. §§ 100.1 to 180.805. Of particular significance to this appeal, HUD adopted specific regulations that prohibit post-acquisition discrimination consistent with its interpretation of the FHA.

For example, 24 C.F.R. § 100.65(b)(2) prohibits "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin." Clearly, "delaying maintenance or repairs" entails activity after an occupant acquires the dwelling. Likewise, 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." "Use of privileges, services, or facilities" denotes ongoing benefits that occur after an occupant acquires the dwelling.

Similarly, 24 C.F.R. § 100.70(d)(4) prohibits discrimination in the provision of municipal services, which are clearly provided to occupants of housing post-acquisition. In addition, 24 C.F.R. § 100.400(b) makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part." The exercise or enjoyment of one's property necessarily refers to post-acquisition events. Moreover, 24 C.F.R. § 100.600 provides that "hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap" may violate the FHA. A "hostile environment" necessarily refers to conditions existing after a person acquires

housing. Accordingly, these HUD regulations clearly demonstrate HUD's interpretation of the FHA to prohibit post-acquisition discrimination.

There is no doubt that HUD interprets the FHA to prohibit post-acquisition discrimination because the agency expressly said so during its rulemaking process:

> Issue: Some commenters expressed concern that the proposed rule did not expressly state that sections 804(b) and 818 of the Fair Housing Act apply to discrimination that occurs after the complainant or plaintiff acquires the dwelling. The commenters stated that some courts have held that these provisions apply only to discrimination that affects access to housing and urged HUD to add language to the rule making clear that these particular provisions apply to post-acquisition discrimination claims.
>
> HUD Response: HUD believes that the definitions of "quid pro quo" and "hostile environment harassment" make clear ***HUD's view that the Act covers post-acquisition conduct*** and therefore no additional language is required. ***These definitions mirror the coverage of sections 804(b), 804(f)(2), and 818 of the Fair Housing Act, which plainly apply to both pre-acquisition and post-acquisition discrimination claims. Moreover, HUD has long interpreted and enforced these provisions of the Act and others to protect against discrimination that occurs before one acquires a dwelling as well as while one is living in the dwelling***. HUD's 1989 regulations interpreting sections 804(b), 804(f)(2), and 818 of the Act, for example, provide that discrimination prohibited under these provisions includes the "maintenance or repairs of sale or rental dwellings," "[d]enying or limiting the use of privileges, services, or facilities associated with a dwelling," and threatening, intimidating or interfering with persons "in their enjoyment of a dwelling." ***The inclusion of language covering the maintenance of housing, the continued use of privileges, services, or facilities associated with housing, and the "exercise or enjoyment" of housing indicates circumstances in which residents—as opposed to just applicants—benefit from the Act's protections throughout their residency***.
>
> Sections 100.65(b)(6)-(7) of the proposed and of the final rule further illustrate some ways in which a person may violate sections 804(b), 804(f)(2), and 818 of the Fair Housing Act: "conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting

> the services or facilities in connection therewith, on a person's response to harassment because of [a protected characteristic]; "subjecting a person to harassment because of [a protected characteristic] that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting services or facilities in connection with the sale or rental of a dwelling." ***In sum, the Act and HUD's regulations, including this final rule, make clear that the Act prohibits discrimination that occurs while a person resides in a dwelling, and courts have repeatedly interpreted the Act similarly.***

81 Fed. Reg. 63054, 63059 (Sept. 14, 2016) (emphasis added) (citations omitted).

Moreover, in an *amicus* brief submitted by the United States Department of Justice and HUD during the initial consideration of this appeal, the United States cited to the regulations referenced above as reflecting "HUD's longstanding view that, under the FHA, a housing provider may be held liable in certain circumstances for failing to address tenant-on-tenant harassment." Doc. 120 at 2 (citation omitted). That brief further explains that "HUD's implementing regulations address, *inter alia*, prohibited, discriminatory conduct that occurs *post-acquisition or post-rental* and conduct by persons not responsible for the sale or rental of a dwelling. *E.g.*, 24 C.F.R. 100.65(b)(4)-(5)." Doc. 120 at 4 (emphasis added).

