15-1823

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,
Plaintiff-Appellant

v.

KINGS PARK MANOR, INC., CORRINE DOWNING,
Defendants-Appellees

RAYMOND ENDRES,
Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

J. PAUL COMPTON, JR.
General Counsel

TIMOTHY J. PETTY
Deputy General Counsel for
Enforcement and Fair Housing

U.S. Department of Housing and
Urban Development
Office of General Counsel
451 7th Street, S.W.
Washington, D.C. 20410

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued) **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

RULE:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-1823

DONAHUE FRANCIS,
Plaintiff-Appellant

v.

KINGS PARK MANOR, INC., CORRINE DOWNING,
Defendants-Appellees

RAYMOND ENDRES,
Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a). The United States has substantial responsibility for enforcement of the Fair Housing Act (FHA). The Secretary of Housing and Urban Development (HUD) is charged with the administration and enforcement of the FHA in administrative proceedings and the promulgation of regulations to implement the FHA. See 42 U.S.C. 3608-3612. The Attorney General is

responsible for all federal court enforcement of the FHA by the United States. 42 U.S.C. 3614. This appeal raises important issues regarding whether the FHA reaches post-acquisition discrimination and the circumstances under which property owners and landlords may be liable under the FHA. The resolution of this case, therefore, will affect the enforcement programs of both the HUD Secretary and the Attorney General.

STATEMENT OF THE ISSUES

The United States addresses the following issues:

1. Whether the Court should rely on the 2016 HUD regulation, 24 C.F.R. 100.7(a)(1)(iii), in determining whether the Fair Housing Act imposes liability on landlords and property owners for the discriminatory actions of their tenants.

2. Whether Sections 3604(b) and 3617 of the Fair Housing Act reach discrimination in the terms, conditions, privileges, services, or facilities in connection with the sale or rental of a dwelling, which occurs after the moment of purchase or sale (*i.e.*, post-acquisition discrimination).

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

The FHA does not specify a class of potential defendants; instead, it is drafted only in terms of the prohibited conduct. Section 3604(b) of the Fair Housing Act (FHA) 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." 42 U.S.C. 3604(b). Section 3617 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" the "right[s] granted or protected by section[s] 3603, 3604, 3605, or 3606" of the FHA. 42 U.S.C. 3617.

On September 14, 2016, HUD issued a final rule entitled, "Quid Pro Quo And Hostile Environment Harassment And Liability For Discriminatory Housing Practices Under The Fair Housing Act." 81 Fed. Reg. 63,054. Part of the final rule addressed liability for the discriminatory housing practices of a third party:

> **100.7 Liability for discriminatory housing practices.**
> (a) *Direct liability.*
> (1) A person is directly liable for: * * *
> (iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party.

81 Fed. Reg. 63,074; see also 24 C.F.R. 100.7(a)(1)(iii) (2016 HUD Rule).[1]

[1] All references in this brief to the 2016 HUD Rule refer only to the subpart codified in 24 C.F.R. 100.7(a)(1)(iii).

2. Factual And Procedural Background

a. District Court

In June 2014, Donahue Francis, an African American, filed a complaint against Kings Park Manor, Inc., the owner and property management company for the apartment complex where Francis leased an apartment, and Corrine Downing, the property manager at the complex (collectively, referred to as KPM), as well as Raymond Endres, a fellow tenant. Doc. 1 ¶ 10-13.[2] The complaint alleges that, starting in February 2012, Endres created a hostile housing environment by, among other things, repeatedly making racial slurs and other racially derogatory and profane insults to Francis over several months while Francis was in his apartment with his door open or in common areas of the apartment complex. Doc. 1 ¶ 16-24, 28-37. The complaint further alleges that Francis reported this conduct to the Suffolk County Police Hate Crimes Division and later, in May 2012, Francis first reported Endres' conduct to KPM. Doc. 1 ¶ 21, 32. In August 2012, the Suffolk police arrested Endres and charged him with aggravated harassment. Doc. 1 ¶ 37. Endres vacated his apartment in January 2013, and subsequently pleaded guilty to

[2] "Doc. __" refers to the document as recorded on the district court docket sheet.

