Nos. 08-55069, 08-55072, 08-55151

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANN REED, *et al.*,

Plaintiffs-Appellants/Cross-Appellees

v.

PENASQUITOS CASABLANCA OWNER'S ASSOCIATION,

Defendant-Appellee/Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES SEEKING TO VACATE PORTIONS OF THE DISTRICT COURT'S ORDER AND REMAND

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ISSUES PRESENTED

1. Whether Sections 3604 and 3617 of the Fair Housing Act (FHA) reach post-acquisition discrimination.

2. Whether the Department of Housing and Urban Development's regulations validly apply the FHA to post-acquisition discrimination.

SUMMARY OF ARGUMENT[1]

The Fair Housing Act is most reasonably read to bar sexual harassment occurring after the sale or rental of a dwelling. 42 U.S.C. 3601 *et seq*. Section 3604(b) bars discrimination in the "provision of services or facilities in connection" with the dwelling; this language is most fairly read to encompass activities and benefits that extend beyond the moment of sale or rental. Similarly, Section 3604(b) prohibits discrimination in "terms, conditions, or privileges of sale or rental of a dwelling," and these terms reasonably include the right to live in a unit free from discrimination. In addition, Section 3617 protects against interference with the exercise and enjoyment of housing rights granted or protected by Section 3604(b).

Courts have applied the FHA to post-rental discrimination for more than two decades. They have relied not only on the plain language of the statute, but on HUD's regulations, the Supreme Court's instructions that the FHA be broadly construed, and application of analogous statutory provisions.

In 1988, Congress authorized HUD to promulgate interpretive rules under the Act, and HUD adopted the reasonable view that the statute protects against

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[1] We described the relevant facts in our first amicus brief in support of plaintiffs' appeal. See United States' Amicus Br. 2-12 (filed Nov. 6, 2008).

post-acquisition interference in the "enjoyment of a dwelling." 24 C.F.R. 100.400(c)(2). The regulations also bar "[l]imiting the use of privileges, services, or facilities associated with a dwelling because of [the sex] of an owner, tenant or a person associated with him or her." 24 C.F.R. 100.65(b)(4); see also 24 C.F.R. 100.65(b)(5). This interpretation, which clearly includes post-acquisition sexual harassment, is entitled to deference under *Chevron USA, Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). In addition, both the legislative history of the FHA and application of the similarly-worded Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, support the FHA's application to post-acquisition discrimination.

ARGUMENT

I

FHA SECTIONS 3604 AND 3617 REACH POST-ACQUISITION DISCRIMINATION

A. Section 3604(b)

The Casablanca Owner's Association (Association) argues that it is immune to FHA claims because it does not sell or rent the units it manages, and because the Association's security guard harassed and assaulted Reed only *after* she had moved into a Casablanca condominium. The plain language of the FHA, however,

reaches post-acquisition discrimination, as it 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." 42 U.S.C. 3604(b).

Nothing in the statute indicates whether it prohibits discrimination only in the initial sale or rental transaction. It does not specify whether the "provision of services or facilities" it protects are only those that accompany a "sale or rental" transaction, or those that apply to "a dwelling," or both. In our view, "provision of services or facilities in connection therewith" is fairly read to encompass activities and benefits that are ongoing, such as use of common areas, provision of maintenance, staffing, and rules enforcement. To restrict "provision of services or facilities" to those tied only to the initial sale or rental transaction would severely and unnecessarily circumscribe the Act. Such a restrictive reading is inappropriate where the FHA "does not define key terms" in several instances. *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) (noting that "Congress created ambiguity" by using expansive language, permitting *broad* interpretation), cert. denied, 508 U.S. 907 (1993).

1. Courts Have Allowed Post-Acquisition Claims Under The Statute

At least one court of appeals and other district courts adopted this reading even before HUD's applicable regulations, see Part II, *infra*, interpreted the