In sum, Congress authorized HUD to administer the FHA and to adopt regulations enforcing the statute. 42 U.S.C. §§ 3608, 3614a. Pursuant to its statutorily-delegated authority to prevent discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling" and to enforce the provision making it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise

or enjoyment" of rights afforded under the FHA, HUD adopted 24 C.F.R. §§ 100.65, 100.600, and 100.70 (applying to § 3604) and 24 C.F.R. § 100.400 (applying to § 3617). HUD's regulations are consistent with the plain meaning of the FHA. *See Francis*, 944 F.3d at 378. Furthermore, given the FHA's references to the "terms, conditions, or privileges of sale or rental of a dwelling" and the "exercise or enjoyment" of rights under the FHA, as well as the absence of any temporal limitation in the FHA, HUD's interpretation that the FHA prohibits post-acquisition discrimination is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Thus, HUD's reasonable interpretation of the FHA as prohibiting post-acquisition discrimination is entitled to "controlling weight." *Id.*

II. The Second Circuit and Sister Circuits Recognize that the FHA Prohibits Post-Acquisition Discrimination

A. The Panel Decision in *Francis v. Kings Park Manor* Correctly Held That The FHA Prohibits Post-Acquisition Discrimination

i. The Availability of Post-Acquisition Discrimination Claims is Rooted in the Statutory Language of 42 U.S.C. §§ 3604 and 3617

The panel decision correctly held that under the plain meaning of the statute, the FHA prohibits post-acquisition discrimination. *Francis*, 944 F.3d at 377.

The *Francis* court started by analyzing the text of 42 U.S.C. § 3604(b). As relevant to this appeal, § 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color,

religion, sex, familial status, or national origin." The Court then turned to the language of 42 U.S.C. § 3617, which makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed" any right protected by the Act. The Court held that "the language of the FHA has a broad and inclusive compass." 944 F.3d at 376, *citing City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 731 (1995) (quotation marks omitted). Furthermore, the Court, relying on Supreme Court precedent, held that the FHA should be given a "generous construction," focusing on the intentions of the Act, which were designed "to eliminate all traces of discrimination within the housing field." 944 F.3d at 376, *citing Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 212 (1972); *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994).

The availability of post-acquisition discrimination claims under the FHA "is rooted first in the language of the provision itself, which prohibits discrimination in the 'terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.'" 944 F.3d at 376 (citing 42 U.S.C. § 3604(b)). "[T]he FHA's use of the terms 'privileges' and 'conditions' refers not just to the sale or rental itself, but to certain benefits or protections *flowing from and following the sale or rental*." 944 F.3d at 376 (emphasis added) (citation omitted). Accordingly, "§ 3604(b) reaches conduct that, as here, 'would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of

services associated with that dwelling' *after acquisition*." 944 F.3d at 377 (emphasis added) (citations omitted).

Moreover, the Court noted that "if there were any doubt that the FHA reaches post-acquisition conduct — and we think there is none — Francis has also brought a claim under § 3617." *Id.* "Section 3617 more comprehensively prohibits discriminatory conduct barred by § 3604(b) and creates an independent cause of action." *Id*. Thus, "separate and apart from § 3604(b), then, § 3617 also applies to at least some post-acquisition conduct." *Id*.

ii. HUD Regulations are Consistent with This Court's Holding That 42 U.S.C. §§ 3604 and 3617 Prohibit Post-Acquisition Discrimination

The *Francis* Court also concluded that HUD's regulations have "clearly contemplated claims based on post-acquisition conduct" for over thirty years. 944 F.3d at 378. "In 1989, for example, HUD promulgated regulations that prohibited '[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race,' 24 C.F.R. § 100.65(b)(2), or '[l]imiting the use of privileges, services or facilities associated with a dwelling because of race... of an owner [or] tenant.'" 944 F.3d at 378 (citing 24 C.F.R. § 100.65(b)(2); § 100.65(b)(4)). Furthermore, the direct reference to "tenants" in § 100.65(b)(4) provides strong evidence that HUD has long considered the services provision of § 3604 to apply throughout a person's tenancy. 944 F.3d at 378.

Thus, based on the Court's interpretation of 42 U.S.C. §§ 3604 and 3617, and relevant HUD regulations, the panel correctly held that the FHA prohibits post-acquisition discrimination. Accordingly, on *en banc* review, this Court should uphold the panel decision that the FHA prohibits post-acquisition discrimination.