the harassment charge. Doc. 1 ¶ 49-50.[3] Francis alleges that KPM violated the FHA in failing to act to stop Endres' conduct. Doc. 1 ¶ 25-27, 32-48. Francis also alleges that KPM's failure to act violated other state and federal laws. Doc. 1 ¶ 51-69, 73-106.[4]

KPM filed a motion to dismiss the FHA claims, which the district court granted in relevant part. Doc. 28. The district court "assum[ed], without deciding, that a 'hostile housing environment' claim is actionable against a landlord or property owner under the FHA" and that "such a claim would require allegations of intentional discriminatory conduct, or failure to intervene, by the landlord or property owner based on a protected category." Doc. 28, at 19-20. The court also noted that "the Plaintiff [did] not bring a disparate impact claim under Section 3604(a) against the KPM Defendants, nor, on these facts, could he plausibly [have done] so." Doc. 28, at 19. The district court concluded that Francis did not allege sufficient facts to adequately and plausibly state a viable claim of intentional discrimination under the FHA against KPM because he did not allege that KPM

[3] KPM represented in its Motion to Dismiss that it notified Endres in November 2012 that it declined to renew his lease set to expire in June 2013. See Doc. 15-2; Doc. 15-6, at 3-4.

[4] The district court entered a Certificate of Default against the allegedly offending tenant Endres. Doc. 13. Endres is not a party to this appeal.

failed to act because of race, *i.e.*, because of KPM's own racial animus. Doc. 28, at 19-20.

b. The Second Circuit

Francis appealed. Doc. 40. While the appeal was pending, HUD undertook a rulemaking proceeding to adopt regulations that would address a landlord's liability for tenant-on-tenant harassment. 80 Fed. Reg. 63,720 (Oct. 21, 2015). In June 2016, after oral argument, the Second Circuit requested HUD's answers to a series of questions. 2d Cir. Letter to HUD; 2d Cir. Letter to the Department of Justice. After the promulgation of the final 2016 HUD Rule in September 2016, the United States filed an amicus brief in support of neither party addressing the questions from the Second Circuit and discussing the newly promulgated final 2016 HUD Rule. U.S. Amicus Br. (Nov. 4, 2016).

On March 4, 2019, the Court vacated the district court's opinion and remanded for further proceedings. The Court first addressed, as a threshold matter, "whether § 3604 prohibits discrimination occurring after a plaintiff buys or rents housing." *Francis* v. *Kings Park Manor, Inc.*, 917 F.3d 109, 117 (2d Cir. 2019) (*Kings Park I*). The Court held that these "so-called 'post-acquisition' claims are cognizable under § 3604." *Ibid.* Second, after agreeing "that the text of the FHA nowhere explicitly endorses landlord liability for tenant-on-tenant harassment," the Court adopted a standard similar to the 2016 HUD Rule, concluding that a landlord

can be liable under the FHA "for failing to intervene in tenant-on-tenant racial harassment of which it knew or reasonably should have known and had the power to address." *Id.* at 120-121. In adopting this standard, the Court purported to accord the 2016 HUD Rule "'great' but by no means definitive weight." *Id.* at 120 (citing *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972)); see also *id.* at 123 n.11 (stating that the panel was "applying the FHA itself (using the Rule as an aid in interpreting the FHA) not the Rule, to assess Francis's allegations in this case"). Third, in the alternative, the Court stated that the complaint adequately alleged a claim of intentional race discrimination by KPM based on the allegation that KPM had "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law." *Id.* at 124 (citation omitted).

Judge Livingston dissented. She argued, among other things, that HUD's 2016 Rule "creat[ed] a new form of liability for an entire class of housing providers" such that, in her view, it was a legislative rule that that could not apply retroactively to this case. *Kings Park I*, 917 F.3d at 140. Subsequently, the Court sua sponte withdrew this opinion on April 5, 2019.