statute. In 1984, the Fourth Circuit stated that "Section 804(b) prohibits discrimination against any person in the provision of services or facilities in connection with a dwelling." *Mackey* v. *Nationwide Ins. Cos*., 724 F.2d 419, 424 (1984) (superceded by regulation on other grounds). The Northern District of Illinois reasoned that the FHA reached post-rental sexual harassment in a case where the landlord demanded sex from a tenant in return for "tenancy and services," including repairs. *Grieger* v. *Sheets*, 689 F. Supp. 835, 840 (N.D. Ill. 1988); see also *Khawaja* v. *Wyatt*, 494 F. Supp. 302, 305 (W.D.N.Y. 1980) (plaintiff could state a claim for discrimination in billing for repairs because the FHA prohibits "deni[al], on the basis of race certain 'conditions,' 'services,' or 'facilities' in connection with renting a dwelling") (quoting Section 3604(b)). Similarly, *Concerned Tenants Ass'n of Indian Trails Apartments* v. *Indian Trails Apartments*, 496 F. Supp. 522, 525 & n.1 (N.D. Ill. 1980) (superceded by statute on other grounds), held the FHA covered residents' claims that services were reduced because of changes in the complex's racial composition. Defendant in *Concerned Tenants* argued, as does the Association here, that 3604(b) did not apply unless defendant "intended to keep the blacks out and the whites in." *Id.* at 525. The court found "[s]uch a tortured interpretation of the application of § 3604(b) is ludicrous and runs counter to the plain and unequivocal language of the

statute." *Ibid.*; see also *Lopez* v. *City of Dallas*, No. 03-CV-2223, 2004 WL 2026804, at *9 (N.D. Tex. Sept. 9, 2004) ("the 'in connection with the sale or rental of a dwelling' requirement can permissibly be broadly interpreted to encompass '[l]imiting the use of . . . services . . . associated with a dwelling because of race'") (citation omitted).

Similarly, the language of Section 3604(b) covers municipalities that provide *only* post-acquisition services. The Fourth Circuit stated that the FHA covers "such things as garbage collection and other services of the kind usually provided by municipalities." *Mackey*, 724 F.2d at 424; see also *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 193 (4th Cir. 1999); *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). The D.C. Circuit has stated that where "ultimate control over the service in question resides with the municipality or utility rather than with the provider of housing * * * such a 'sole source' could conceivably violate the [3604(b)] rights of the tenants." *Clifton Terrace Assocs., Ltd.* v. *United Techs. Corp.*, 929 F.2d 714, 720 (1991). But see *Cox* v. *City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding city's failure to police an illegal dump did not support a Section 3604(b) claim "because the service was not 'connected' to the

sale or rental of a dwelling as the statute requires"), cert. denied, 547 U.S. 1130 (2006).

Section 3604(b) also prohibits discrimination in the "terms, conditions, or privileges of sale or rental," and this language is also most fairly read to provide post-acquisition protection. The "terms, conditions, or privileges" flowing from a real-estate transaction most reasonably are read to include not only the right to acquire, but the right to inhabit a dwelling. *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."); *Shellhammer* v. *Lewallen*, 1 Fair Hous. Fair Lend. ¶ 15,472 at 137 (N.D. Ohio Nov. 22, 1983) (plaintiff states an FHA claim where harassment "affected one or more tangible terms, conditions, or privileges of tenancy") (see First Cross-Appeal Br., Legal App. 13), aff'd, 770 F.2d 167 (6th Cir. 1985) (Table), unpublished opinion available at 1985 WL 13505. The term "privileges" would have little meaning if limited simply to the initial act of sale or rental.

In fact, the signing of a lease or the closing of a real estate sales transaction is most often the beginning, not the end, of an ongoing relationship with the housing entity. A lease constitutes an ongoing rental relationship which can be renewed or terminated according to the terms of the lease or applicable law. By

renting a condominium at Casablanca, the plaintiffs had an obligation to follow Association rules as a condition for continued use of the common areas, which are part of the "[d]welling," see 42 U.S.C. 3602(b), and the other privileges, services, and facilities that come with a condominium. If residents fail to observe the rules or pay assessments, the Association may revoke privileges and ultimately evict them. AER 23-24, 29, 34. Residents at Casablanca also rely on the Association to schedule use of the clubhouse, repair the premises, and maintain landscaping, pools, and other common areas. AER 28, 33, 36, 43. They even agree to permit staff to enter their units under certain conditions. AER 16. The Association's bylaws charge its board to "supervise all officers, agents, and employees of the Association." AER 10; see also AER 71, 76.