B. District Courts in the Second Circuit Have Held That Post-Acquisition Discrimination Is Prohibited by the FHA

Apart from the panel decision in this appeal, district courts in this Circuit have held that the FHA prohibits post-acquisition discrimination. *See e.g., Davis v. City of New York*, 902 F. Supp.2d 405, 436 (S.D.N.Y. 2012); *Mazzocchi v. Windsor Owners Corp*., 204 F. Supp. 3d 583, 608 (S.D.N.Y. 2016); *Viens v. Am. Empire Surplus Lines Ins. Co.,* 113 F. Supp. 3d 555, 569 (D. Conn. 2015); *Ohana v. 180 Prospect Place Realty Corp*., 996 F. Supp. 238, 242 (E.D.N.Y. 1998).

For example, in *Mazzocchi*, plaintiff brought an action on behalf of himself and his girlfriend, alleging that defendant Housing Association/Housing Board, discriminated against them because of the girlfriend's disability in violation of Section 3604(f)(2). The district court held that the FHA prohibits such post-acquisition discrimination. *Mazzocchi,* 204 F. Supp. 3d at 608.

In *Davis*, a class action lawsuit against New York City and its Housing Authority alleging an unconstitutional policy of stops and frisks in public housing buildings, the district court concluded that the FHA reached a post-acquisition claim for discrimination in the provision of police services. *Davis,* 902 F. Supp.2d

405. The district court held that post-acquisition conduct was actionable under Section 3604(b) for three reasons: (1) the statutory language includes the word "privileges," which implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling, (2) limiting the FHA to claims brought at the point of acquisition would "insulate egregious post-acquisition actions from the law's reach," and (3) reading the FHA to prohibit post-acquisition discrimination "comports with the interpretation of the Department of Housing and Urban Development ('HUD') and with the interpretation of the Department of Justice." 902 F. Supp.2d at 436–37 (citations omitted).

Moreover, in *Ohana,* the district court found that "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons" is prohibited by § 3617. 996 F. Supp. at 242. The district court noted that the application of the FHA to post-acquisition discrimination was "simply about holding one accountable for intentionally intruding upon the quietude of another's home because of that person's race, color, religion, sex, familial status or national origin." *Id.* at 243. "The Fair Housing Act, with its broad range of compensatory, punitive and injunctive remedies… is an appropriate means for accomplishing this salutary end." *Id.* (claim for post-acquisition discrimination valid under § 3617).

In sum, several district courts in the Second Circuit have recognized that the FHA prohibits post-acquisition discrimination.

C. Other Circuits Have Recognized That the FHA Prohibits Post-Acquisition Discrimination

The panel decision in this appeal is consistent with cases in other Circuits holding that the FHA prohibits post-acquisition discrimination. For example, in *The Comm. Concerning Cmty. Improvement v. City of Modesto,* 583 F.3d 690 (9th Cir. 2009), the Ninth Circuit concluded that post-acquisition claims were permitted in a case alleging discrimination in the provision of municipal services, reasoning that the inclusion of the word "privileges" in 42 U.S.C. § 3604(b) "implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling," and the "natural reading" of the statute "encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling." 583 F.3d at 713. The Court noted that "there are few 'services or facilities' provided at the moment of sale, but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling." *Id.* The Ninth Circuit also noted that "limiting the FHA to claims brought at the point of acquisition would limit the [A]ct from reaching a whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling." *Id.* at 714.

In *Bloch v. Frischholz,* 587 F.3d 771 (7th Cir. 2009), the Seventh Circuit reversed summary judgment for the defendant, holding that the plaintiffs-tenants residing in a condominium presented evidence of post-acquisition discrimination, which the tenants should be allowed to offer before a trier of fact. *Id.* at 772. The Seventh Circuit held that the plaintiffs' agreement to subject their occupancy rights to the restrictions imposed by the condominium association was a "condition" of their purchase. *Id.* Consequently, because the "[plaintiffs] purchased dwellings subject to the condition that the Association can enact rules that restrict the buyer's rights in the future, § 3604(b) prohibits the Association from discriminating against [plaintiffs] through its enforcement of the rules, even facially neutral rules." *Id.* at 780. The Court also held that allowing certain claims for post-acquisition discrimination to proceed under § 3604(b) is consistent with regulations adopted by HUD. *Id.* Moreover, the Seventh Circuit concluded that § 3617 also prohibits post-acquisition discrimination. *Id.* at 782.