On December 6, 2019, the Court issued a second opinion affirming in part and vacating in part. *Francis* v. *Kings Park Manor, Inc.*, 944 F.3d 370 (*Kings Park II*). Again, the Court held that the FHA reaches post-acquisition

conduct. *Id.* at 377. However, contrary to the earlier opinion, the Court stated that it "need not and [did] not rely on" the 2016 HUD Rule "to resolve this appeal." *Id.* at 379 n.7. To that end, the Court "express[ed] no view regarding [the] formulation" codified in 24 C.F.R. 100.7(a)(1)(iii). *Ibid.* The Court concluded that the plaintiff "adequately and plausibly alleged" that the KPM "defendants intentionally refused to address the harassment [by Endres] *because* it was based on race, even though they had addressed *non-race-related* issues in the past, including, it is reasonable to infer, tenant-on-tenant harassment." *Id.* at 379. The Court observed that, according to the 2016 HUD Rule, the "FHA more broadly imposes liability on landlords arising out of tenant-on-tenant harassment based on race or other protected characteristics even without a showing of intentional discrimination." *Id.* at 379 n.7.

Judge Livingston again dissented. She stated that the FHA does not impose a duty on landlords to remediate the harassing behavior of tenants. *Kings Park II*, 944 F.3d at 385. Judge Livingston criticized the majority for construing the complaint to allege a theory of liability that she believed was not fairly contained in the complaint and for exposing "*all* landlords to suit for purposeful discrimination based on the wrongful conduct of one tenant vis-à-vis another so long as such landlords have ever responded to a lease violation." *Ibid.* She agreed that the FHA "may have *some* post-acquisition application (prohibiting for

instance, constructive eviction on the basis of race)," but disagreed with the majority's view that such a standard included the type of conduct at issue here. *Id.* at 388 (citation omitted). She also stated that the HUD regulation deserves no deference because "it misinterprets the FHA's text, finds no support in precedent, and relies on a flawed analogy to Title VII." *Id.* at 394.

On January 7, 2020, KPM filed a petition for rehearing en banc. On February 3, 2020, the Court granted the petition and vacated the panel's opinion.

SUMMARY OF THE ARGUMENT

The United States submits this amicus brief to address two issues that may aid the en banc Court as it interprets the FHA:

First, this Court should decide whether a landlord can be liable for tenant-on-tenant conduct without relying upon the 2016 HUD Rule. Both the conduct at issue and the filing of this lawsuit predate the 2016 HUD Rule. The 2016 HUD Rule is not the subject of this appeal and to the extent it changed the standard of liability for tenant-on-tenant harassment it does not have retroactive effect on this case. Further, HUD has submitted to the Office of Information and Regulatory Affairs (OIRA), for publication on its regulatory agenda, HUD's intention to engage in rulemaking to withdraw the 2016 HUD Rule.

Second, consistent with the plain text of Section 3604(b) and the decisions of all courts of appeals that have considered the issue, Section 3604(b) prohibits at

least some intentional discrimination that occurs after the initial moment of sale or rental, *i.e.*, post-acquisition conduct. This is a question of timing and is distinct from the question of whether and when landlords are liable for failing to respond to the harassing conduct of their tenants. Section 3604(b) contains no temporal limitation and its language otherwise refers to continuing rights beyond the point of acquisition. In particular, the provision's reference to "terms, conditions, or privileges of sale or rental of a dwelling" extends Section 3604(b)'s protections to ongoing relationships that post-date the sale or rental of a dwelling. Section 3604(b)'s protection against discrimination in the "provision of services or facilities" is also naturally read to extend beyond the point of sale or rental, in particular where such services or facilities are provided by a party to the sale or rental. Further, Section 3617 similarly covers discrimination after the point of sale or rental by prohibiting conduct on account of the plaintiff "having *exercised* or *enjoyed*" a protected right under the FHA. 42 U.S.C. 3617 (emphasis added).

The United States has a strong interest in ensuring that the Court aligns itself with the other courts of appeals and recognizes that, based on its text, the FHA reaches certain intentional post-acquisition discrimination. Indeed, the Attorney General's Sexual Harassment in Housing Initiative, under which 16 cases have been filed or settled by the United States since October 2017, necessarily rests, in significant part, on that reading of the statute. These cases typically involve

demands for sex or sexual acts to continue occupying a property or other severe or pervasive sexual harassment that undermine the terms, conditions, privileges, services, or facilities of rental or ownership. See https://www.justice.gov/crt/sexual-harassment-housing-initiative. Recently, the Department of Justice announced that it will devote all available resources to this initiative during the COVID-19 pandemic. Attorney General William P. Barr, Memorandum from the Attorney General for the Assistant Attorney General for Civil Rights, *Stopping Predatory Practices Related to COVID-19 and Housing* at 1 (Apr. 23, 2020), https://www.justice.gov/coronavirus/page/file/1270951/download.