Indeed, courts have held that Associations like Casablanca, with responsibility for everyday management and monitoring of a housing complex, are in a unique position from which to alter the conditions of the housing arrangement through post-acquisition discrimination. *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n*, No. 96-2495, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997); see also *Honce* v. *Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (finding FHA liability for "alter[ing] the conditions of the housing arrangement" in a discriminatory way). Courts have recognized that Section 3604(b) covers owners' associations or

municipalities operating as exclusive providers of certain housing services to residents. The Eleventh Circuit approved HUD's Section 3604(b) suit against a homeowners' association that barred children from common areas. *Paradise Gardens Section II Homeowners' Ass'n* v. *HUD*, 8 F.3d 36 (11th Cir. 1993) (Table), aff'g No. 04-90-0321-1, 1992 WL 406531, at *10 (HUDALJ Oct. 15, 1992); see also *Landesman* v. *Keys Condo. Owners Ass'n*, No. C 04-2685 PJH, 2004 WL 2370638 (N.D. Cal. Oct. 19, 2004) (similar suit), aff'd, 125 F. App'x 146 (9th Cir. 2005); see also pp. 6-7, *supra* (discussing municipalities' liability). As one court stated, "part and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community." *Savanna Club Worship Serv.* v. *Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1230 (S.D. Fla. 2005). Because "association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the FHA." *Ibid*.[2]

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[2] This is not to say that the language of Section 3604(b) of the FHA extends to every act of discrimination that touches residents; it simply means liability is not determined by whether alleged discrimination comes before or after property acquisition. Actions "too remotely related to * * * housing" do not trigger liability. In *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 192

(continued...)

Applying Section 3604(b) to owners' associations is consistent with the broad application of other FHA sections to those who do not rent or sell property. Appraisers and lenders are liable. *Hanson* v. *Veterans Admin*., 800 F.2d 1381, 1385 (5th Cir. 1986); *Simms* v. *First Gibraltar Bank*, 83 F.3d 1546, 1554 (5th Cir.), cert. denied, 519 U.S. 1041 (1996). Under the FHA's advertising provisions, courts have held housing information vendors and even newspapers liable. The Second Circuit did so because "[n]othing in this language limits the statute's reach to owners or agents." *United States* v. *Space Hunters, Inc*., 429 F.3d 416, 424 (2005); see also *Ragin* v. *New York Times Co.*, 923 F.2d 995, 1000 (2d Cir.), cert. denied, 502 U.S. 821 (1991). Courts have "applied § 3604 to a number of parties and practices not mentioned" in the statute. *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996).

Accordingly, the "terms, conditions, or privileges of sale or rental" are most reasonably construed to include ongoing relationships that are part of occupancy of a residence. It is incorrect to conclude, as the Association contends, that

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[2](...continued)
(4th Cir. 1999), the court ruled that highway construction, even if discriminatorily sited to run through a minority neighborhood, did not implicate FHA rights.

discrimination "in connection" with the sale or rental of a dwelling can never occur after the initial sale or rental transaction. 42 U.S.C. 3604(b).

2. Analogous Statutes Support Post-Acquisition Application

Judicial interpretations of analogous statutory language support a broad reading of the "terms, conditions, or privileges" protected under the FHA. This Court and others repeatedly have turned to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in employment, for guidance in the application of the FHA. *Gamble* v. *City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) ("We apply Title VII discrimination analysis in examining Fair Housing Act ("FHA") discrimination claims."). As the Second Circuit stated, both statutes "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination." *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935 (1988), aff'd, 488 U.S. 15 (1988). Accordingly, this Court "may look for guidance to employment discrimination cases." *Pfaff* v. *HUD*, 88 F.3d 739, 745 n.1 (9th Cir. 1996).

Title VII bars discrimination "against any individual with respect to his compensation, *terms*, *conditions*, *or privileges* of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). These "terms, conditions, or privileges" are not limited to

initial hiring procedures, but extend throughout the employment relationship.[3] Defining the parameters of sexual harassment claims under Title VII in *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986), the Supreme Court cited Title VII language which is identical to language in the FHA. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," the Court explained. *Ibid*. (internal quotations and citation omitted). Accordingly, relying on Title VII language, the Sixth, Seventh, Eighth, and Tenth Circuits have allowed sexual harassment claims under the FHA where landlords inappropriately touched tenants or asked for sex after they moved in.

As the Tenth Circuit stated, "[h]arassment based on sex is a form of discrimination." *Honce*, 1 F.3d at 1089; see also *Shellhammer* v. *Lewallen*, 770 F.2d 167 (6th Cir. 1985) (Table), unpublished opinion available at 1985 WL 13505. *Honce* held that in the housing context, as under Title VII, a plaintiff

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[3] The same language is also used in other federal employment legislation, where it encompasses such benefits as workplace cafeterias or protection from assignment to "a remote cubicle." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979) ("terms and conditions of employment" includes on-site food sales under the National Labor Relations Act, 29 U.S.C. 151 *et seq*.); *Simas* v. *First Citizens' Fed. Credit Union*, 170 F.3d 37, 48 (1st Cir. 1999); *id*. at 43, 48 (whistleblower protections barring "discriminat[ion] against any employee with respect to compensation, terms, conditions, or privileges of employment" may include "the physical setting in which one's work is performed").

could bring a harassment claim based on an ongoing hostile environment. The court explained that "an employer violates Title VII by creating a discriminatory work environment, even if the employee loses no tangible job benefits, because the harassment is a barrier to equality in the workplace." 1 F.3d at 1090. In housing, the court held, a claim is similarly actionable "when the offensive behavior unreasonably interferes with use and enjoyment of the premises." *Ibid*.