A few circuit court decisions have rejected some types of post-acquisition discrimination claims, most notably, *Halprin v. The Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004). However, even *Halprin* conceded that the FHA could reach discrimination leading to "constructive eviction," undoubtedly a post-acquisition event. *Id*. at 329. Moreover, the Seventh Circuit more recently "effectively overrule[d]" a portion of *Halprin* that restricted

some types of post-acquisition claims under the FHA. *Bloch*, 587 F.3d at 782. Indeed, in this appeal, the panel decision recognized *Bloch* rather than *Halprin* as the relevant Seventh Circuit precedent. *See Francis*, 944 F.3d at 376. Moreover, *Halprin* has been rejected in other cases. *See e.g. The Comm. Concerning Cmty. Improvement*, 583 F.3d at 713. The *Halprin* court was focused on the policy implications of allowing post-acquisition discrimination claims (388 F.3d at 329), rather than strictly hewing to the principles of statutory interpretation. The *Halprin* court did not consider the FHA's use of the term "privileges," which denotes continuing rights post-acquisition, nor did it consider that Congress did not impose any temporal limitation in the statute. While the *Halprin* court referred to one HUD regulation (388 F.3d at 330), it did not address other HUD regulations that clearly demonstrated the agency's interpretation that the FHA prohibits post-acquisition discrimination. *See* 81 Fed. Reg. 63054, 63059 (Sept. 14, 2016)*; Francis*, 944 F.3d at 378.

Moreover, in *Cox v. City of Dallas, Texas*, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006), the Fifth Circuit adopted a narrow construction of the FHA, holding, for example, that discrimination in municipal services must be connected to the availability – not the habitability – of housing. *Id*. at 745-46. The Fifth Circuit, citing to *Halprin*, shared the Seventh Circuit's concern about the policy implications of interpreting the FHA expansively, despite the FHA's admittedly

"broad reach." *Id*. at 746. The *Cox* court, however, failed to discuss or apply the *Chevron* standard for interpreting federal statutes, and it also failed to consider the HUD regulations under the FHA to which the Fifth Circuit should have deferred under *Chevron*. The *Cox* case is yet another example of a court departing from established principles of statutory interpretation in an attempt to narrow a statute that Congress intended broadly to confer civil rights in housing. Despite those shortcomings in *Cox*, the Fifth Circuit nonetheless recognized that the FHA could reach actual or constructive eviction – forms of post-acquisition discrimination. *Id.* at 746.

In sum, consistent with the panel decision in this appeal, sister circuits have recognized that the FHA prohibits post-acquisition discrimination.

III. Upholding the Scope of the FHA to Prohibit Post-Acquisition Discrimination is Essential to Address the Prevalence of Municipal Services Discrimination Connected to Housing

This appeal does not directly involve discrimination in the provision of municipal services, and the Court may affirm the panel decision without expressly determining that the FHA prohibits municipal services discrimination. Nonetheless, it is essential to recognize that if the FHA were interpreted to *permit* post-acquisition discrimination, it would have the effect of denying a remedy for widespread discrimination in the provision of municipal services connected to housing.

Although not as stark as the racial harassment at issue in this appeal, municipal services discrimination cases represent the cutting edge of post-acquisition claims

under the FHA. Cases involving municipal services discrimination often involve cities or counties not providing water, sewer, trash and similar services to heavily Black, Latino, or other racially diverse communities, or municipalities declining to annex unincorporated adjacent neighborhoods that lack adequate municipal services, because of discriminatory practices. *See U.S. v. City of Black Jack, Missouri*, 508 F.2d 1179, 1182-83 (8th Cir. 1974) (applying FHA to address attempted manipulation of municipal incorporation to preserve segregated neighborhoods), *cert. denied*, 422 U.S. 1042 (1975).

In the early part of the twentieth century, "common interest" housing schemes were created, in large part, to prevent racial, religious, and ethnic minorities from moving into white neighborhoods. *See* Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. Rev. 1, 57 (2008). "The passage of the FHA forced common interest developments that wanted to remain racially exclusive to resort to even more subtle, but by no means ineffective, methods of discrimination. Although overtly discriminatory advertising was outlawed by § 3604(c), common interest communities still almost universally advertise themselves as 'exclusive'… Such communities may form themselves around costly 'lifestyle amenities.'" *Id*. at 59. Discrimination in the form of inferior municipal services to minority communities has the effect of preserving historically segregated neighborhoods. *Id.* at 58. As FHA sponsor and

then-Senator Walter Mondale said during the Congressional debate over the FHA, the goal of the Act was to replace segregated living patterns with "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (Feb. 20, 1968). Court decisions upholding legal challenges to that form of post-acquisition discrimination are important to safeguard the rights that Congress intended to protect under the FHA.

For example, in *Georgia State Conference of the NAACP*, anti-discrimination advocacy groups and Black city residents brought an action challenging a city's policy that required residents to pay any outstanding municipal debts and to present valid state or federally-issued photo identification and a valid Social Security Number as a condition to obtain city-provided utility services. 940 F.3d at 627. The plaintiffs noted that "the debt policy disproportionately harms black residents because they are more likely to have outstanding municipal court debt." 940 F.3d at 631. The Eleventh Circuit explained, "the language of the FHA is broad and inclusive, prohibits a wide range of conduct, has a broad remedial purpose, and is written in decidedly far-reaching terms." 940 F.3d at 632, *quoting City of Miami v. Wells Fargo & Co.,* 923 F.3d 1260, 1278 (11th Cir. 2019) (quotations and punctuation omitted); *see also Trafficante*, 409 U.S. at 209. The Eleventh Circuit held that the plain language of § 3604(b) may "encompass the claim of a current owner or renter for discriminatory conduct related to the provision of services, as

long as those services have a connection to the sale or rental of the dwelling." 940 F.3d at 632.

Similarly, in *The Comm. Concerning Cmty. Improvement*, residents of predominantly Latino neighborhoods, and community groups representing those neighborhoods, known as "unincorporated territories" or "islands" partly or completely surrounded by a city, filed suit under the FHA claiming that the failure to provide adequate municipal services and to annex neighborhoods into a city constituted intentional discrimination based on race or ethnicity. 583 F.3d at 696. The Ninth Circuit held that the FHA encompasses post-acquisition discrimination claims entailing the denial of municipal services, stating that "limiting the FHA to claims brought at the point of acquisition would limit the act from reaching a whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling." 583 F.3d at 714.[2]

Furthermore, commentators have noted the importance of applying the FHA to address post-acquisition discrimination in the provision of municipal services. *See* Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. Rev. 1, 9 (2008) (discussing cases

[2] HUD interprets the FHA to prohibit post-acquisition discrimination in the form of denying municipal services. 24 C.F.R. § 100.70(d)(4).

in which county or municipality provides inferior water, trash, or snow-clearing services to minority neighborhoods). "When different levels of city services are provided to neighborhoods with different racial compositions, 'a vicious circle of causation' will result, leading to even more profound segregation." *Id.* at 30 n.164 (citation omitted). Historically, some courts have impaired post-acquisition claims involving the denial of municipal services by holding that the denial of services must be "connected" to the sale or rental of a dwelling. *Id*. at 36.

"If the FHA's broad remedial purpose of providing for fair housing 'throughout the United States' is to mean anything, the Act must reach the discriminatory conduct that local governments and [housing associations] direct towards their residents," as evidenced through discriminatory withholding of municipal services. *Id*. at 62 (citation omitted).[3]

Therefore, by affirming the panel's decision that the FHA prohibits the post-acquisition discrimination at issue in this appeal, this Court would yield the indirect benefit of preserving the FHA as an available remedy in other cases to address post-acquisition discrimination in the form of denying municipal services in housing occupied by ethnically and racially diverse communities.

[3] Underlying the enactment of the FHA there is a long, troubling history of local governments utilizing discriminatory practices in the provision of municipal services to preserve historically segregated communities. *Id.* at 57-62 (citing scholarly articles on subject).

CONCLUSION

For the foregoing reasons, this Court should affirm the panel decision holding that the FHA prohibits post-acquisition discrimination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, and Second Circuit Rules 29.1 and 32.1, counsel for the Lawyers' Committee certifies that the foregoing brief contains 5,569 words, excluding content permitted by Rule 32, based on the word count computed by the word-processing system used to prepare the document.

/s/ Kenneth M. Klemm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2020, I caused to be served a true and correct copy of the foregoing document electronically via the Court's case management system upon counsel for all parties.

/s/ Kenneth M. Klemm
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