ARGUMENT

I

IN DECIDING THIS APPEAL, THE COURT SHOULD NOT RELY UPON THE 2016 HUD RULE

This Court should resolve whether a landlord may be liable under the FHA for its handling of the harassing conduct of a third-party tenant without relying upon, or even addressing, the 2016 HUD Rule.

Francis's complaint was filed in 2014 before the promulgation of the final rule and the district court's decision dismissing Francis's claims was entered in 2015. As a result, plaintiff's complaint does not allege liability on the basis of the 2016 HUD Rule. And even in this Court, Francis does not rely on the 2016 HUD Rule as supplying a binding legal standard in his brief. See Plaintiff-Appellant En

Banc Br. (filed Mar. 16, 2020). Instead, Francis asserts "deference" only to HUD's view—discussed in Section II below—that the FHA reaches post-acquisition conduct. See Plaintiff-Appellant En Banc Br. 29-30. The validity of the 2016 HUD Rule is therefore not presented.

This is true regardless of whether the Court views the 2016 HUD Rule as a legislative or an interpretive rule—a subject on which the panel majority and dissent disagreed. In promulgating the 2016 HUD Rule, HUD took the position, to which it adheres, that the rule was interpretive in nature. See, *e.g.*, Final Rule, 81 Fed. Reg. 63,068. In its initial opinion, the panel accepted "HUD's characterization of its own regulation as interpretive." *Kings Park I*, 917 F.3d 109, 123 (2d Cir. 2019). If the en banc Court were to agree, then the 2016 HUD Rule "do[es] not have the force and effect of law." See *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (citation omitted).

If the Court concludes that the 2016 HUD Rule is a legislative rule, the rule likewise would not apply in this case because it became effective on October 14, 2016, after the date of the complaint in this case, and it is not retroactive. See *City of N.Y.* v. *Permanent Mission of India to United Nations*, 618 F.3d 172, 192-193 (2d Cir. 2010) (explaining that, as "to rulemaking by executive agencies and departments, [the] presumption against retroactivity means that 'a statutory grant of legislative rulemaking authority will not, as a general matter, be

understood to encompass the power to promulgate retroactive rules'") (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)), cert. denied, 564 U.S. 1046 (2011); see *Kings Park I*, 917 F.3d at 140 (Livingston, J., dissenting) (maintaining that "the Rule is *legislative*, and so cannot have [a] retroactive effect on this case").

Finally, prudence also counsels in favor of not relying on the 2016 HUD Rule in this case. Mindful that the Seventh Circuit and a panel of this Court have declined to endorse the 2016 HUD Rule as a correct interpretation of the FHA, HUD has submitted to OIRA, for publication on its regulatory agenda, HUD's intention to engage in rulemaking to withdraw the 2016 HUD Rule. See *Wetzel* v. *Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 866 (7th Cir. 2018) (stating that "more analysis than HUD was able to offer is necessary" before the court could apply the standard reflected in the 2016 HUD Rule), cert. dismissed, 139 S. Ct. 1249 (2019); *Kings Park II*, 944 F.3d 370, 379 n.7 (2d Cir. 2019) (stating that "we need not and do not rely on [the 2016 HUD Rule] to resolve this appeal" and that it "express[ed] no view regarding [HUD's] formulation").

Thus, whether the 2016 HUD Rule is interpretive or legislative, it does not control the disposition of this appeal, and this Court can and should decide this case based on the Court's own interpretation of FHA.