Although its law on the subject is unclear, the Seventh Circuit has also held that Sections 3604(b) and 3617 of the FHA reach sexual harassment. The court in *DiCenso* v. *Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996), held that "a determination of what constitutes a hostile environment in the housing context requires the same analysis courts have undertaken in the Title VII context." See also *Krueger* v. *Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997). But see *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004); Section I.C, *infra* (discussing *Halprin*). Clearly, this would occur *after* a tenant moves in.

Relying on *DiCenso*, *Honce*, and employment cases under the ADA, the Eighth Circuit applied the FHA to post-acquisition action in *Neudecker* v. *Boisclair Corp*., 351 F.3d 361, 364 (2003) (per curiam), where apartment managers threatened to evict a tenant who complained of harassment. The tenant

developed stress-related physical symptoms and ultimately left. The court found that the "unwelcome harassment was sufficiently severe to deprive him of his right to *enjoy his home*, as evidenced by his physical problems and ultimate decision to move out." *Id*. at 364-365 (emphasis added).

B. Section 3617

Even if this Court finds Section 3604(b) alone does not extend the FHA to post-acquisition discrimination, the plain language of Section 3617 clearly does. That section 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, among others, Section 3604(b). 42 U.S.C. 3617. If a family rents or buys a dwelling, as is their right under Section 3604(b), and then faces sexual, religious, or racial discrimination in connection with their tenancy, they have endured "interfere[nce]" with their "enjoyment" of their Section 3604(b) rights, actionable under Section 3617. Section 3617 does not require that a defendant also violate Section 3604, nor does its language limit it to reach only the right to buy or rent a home. Instead, Section 3617 protects against "interfer[ence]" with Section 3604(b) rights, rather than denial of them. This Court stated in *San Pedro Hotel Co.* v. *City of Los Angeles*, 159 F.3d 470, 476 (1998) that "[w]hile [a] City is under no duty to construct, to plan for, approve

and promote any housing, the City does have a duty to act in a non-discriminatory manner" in regulating or funding housing (internal quotations and citation omitted). "The language 'interfere with' has been broadly applied," this Court held, "to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws." *United States* v. *City of Hayward*, 36 F.3d 832, 835 (1994) (internal citations and quotation omitted), cert. denied, 516 U.S. 813 (1995).

The Seventh Circuit also has allowed post-acquisition harassment claims under Section 3617, relying in part on HUD's regulations. In *East-Miller* v. *Lake County Highway Department*, 421 F.3d 558, 562-563 (7th Cir. 2005), a homeowner alleged that the city discriminated against her by repeatedly running over her mailbox with a snowplow. The court recognized a post-acquisition claim under Section 3617 for discrimination "in the exercise or enjoyment of * * * fair housing rights." *Id.* at 563; see also *Halprin*, 388 F.3d at 330.

C. Decisions Rejecting Post-Acquisition Liability

While some decisions have rejected post-acquisition liability under portions of the FHA, none of them is controlling or persuasive. The Seventh Circuit in *Halprin* rejected homeowners' Section 3604(b) claim of ethnic and religious

discrimination against their neighborhood owners' association. 388 F.3d at 330.[4] Plaintiffs charged that the association president had vandalized their home by writing derogatory graffiti on their wall. The *Halprin* court reasoned that neither the plain language nor the legislative history of the Act mentioned post-acquisition application, and hence it was unavailable. *Id*. at 328-330. The *Halprin* court rejected the Seventh Circuit's previous reasoning in *DiCenso*, holding that *DiCenso* did not "contain[] a *considered* holding on the scope of the Fair Housing Act." *Id*. at 329. Ultimately, however, the court in *Halprin* reinstated plaintiffs' claims of racial harassment, based on HUD's regulations interpreting Section 3617.