II

THE FAIR HOUSING ACT REACHES POST-ACQUISTION DISCRIMINATION IN TERMS, CONDITIONS, PRIVILEGES, SERVICES, OR FACILITIES IN CONNECTION WITH RENTAL OR SALE OF A DWELLING

The panel held that the complaint in this case adequately stated a claim based on intentional discrimination by the landlord for its own failure to intervene without regard to its liability as a third party to tenant-on-tenant harassment. See *Kings Park II*, 944 F.3d 370, 379 (2d Cir. 2019). The United States takes no position on whether Francis adequately pleaded and pressed a claim of intentional discrimination by KPM. But apart from those case-specific questions, the United States has a strong interest in ensuring that the Court aligns itself with the other courts of appeals and recognizes that, based on its text, the FHA reaches certain intentional post-acquisition discrimination.[5]

A. Section 3604(b) Prohibits Post-Acquisition Housing Discrimination

Section 3604(b) of the FHA makes it 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

[5] In its amicus brief before the panel, the United States defended the broader position adopted in the 2016 HUD Rule and urged the Court to defer to that reading. See U.S. Amicus Br. (Nov. 4, 2016). In light of HUD's intended withdrawal of the rule, the United States presses only the narrower position outlined here before the en banc Court.

race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). The "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted). Discrimination engaged in "by reason of" or "on account of" a protected trait is discrimination "because of" that trait. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). A landlord thus violates Section 3604(b) when it subjects a tenant to less favorable "terms, conditions, or privileges of sale or rental" or less favorable "services or facilities in connection" with that sale or rental and the reason for that differential treatment is the tenant's race or another protected trait.

As the Eleventh Circuit has recognized, 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." *Georgia State Conference of the NAACP* v. *LaGrange*, 940 F.3d 627, 632 (2019). For this reason, the Eleventh Circuit declined to read an "absent temporal limitation into the language of the statute" in Section 3604(b) and observed that "[s]uch a narrow reading * * * is not supported by the plain language of the statute." *Id.* at 631-632. Rather, the plain language of Section "3604(b) is unambiguous and reaches certain post-acquisition conduct [that is] connected to the sale or rental of a dwelling." *Id.* at 632-633. This Court should reach the same conclusion.

1. Section 3604(b)'s Reference To The "Terms, Conditions, Or Privileges Of Sale Or Rental" Reaches Conduct Continuing Beyond The Initial Acquisition Of A Dwelling

The prohibition of discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling" is naturally read to encompass post-acquisition protection as these words generally implicate continuing rights within an ongoing relationship. "When a term goes undefined in a statute," as the key language here does, courts give "the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

The "terms [and] conditions * * * of sale or rental of a dwelling" reflect an ongoing relationship with continuing or future obligations governing a housing relationship. 42 U.S.C. 3604(b); see *Webster's New International Dictionary of the English Language* 556 (2d ed. 1958) (defining "conditions" to include "[a]ttendant circumstances * * * as [in], living conditions; playing conditions"). The text's use of the word "rental" in particular suggests an ongoing relationship between landlord and tenant. The signing of a rental agreement is often the beginning, not the end, of a relationship with a housing provider. A lease, for example, constitutes an ongoing rental relationship which can be renewed or terminated according to the terms of the lease or applicable law. See, *e.g.*, *Richards* v. *Bono*, No. 5:04CV484, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) (recognizing that "the plain meaning of 'rental'

contemplates an ongoing relationship," which "means that the statute prohibits discrimination at any time during the landlord/tenant relationship, including after the tenant takes possession of the property"). A lease may provide for post-acquisition access to common areas, such as shared outdoor space, pools, community centers, or other amenities.

Similarly, a "sale" may also involve a continuing relationship between a homeowner and a housing association that is covered by the FHA. For example, the terms of a home purchase may include an agreement to be bound by the rules of a homeowner's association, enforcement of which could result in fines or even forced sale. Thus, the Seventh Circuit found that such an agreement "contemplating future, post-sale governance by [the homeowner's association], was * * * a term or condition of sale" within the meaning of Section 3604(b). See *Bloch* v. *Frischholz*, 587 F.3d 771, 779-780 (2009) (en banc). Further, a purchase agreement in a planned community may, like a lease, provide for access to common areas, such as shared outdoor space, pools, community centers, and other amenities.

Likewise, the ordinary meaning of the word "privileges" includes a "right or immunity granted as a peculiar benefit, advantage, or favor." *Webster's New International Dictionary of the English Language* 1969 (2d ed. 1958). For example, one unquestionable "privilege" of sale or rental of a dwelling

(although not the only such privilege) is "the right to inhabit the premises." *Bloch*, 587 F.3d at 779; see *United States* v. *Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) ("[I]t is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein.").