The Fifth Circuit also rejected the application of the FHA to some municipal actions. In *Cox*, 430 F.3d at 747, the court held that minority residents could not sue the city under the FHA for its failure to police illegal dumping at a gravel pit in their neighborhood. "[T]he alleged service here was not 'connected' to the sale or rental of a dwelling, as the statute requires." *Ibid.* While the court found that the city's actions did not affect acquisition of housing, it also expressed concern

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[4] The Seventh Circuit recently granted en banc rehearing in a post-acquisition FHA case. At the court's invitation, the United States filed as amicus suggesting *Halprin*'s reading of the statute was incorrect and that HUD regulations, entitled to deference, permit post-acquisition claims. See U.S. Amicus Br., *Bloch* v. *Frischholz*, No. 06-3376 (Jan. 16, 2008).

that the plaintiffs' claims were only tangentially connected to general housing interests. "While sweeping widely, the FHA does so in the housing field and remains a housing statute." *Id.* at 746.

Claims like those in *Cox* are better resolved with the reasoning presented in *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 192, where the Fourth Circuit found FHA claims based on proposed highway construction "too remotely related to * * * housing." See also *Michigan Prot. & Advocacy Serv.* v. *Babin*, 18 F.3d 337, 348 (6th Cir. 1994) (economic competition is not "interference" with housing rights in violation of Section 3617); *Growth Horizons, Inc.* v. *Delaware County*, 983 F.2d 1277, 1284 n.12 (3d Cir. 1993) (holding that a county's refusal to assume leases for group homes did not involve FHA interests). Some actions, while affecting neighborhood life and resale values, are too remote from housing to be covered. In contrast, plaintiffs' claims here concern sexual harassment by condominium security staff who entered their apartment, stalked them in the common areas, and followed them in the condominium's golf cart. Security inside one's home is an important housing consideration, especially when it concerns freedom from sexual harassment by condominium staff. Safety from discrimination by housing staff is more intimately connected with an individual's

occupancy of a dwelling than is a municipality's effective enforcement of anti-dumping laws against a neighboring business.

This direct connection with housing concerns also sets this case apart from the D.C. Circuit's decision in *Clifton Terrace Associates, Ltd.* v. *United Technologies Corp*. In that case, a landlord claimed repairmen violated the FHA by failing to maintain elevators, rendering units "unavailable" to mostly minority tenants of high rise apartments. 929 F.2d at 720. The court held that the defendant elevator company could not be liable in part because the company "does not have a duty under Title VIII to furnish housing services in a nondiscriminatory manner to the tenants of Clifton Terrace. That duty resides primarily with their landlord." *Id*. at 719. It would be improper, the court stated, for the landlord to "convert its statutory duty into a vicarious cause of action against third-party contractors." *Ibid*. Thus, the court recognized that shared services in a multi-dwelling unit were important housing concerns and, if provided on a discriminatory basis, might be covered by the FHA. However, non-exclusive, third-party providers of such services were too remotely connected to the dwellings to be liable under the FHA. The court stated that Section 3604(b) was "directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or those who *otherwise control the provision of*

housing services and facilities." *Id.* at 720 (emphasis added). The logic of *Clifton Terrace* easily suggests that, as exclusive providers of housing services which "control" facilities in their respective communities, owners' associations are liable for discriminatory provision of such services.

The Association notes several district court decisions holding that Section 3604(b) does not reach post-acquisition harassment. They state, without giving figures, that "[a] majority of courts" have so held, Second Cross-Appeal Br. 20. This is untrue but even assuming it were true, there are also numerous district court cases, in addition to those cited elsewhere in this brief, holding that claims concerning post-acquisition discrimination are available under Section 3604(b). See, *e.g.*, *Corwin* v. *B'Nai B'Rith Senior Citizen Hous., Inc*., 489 F. Supp. 2d 405, 408 (D. Del. 2007); *Housing Rights Ctr.* v. *Sterling*, 404 F. Supp. 2d 1179, 1192 (C.D. Cal. 2004); *Burgess* v. *United States*, No. C 96-0205 FMS, 1997 WL 227815, at *5 (N.D. Cal. Apr. 29, 1997); *Fair Hous. Congress* v. *Weber*, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997). Many cases, in addition to those cited elsewhere in this brief, allow residents to sue homeowners' associations for discriminatory treatment. See *Fearing* v. *Lake St. Croix Villas Homeowner's Ass'n*, No. 06-456 (JNE/JJG), 2006 WL 3231970, at *6 (D. Minn. Nov. 8, 2006); *George* v. *Colony Lake Prop. Owners Ass'n*, No. 05 C 5899, 2006 WL 1735345,

at *3 (N.D. Ill. June 16, 2006); *Wilstein* v. *San Tropai Condo. Master Ass'n*, No. 98 C 6211, 1999 WL 262145, at *11 (N.D. Ill. Apr. 22, 1999); *United States* v. *Sea Winds of Marco*, *Inc*., 893 F. Supp. 1051, 1055 (M.D. Fla. 1995).

D. The Legislative History Of The FHA And Congressional Intent

There is limited FHA legislative history; there are no committee reports for the 1968 Act. *Burney* v. *Housing Auth. of the County of Beaver*, 551 F. Supp. 746, 769 n.7 (W.D. Pa. 1982). What there is, however, supports the plaintiffs here.

The first section of the Senate draft stated that it was "the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States." 114 Cong. Rec. 2270 (1968) (emphasis added). Occupancy necessarily occurs post-acquisition, and Congress thus contemplated post-acquisition application when drafting the legislation. Congress ultimately collapsed "purchase, rental, financing and occupancy" into the summary phrase "fair housing," stating, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. This final language indicates the broad intent remains, as there is

nothing in the revisions that suggests a lessened degree of protection.[5] Indeed, the Supreme Court in *Trafficante* v. *Metropolitan Life Insurance Co.* cited the FHA debates to show that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (statement of Sen. Mondale)); see also 114 Cong. Rec. 2275-2276, 2279 (statement of Sen. Mondale) (noting that the Congress was "committed to the principle of living together," and sought to promote neighborhoods with interracial "good harmony").

The Supreme Court has held that where a statute is silent or "ambiguous as to whether it includes" certain claims, courts should adopt a reading "more

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[5] Several initial versions of the bill contained this original Declaration of Policy. Changes to it were not accompanied by any substantive changes. Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 Ala. L. Rev. 203, 230-231 (2006). As one observer has commented, "[i]f anything, the fact that a prohibition against discrimination in all aspects of housing – sales, rentals, financing, and occupancy – was included in the first three versions of the bill but omitted from the final version in favor of a broad statement of commitment to fair housing, indicates that Congress specifically intended 'fair housing' to include the right to purchase, rent, finance, and occupy housing free of discrimination." Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. L. Rev. 1, 28 (2008). Other provisions of the FHA indicate Congress intended the FHA to reach beyond sales and rentals. For example, Section 3605 of the statute plainly indicates a concern with post-acquisition action; it bars discrimination in "real estate-related transactions," including loans for "improving, repairing, or maintaining a dwelling." 42 U.S.C. 3605(b).

consistent with the broader context" and "primary purpose" of the law. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). Application of the FHA to post-acquisition discrimination is very clearly in keeping with the statute's purpose. As Congress's aim was "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. 3601, courts accordingly "have applied the Act broadly within its terms." *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1209; see also *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (statement of Sen. Mondale)); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *Otero* v. *New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

In construing a statute, courts must also avoid unreasonable or illogical results. See *United States* v. *X-Citement Video, Inc*., 513 U.S. 64, 69-70 (1994) (statutory construction should not assume Congress intended "odd" results, and courts should not "simply follow the most grammatical reading of the statute" if it creates such results). If this Court were to reject post-acquisition liability, discrimination would turn only on whether a resident had yet completed a sale or rental transaction; this clearly would create an arbitrary distinction between individuals suffering similar discrimination. If, as was alleged in *Halprin*, an

owners' association vandalized property with anti-Semitic graffiti, a Jewish potential buyer could sue, claiming the association prevented her from moving in. She could claim the association discriminated in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities" associated with the dwelling by damaging it. 42 U.S.C. 3604(b). If the vandalism occurred the day after the sale, however, the victimized homeowner would have no claim unless she moved out.

Similarly, in this case, if Association staff harassed a woman inspecting a unit for rental, interfering with her attempt to rent in the complex, she could claim discrimination. Yet, if this Court were to reject post-acquisition liability, the Reeds will not be able to state a claim unless they are first constructively evicted or allege they were discouraged from renewing their lease.

The rule would also create odd results in allowing residents to sue for harm to others but not for harm to themselves. As this Court recognized in *Harris* v. *Itzhaki*, 183 F.3d 1043, 1050 (9th Cir. 1999), "any person harmed by discrimination, *whether or not the target of the discrimination*, can sue to recover for his or her own injury." See also *Trafficante*, 409 U.S. at 212. In *Harris*, a minority resident claimed landlords deprived her of the opportunity to live in a desegregated environment by discriminating against minority homeseekers. If this

Court were to adopt the rule in *Halprin,* a renter would still have a claim for others' deprivation of housing, but could not file a claim if her landlords directly discriminated against her by delaying repairs, turning off her hot water, barring her from the pool, or harassing her because of race or sex. See *Farrar* v. *Eldibany*, No. 04 C 3371, 2004 WL 2392242, at *4 (N.D. Ill. Oct. 15, 2004) (holding under *Halprin* that the FHA did not cover denial of "maintenance" such as heat and hot water), aff'd, 137 F. App'x 910 (7th Cir. 2005); *Landesman*, 2004 WL 2370638 (holding the FHA covers rules barring children from pools); *Grieger* v. *Sheets*, No. 87 C 6567, 1989 WL 38707, at *5 (N.D. Ill. April 10, 1989) (holding, before *Halprin*, that "repairs may constitute 'terms' of tenancy, which the plaintiffs lost because of sexual harassment"). To create such an illogical statutory scheme was hardly Congress's intention.

II

VALID HUD REGULATIONS SUPPORT POST-ACQUISITION APPLICATION

Additionally supporting the FHA's applicability to post-acquisition discrimination, HUD, authorized by Congress in 1988 to enforce the FHA and promulgate interpretive rules, has applied the Act to post-acquisition discrimination. See *Meyer* v. *Holley*, 537 U.S. 280, 287 (2003); 42 U.S.C. 3614a,

3535(d); Implementation of the Fair Housing Act, 54 Fed. Reg. 3232 (Jan. 23, 1989).

A. HUD Has Consistently Supported Post-Acquisition Application

HUD's regulations interpret Section 3617, which protects against "interfere[nce]" with rights covered under Section 3604. These regulations prohibit "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling," 24 C.F.R. 100.400(c)(2), and bar "[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," 24 C.F.R. 100.65(b)(4); see also *East-Miller* v. *Lake County Highway Dep't*, 421 F.3d 558, 562 (7th Cir. 2005) ("Because interference with the 'enjoyment of a dwelling' can take place at any time, this regulation extends the protections of the FHA to post-purchase discrimination."). By anchoring the prohibitions against discrimination to what occurs in "a dwelling," HUD's regulations speak directly to post-acquisition events.

B. HUD's Regulations Are Entitled To Chevron *Deference*

Even if this Court finds that the text of Section 3604 does not unequivocally reach post-acquisition discrimination, this Court should apply *Chevron* deference to HUD's regulations. *Chevron USA, Inc.* v. *Natural Res. Def. Council*, 467 U.S.

837 (1984). The only court of appeals to address the validity of the regulation has determined that it appropriately "reinforces a statute and thus helps to provide the basis for a cause of action." *Gonzalez* v. *Lee County Hous. Auth.*, 161 F.3d 1290, 1303 (11th Cir. 1998).

Chevron requires that "if the statute is silent or ambiguous with respect to the specific issue," a court should ask only "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Even if the language of Sections 3604 and 3617 on the "precise question" of post-acquisition liability is not completely clear, HUD has provided a reasonable interpretation, which under *Chevron* is entitled to substantial judicial deference. A court may not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Ibid*. (footnote omitted).

In considering congressional intent, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA* v. *Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000). Instead, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id*. at 133 (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). In addition, an agency may, through rulemaking, "fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231

(1974). Thus, HUD's regulations may clarify what housing rights the FHA created. Regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. HUD's regulations are clearly reasonable because they incorporate a statutory reading "more consistent with the broader context" and "primary purpose" of the Fair Housing Act. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); see also 42 U.S.C. 3601 (noting Congress's intent "to provide * * * for fair housing throughout the United States").

To the extent congressional intent is evident in this case, HUD's interpretation of the FHA in 24 C.F.R. 100.400(c)(2) and 100.65(b)(4) does not conflict with it. Sections 3617 and 3604 do not expressly impose temporal limitations on liability. The FHA's limited legislative history supports HUD's regulation, as it fails to show that Congress intended to limit the FHA only to property acquisition. See Section I.D, *supra*.

And even if one concludes that, on the whole, the FHA's legislative history is silent as to post-acquisition liability, this silence does not invalidate HUD's regulation. "Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply" or it could simply mean Congress was "leaving details to the future," *NAACP* v. *American Family Mut.*

Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993), permitting HUD to "fill [the] gap." *Morton*, 415 U.S. at 231. As the text of Section 3604 is broad and somewhat "pliable," courts "should respect a plausible construction" by HUD. *American Family Mut. Ins. Co*., 978 F.2d at 300 (citing *Chevron*, 467 U.S. at 837); see also *Trafficante* v. *Metropolitan Life Ins. Co*., 409 U.S. 205, 210 (1972) (HUD's views have "great weight" in interpreting the FHA). This Court has held that HUD "ordinarily commands considerable deference in interpreting the FHA because HUD is the federal agency primarily assigned to implement and administer Title VIII." *Harris* v. *Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).

Sections 3604 and 3617, taken together, can quite easily and logically be read to reach post-acquisition discrimination. Indeed, as stated in Sections I.A-I.B, *supra*, even before HUD promulgated its rules in 1989, courts had interpreted the act to reach post-acquisition claims. See *Shellhammer* v. *Lewallen*, 1 Fair Hous. Fair Lend. ¶ 15,472 at 137 (N.D. Ohio Nov. 22, 1983) (holding plaintiff states an FHA claim where harassment "affected one or more tangible terms, conditions, or privileges of tenancy"), aff'd, 770 F.2d 167 (6th Cir. 1985) (Table), unpublished opinion available at 1985 WL 13505; *Grieger* v. *Sheets*, No. 87 C

6567, 1989 WL 38707, at *5 (N.D. Ill. April 10, 1989) (holding that "repairs may constitute 'terms' of tenancy").

HUD has consistently taken this position in litigation and in other regulations. 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." In enforcement actions, HUD has sought redress where owners' associations have excluded residents from common areas because of familial status. *HUD* v. *Paradise Gardens Section II Homeowners' Ass'n*, No. 04-90-0321-1, 1992 WL 406531, at *10 (HUDALJ Oct. 15, 1992) (the association may not "discriminate against [tenants] and interfere with their enjoyment and use of the facilities" including pools), aff'd, 8 F.3d 36 (11th Cir. 1993) (Table). HUD has also charged a mobile home park operator with violating Section 3604(b) and 24 C.F.R. 100.65(a) by neglecting dangerous playground equipment in common areas and refusing to allow a resident to build a play area because of animus based on familial status. *HUD* v. *Murphy*, No. 02-89-0202-1, 1990 WL 456962, at *43 (HUDALJ July 13, 1990).[6] Other

[6] The Association incorrectly states that 24 C.F.R. 100.65(a) does not cover post-acquisition discrimination. Second Cross-Appeal Br. 33. The regulation provides that "[i]t shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions

(continued...)

violations HUD recognizes include increasing a tenant's rent because she entertained black guests. *HUD* v. *Jerrard*, No. 04-88-0612-1, 1990 WL 456959, at *11 (HUDALJ September 28, 1990). In *Jerrard*, the landlord twice raised the rent, told the tenant she could not have black guests, and finally evicted her. HUD argued and the ALJ found all three acts violated Section 3604(b). *Ibid*.; see also *DiCenso* v. *Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (a hostile environment claim). HUD's position in adjudicating FHA is also due judicial deference. This Court has held that it must "review with deference an agency's interpretation of the statute that it has responsibility to enforce, whether that interpretation emerges from an adjudicative proceeding or administrative rulemaking." *Pfaff* v. *HUD*, 88 F.3d 739, 747 (1996).

This Court properly should defer to HUD's construction even though it may not "conclude that the agency construction was the only one it permissibly could have adopted," or that the agency's reading of the statute is "the reading the court

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[6](...continued)
or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling." *Murphy* indicates that defendant's contention is wrong; HUD maintained and the ALJ found that park owners violated Section 100.65(a) when they discriminated in facilities maintenance and rules enforcement, although the victimized family had already acquired a dwelling and was not forced to leave. No. 02-89-0202-1, 1990 WL 456962, at *43 (HUDALJ July 13, 1990).

would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. The regulations adopt a permissible reading of the statute and prevent the odd results of a narrower reading, which would create a strained distinction between residents and prospective residents facing similar discrimination. See Section I.D, *supra*. Accordingly, the regulations are not "arbitrary" or "capricious." *Chevron*, 467 U.S. at 844.

CONCLUSION

For the forgoing reasons, this court should uphold the district court's determination that the plaintiffs stated a claim under the FHA. For the reasons stated in the United States' brief in support of plaintiffs' appeal, filed Nov. 6, 2008, this Court should vacate the district court's dismissal of punitive damages claims and Reed's children's and grandchild's compensatory claims and remand for further consideration under the appropriate legal standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using WordPerfect 12 and contains no more than 7,000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ April J. Anderson
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Date: March 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES SEEKING TO VACATE PORTIONS OF THE DISTRICT COURT'S ORDER AND REMAND with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ April J. Anderson
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