That the text of Section 3604(b) reaches post-acquisition discrimination is also supported by judicial interpretations of the phrase "terms, conditions, or privileges" under other anti-discrimination statutes. Courts have held that the "terms, conditions, or privileges" under Title VII, 42 U.S.C. 2000e-2(a)(1), are not limited to initial hiring procedures but extend throughout the employment relationship. See, *e.g.*, *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (explaining that the "phrase 'terms, conditions, or privileges of employment'" in Title VII "evinces a congressional intent" to "include[] requiring people to work in a discriminatorily hostile or abusive environment"). This phrase appears in other federal employment-related legislation and there, too, has been construed to encompass actions that take place after an employee is hired. See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979) (finding "terms and conditions of employment" about which employer and union must bargain under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, include the prices of food sold on site); *Simas* v. *First Citizens' Fed. Credit Union*, 170

F.3d 37, 43, 48 (1st Cir. 1999) (finding whistleblower protections barring "discriminat[ion] against any employee with respect to compensation, terms, conditions, or privileges of employment" included actions taken against the employee well after he was hired).

2. Section 3604(b)'s "Provision Of Services Or Facilities" Language Also Supports Post-Acquisition Application Of The Statute

Section 3604(b)'s text referring to the "provision of services or facilities," "in connection" with a sale or rental, also demonstrates that Section 3604(b) applies to post-acquisition discrimination. Few "services" are provided before or at the moment of sale or rental, and "facilities" refers to something other than the "dwelling" that is the subject of a sale or rental. But services or facilities provided subsequent to, and in connection with, a sale or rental are common, such as maintenance, repairs, or amenities provided with the purchase or lease of a dwelling.

Of course, "not all housing-related services necessarily fall within the scope of § 3604(b)." *LaGrange*, 940 F.3d at 633. The post-acquisition "conduct at issue must relate to services provided in connection with the sale or rental of a dwelling" such that, for example, "[l]aw enforcement services" would not support a claim because "those services are provided regardless of whether an individual has housing." *Id.* at 633-634. Indeed, the Fifth Circuit determined that failing to prevent dumping at an illegal site was not connected

to the sale or rental of a dwelling under Section 3604(b). *Cox* v. *City of Dall.*, 430 F.3d 734, 740 (2005), cert. denied, 547 U.S. 1130 (2006). The Fourth Circuit likewise determined that Section 3604(b) does not authorize a challenge to a city's decision to locate a highway near particular dwellings because such a decision "does not implicate 'the terms, conditions, or privileges of sale or rental of a dwelling, or…the provision of services or facilities in connection therewith.'" *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 193 (1999) (alteration in original).

This case does not necessarily require the Court to delineate the outer bounds of post-acquisition liability that could qualify as "services or facilities." The United States submits, however, that the Court should be mindful of two potential interpretive shoals. First, as Judge Livingston observed, the text of the FHA requires that any claim based on "services or facilities" be in connection with a rental or sale. See 42 U.S.C. 3604(b) (barring discrimination in the "sale or rental of a dwelling, or in the provision of services or facilities *in connection therewith*" (emphasis added)); *Kings Park I*, 917 F.3d at 129 (Livingston, J., dissenting). This requires that the party's conduct that is the basis of the complaint is connected to the sale or rental of the dwelling. Second, such limits on liability derive from the statutory text enacted by Congress, not from "add[ing] words to the law to produce what is thought to be a desirable result."

EEOC v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). Here, Congress prescribed the limits of post-acquisition liability by requiring a connection to "sale or rental" of a dwelling, and courts should not substitute that with alternative terminology not found in the text of the FHA (*i.e.*, concepts such as "constructive eviction"). See, *e.g.*, *Cox*, 430 F.3d at 746 (stating, in dicta, that Section 3604(b) applies post-acquisition when it amounts to an "actual or constructive eviction").

3. Case Law Uniformly Supports Post-Acquisition Application Of Section 3604(b)

Because the text of the statute reflects an ongoing relationship, numerous courts have recognized that the plain language of the FHA prohibits discrimination with respect to such terms, conditions, or privileges and in the provision of services or facilities after a property is acquired or leased. See, *e.g.*, *Hunt* v. *Aimco Props., L.P.*, 814 F.3d 1213, 1224 (11th Cir. 2016) (finding apartment complex violated Section 3604(f)(2), which extends Section 3604(b) to individuals with disabilities, by restricting plaintiff's access to certain facilities on the complex); *Wells* v. *Willow Lake Estates, Inc.*, 390 F. App'x 956, 959 (11th Cir. 2010) (recognizing discriminatory enforcement of mobile home park regulations as actionable under Section 3604(b)); *Bloch*, 587 F.3d at 779-780 (finding condominium association discriminated against plaintiff in its adoption and enforcement of condominium rules in violation of Section

3604(b)); *North Dakota Fair Hous. Council, Inc.* v. *Allen*, 319 F. Supp. 2d 972, 974, 980 (D.N.D. 2004) (denying summary judgment for defendants where plaintiffs alleged that they were discriminatorily singled out for rent increase, prohibited from having a pet, and made to pay a fee upon move-out); *United States* v. *Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (upholding plaintiffs' claim under Section 3604(b) where the condominium owner enforced a renter identification policy only against Hispanic tenants).

Consistent with the foregoing, courts of appeals have recognized post-acquisition harassment by landlords (or their common-law agents) themselves under Section 3604(b), of the type the Department prosecutes in its Sexual Harassment in Housing Initiative, when severe or pervasive harassment "alter[s]" "the terms, conditions, or privileges" of the housing arrangement because of "sex." See, *e.g.*, *DiCenso* v. *Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce* v. *Vigil*, 1 F.3d 1085, 1089-1090 (10th Cir. 1993); cf. *Khalil* v. *Farash Corp.*, 277 F. App'x 81, 83-84 (2d Cir. 2008) (assuming, without deciding, that a hostile housing environment against a landlord is actionable under Section 3604, in that case, on the basis of familial status).

B. Section 3617 Similarly Reaches Post-Acquisition Conduct

Because the panel understood Francis to allege that KPM itself engaged in

intentional discrimination against him, in the United States' view, Section 3604(b)'s prohibition on discrimination is the proper focus of this appeal. But we note briefly that Section 3617 also reaches some post-acquisition conduct.

Section 3617 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 granted or protected by the FHA, including under Section 3604. 42 U.S.C. 3617. Because Section 3604(b) grants a right to be free from some post-acquisition discrimination, Section 3617's prohibition against coercing, intimidating, threatening, or interfering with a person's exercise or enjoyment of such a right necessarily embraces some post-acquisition conduct as well. Moreover, by its own terms, Section 3617 encompasses conduct that occurs after a person has taken possession of a dwelling. In addition to prohibiting coercion, intimidation, threats, and interference with a person's current exercise and enjoyment of their rights, Section 3617 prohibits such conduct "on account of [the plaintiff] having *exercised or enjoyed*" in the past. 42 U.S.C. 3617 (emphasis added). A defendant can "coerce, intimidate, threaten, or interfere" "on account of [the plaintiff] having exercised or enjoyed" even a pre-acquisition right protected by the statute *after* a plaintiff has purchased or rented a dwelling. As a result, courts have interpreted Section 3617 to reach a variety of post-acquisition conduct. See, *e.g.*, *Hidden Village, LLC* v. *City of Lakewood*, 734 F.3d 519, 528-529 (6th

Cir. 2013) (finding Section 3617 could reach city's pattern of intimidation against black tenants in privately-owned apartment complex).

CONCLUSION

For the reasons set forth above, this Court should interpret the FHA itself, without relying on the 2016 HUD Rule. The Court should also recognize that the FHA applies to intentional post-acquisition discrimination concerning the terms, conditions, or privileges of rental or sale, or the provision of services or facilities in connection therewith.

Respectfully submitted,

J. PAUL COMPTON, JR.
General Counsel

TIMOTHY J. PETTY
Deputy General Counsel for
Enforcement and Fair Housing

U.S. Department of Housing and
Urban Development
Office of General Counsel
451 7th Street, S.W.
Washington, D.C. 20410

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of 2d Cir. Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 5287 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: May 7, 2020

CERTIFICATE OF SERVICE

I certify that on May 7, 2020, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney