No. 16-13406-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

JIMMY PAULK, *et al.*,

Plaintiffs-Appellants

v.

GEORGIA DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees

_____

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

_____

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

_____

HELEN R. KANOVSKY
General Counsel
Department of Housing and
Urban Development

VANITA GUPTA
Principal Deputy Assistant
Attorney General

TOVAH R. CALDERON
ELIZABETH P. HECKER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3734
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5550

Case No. 16-13406-D

Paulk, et al. v. *Georgia Department of Transportation, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to those listed in the certificate filed by appellants in their Brief for Appellants, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

2. Gupta, Vanita, United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

3. Hecker, Elizabeth P., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

4. Kanovsky, Helen R., United States Department of Housing and Urban Development, counsel for *amicus curiae* United States.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

Date: September 6, 2016

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

RULES:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13406-D

JIMMY PAULK, *et al.*,

Plaintiffs-Appellants

v.

GEORGIA DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

INTEREST OF THE UNITED STATES

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

The United States has a direct and substantial interest in the resolution of the issue addressed herein: whether Sections 3604(b) and (f)(2) of the Fair Housing Act (FHA or the Act), 42 U.S.C. 3601 *et seq.*, apply to post-acquisition discrimination. The Department of Justice and the Department of Housing and Urban Development (HUD) share enforcement authority under the FHA.

42 U.S.C. 3612(a) and (*o*), 3614(a)-(d). HUD regulations, including regulations that interpret Sections 3604(b) and (f)(2), prohibit discriminatory conduct that takes place after an individual has taken possession of a dwelling. See 24 C.F.R. 100.65(b)(2) and (4); 24 C.F.R. 100.70(d)(4).

The Department of Justice has filed amicus briefs setting forth the United States' view that Section 3604(b) prohibits post-acquisition discrimination. See Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims, *Bloch* v. *Frischholz*, 587 F.3d 771 (7th Cir. 2009) (No. 06-3376); 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, *Reed* v. *Penasquitos Casablanca Owner's Ass'n*, 381 F. App'x 674 (9th Cir. 2009) (Nos. 08-55069, 08-55072, 08-55151).

In addition, both the Department of Justice and HUD regularly bring enforcement actions challenging post-acquisition discrimination under Sections 3604(b) and (f)(2). See, *e.g.*, *United States* v. *Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2006) (sustaining post-acquisition claims of sexual harassment under Section 3604(b)); *Castillo Condo. Ass'n* v. *HUD*, 821 F.3d 92, 98 (1st Cir. 2016) (affirming HUD decision that condominium association's refusal to allow long-

time resident to keep an emotional support dog constituted discrimination in the terms and conditions of housing, in violation of Section 3604(f)(2)).

ISSUE PRESENTED

The United States will address only whether Sections 3604(b) and (f)(2) of the FHA reach discriminatory conduct that occurs after a resident has taken possession of a dwelling.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

The FHA aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. 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 race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). Section 3604(f)(2) extends this protection to persons with disabilities. It 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 with such dwelling, because of a [disability] 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; or (C) any person associated with that person.

42 U.S.C. 3604(f)(2).

HUD has authority to issue regulations under the FHA, 42 U.S.C. 3614a, and has issued regulations interpreting the Act. Regulations interpreting Sections 3604(b) and (f)(2) prohibit "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" and "[l]imiting the use of privileges, services or facilities associated with a dwelling" because of race, color, religion, sex, disability, familial status, or national origin. 24 C.F.R. 100.65(b)(2) and (4). HUD regulations interpreting Section 3604(b) further prohibit "[r]efusing to provide municipal services * * * for dwellings or providing such services * * * differently" because of a protected characteristic. 24 C.F.R. 100.70(d)(4).

2. Factual Background

According to the complaint, Estes Park Apartments is an affordable housing complex owned by plaintiff-appellant Estes Park, L.P. Doc. 6, at 4. Sixty percent of the tenants are minorities and most have incomes below the 2015 federal poverty levels. Doc. 6, at 5. Estes Park Apartments is located on the east side of State Route 135, and five non-minority-owned businesses are located on the opposite side. Doc. 6, at 6, 8. In 2007, defendant-appellee Georgia Department of Transportation (GDOT) proposed to widen State Route 135. As part of the construction, the GDOT planned to reroute the northbound and southbound lanes of the current route onto part of the Estes Park Apartments property. Doc. 6, at 6.

The roadway would run within seven feet of the apartments' clubhouse and within 30 feet of a building containing residential units. Doc. 6, at 6.

Plaintiffs-appellants Jimmy Paulk and Tara Wilcox are renters in the Estes Park Apartments. Both are African American, and Mr. Paulk also has a mobility disability. Doc. 6, at 3-4. Plaintiffs alleged that GDOT's proposed plan would negatively affect residents of the Estes Park Apartments in several ways, including rendering the clubhouse and laundry room unusable; significantly increasing the danger to children using the playground; increasing the noise level in the apartments to a degree that would cause the property to lose federal subsidies; and potentially displacing eight tenants, six of whom are minorities. Doc. 6, at 7-8. They alleged that the proposal would not negatively affect to the same degree the non-minority-owned businesses located on the opposite side of the roadway. Doc. 6, at 8.

On July 17, 2015, the GDOT initiated a proceeding in the Superior Court of Coffee County, Georgia, seeking eminent domain over part of the Estes Park property. Estes Park moved to set aside the taking on several grounds, including that the taking violated the FHA. Doc. 26, at 7-8. On March 29, 2016, the Superior Court of Coffee County denied Estes Park's petition to set aside the GDOT's taking. Doc. 26, at 10.

On February 19, 2016, before the Superior Court ruled in the eminent domain proceeding, plaintiffs filed this lawsuit against GDOT and its Commissioner in his official capacity alleging, among other things, violations of Sections 3604(b) and 3604(f)(2) of the FHA. Doc. 1; Doc. 6, at 8, 14.

3. The District Court's Opinion

On June 8, 2016, the district court issued an order dismissing the complaint on abstention grounds under *Younger* v. *Harris*, 401 U.S. 37 (1971). The court held that abstention was appropriate because States have an important interest in having their own courts apply state eminent domain law and because plaintiffs had failed to show they were prevented from litigating their federal claims in the eminent domain action. Doc. 26, at 16-19.

The district court also held, in the alternative, that plaintiffs had failed to state a claim upon which relief could be granted. With respect to plaintiffs' claim under Section 3604(b) of the FHA, the court acknowledged a split of authority regarding whether the section authorizes claims based on discrimination occurring after an individual has already acquired a dwelling. Doc. 26, at 27. Without significant analysis, the court concluded that Section 3604(b) "does not encompass * * * alleged discrimination against those who have already acquired and are

now in possession of their homes." Doc. 26, at 28-29. For the same reasons, the court also dismissed the plaintiffs' Section 3604(f)(2) claim. Doc. 26, at 29.[1]

SUMMARY OF ARGUMENT

The Fair Housing Act prohibits discrimination occurring after the initial sale or rental of a dwelling. In particular, Sections 3604(b) and (f)(2) bar discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling," and in the "provision of services or facilities in connection" with a dwelling. 42 U.S.C. 3604(b) and (f)(2). Both prohibitions apply to discriminatory conduct that takes place after an individual has taken possession of a dwelling. The statutory text, particularly as amended in 1988, does not limit the prohibition of discrimination in the provision of services and facilities to the initial sale or rental of a dwelling. In addition, "provision of services or facilities" is most naturally read to encompass activities and benefits that are ongoing in nature and extend beyond the moment of sale or rental. Similarly, the prohibition of

[1] In addition, the district court held that the plaintiffs had failed to allege sufficient facts to support claims under Sections 3604(a) and 3617 of the FHA; under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; and under 42 U.S.C. 1983 (alleging denial of due process and equal protection). Doc. 26, at 22-27, 29-39. Finally, the court held that defendants' conduct did not involve the "provision of services" under Section 3604(b) because it did not involve "services generally provided by local governmental units, such as police or fire protection and garbage collection." Doc. 26, at 28. This brief takes no position on these issues.

discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling" implicates ongoing rights within a contractual relationship. Title VII of the Civil Rights Act, which contains a similar prohibition with respect to employment and has been construed to apply beyond initial contact, supports this reading.

Agency regulations further support this interpretation. Congress authorized HUD to promulgate interpretive rules under the Act. 42 U.S.C. 3614a, 3535(d); 54 Fed. Reg. 3232 (Jan. 23, 1989); see also *Meyer* v. *Holley*, 537 U.S. 280, 287 (2003). HUD regulations make clear that these provisions apply to discriminatory conduct that occurs after a resident has taken possession of a dwelling. These regulations are entitled to *Chevron* deference.

Courts have applied the FHA to post-acquisition discrimination for more than two decades. They have relied upon the Act's plain language, HUD's regulations, the application of analogous statutory provisions, and the Supreme Court's directive that the FHA should be broadly construed.

ARGUMENT

SECTIONS 3604(b) AND (f)(2) OF THE FAIR HOUSING ACT REACH POST-ACQUISITION DISCRIMINATION

Sections 3604(b) and (f)(2) of the FHA prohibit discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection" with the dwelling. 42 U.S.C. 3604(b) and

(f)(2). These provisions plainly reach post-acquisition discrimination. Interpreting the statute to reach only discrimination in the initial sale or rental transaction is inconsistent with not only the plain language of these provisions, but also with the statute's implementing regulations and with Congress's broad remedial purpose in enacting the FHA. As shown below, both the text of the FHA and valid HUD regulations support application of Sections 3604(b) and (f)(2) to post-acquisition discrimination. Multiple courts have held that these statutory provisions reach discrimination that occurs after a resident has taken possession of a dwelling, and decisions holding otherwise are neither binding nor persuasive.

A. The Text Of Sections 3604(b) And (f)(2) Supports Their Application To Post-Acquisition 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 race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). Section 3604(f)(2) extends this protection to persons with disabilities. That section prohibits:

> discriminat[ion] 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 a dwelling*, because of a [disability] 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; or (C) any person associated with that person.

42 U.S.C. 3604(f)(2) (emphasis added). Section 3604(f) defines "discrimination" to include a refusal to make "reasonable modifications of existing premises *occupied* or to be occupied by" a person with disabilities where such modifications "may be necessary to afford such person *full enjoyment* of the premises," and a refusal to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use *and enjoy* a dwelling." 42 U.S.C. 3604(f)(3)(A)-(B) (emphasis added). These provisions plainly apply to post-acquisition discrimination. See, *e.g.*, *Hunt* v. *Aimco Props., L.P.*, 814 F.3d 1213, 1226-1227 (11th Cir. 2016) (allowing claim under Section 3604(f)(3)(B) where defendant failed to modify policies to accommodate the disability of existing tenant).

Reading Sections 3604(b) and (f)(2) together, therefore, it is plain that the FHA's prohibition of discrimination in the provision of "services or facilities" applies to the occupancy of a dwelling and is not limited to the point of initial acquisition. Added to the FHA through the Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, 102 Stat. 1619, the operative text of Section 3604(f)(2) differs slightly from that of Section 3604(b) in that it replaces the term "therewith" with the phrase "with such dwelling." Section 3604(f)(2) also expressly protects the rights of *both* individuals already residing in a dwelling and those intending to reside in a dwelling after it is sold or rented. See 42 U.S.C.

3604(f)(2)(B); see also 42 U.S.C. 3604(f)(3) (defining discrimination to include the denial of reasonable accommodations and modifications needed to ensure equal enjoyment of a dwelling).

Congress's choice of words in Section 3604(f)(2) indicates that the term "therewith" in Section 3604(b) refers to "a dwelling" generally and not only to the "sale or rental of a dwelling." Nothing in the legislative history of the 1988 amendments indicates that they were intended to increase the scope of housing discrimination protection for individuals with disabilities beyond that for individuals with other protected characteristics. Instead, the legislative history reflects a desire by Congress to extend the *existing* protections of the FHA to individuals with disabilities. See, *e.g.*, 134 Cong. Rec. 20,917 (1988) (statement of Rep. Rodino) (FHAA "extends the protections of the Fair Housing Act to handicapped persons."). And it would make no sense to infer that Congress intended to protect individuals occupying a dwelling from discrimination based on disability, but not from discrimination based on race, sex, national origin, etc.[2]

[2] Sections 3604(f)(1) and (2) are, as described above, substantively identical to the general discrimination provisions found in Sections 3604(a) and (b). Due to the unique needs of individuals with disabilities, however, Congress specified that "discrimination" based on disability includes the failure to allow reasonable modifications and accommodations and the failure to construct residential properties with certain accessibility characteristics. See 42 U.S.C. 3604(f)(3)-(5). These provisions recognize that disability discrimination may manifest differently than discrimination based on characteristics such as race, national origin, and sex,

(continued...)

That the protection against discrimination in the "provision of services or facilities" is not limited to the point of acquisition is also supported by a "natural reading" of the phrase. *Committee Concerning Cmty. Improvement* v. *City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009). "There are few 'services or facilities' provided at the moment of [acquisition], but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling." *Ibid.* Limiting the scope of the protection to the initial sale or rental would weaken the protection substantially.

The prohibition of discrimination in the "terms, conditions, and privileges of sale or rental of a dwelling" also applies post-acquisition, as these words generally implicate continuing rights within an ongoing relationship. See, *e.g.*, *City of Modesto*, 583 F.3d at 713 ("The inclusion of the word 'privileges' implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling."). Judicial interpretations of nearly identical language in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, support this interpretation. 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).

(...continued)
but they do not enlarge the *scope* of protection against discrimination beyond that provided by Sections 3604(a) and (b).

Because of the overlap in statutory language and the similar purposes of the two statutes, it is appropriate for courts to turn to Title VII for guidance in interpreting the FHA. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015); see also, *e.g.*, *Larkin* v. *Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) ("Most courts applying the FHA * * * have analogized it to Title VII."); *HUD* v. *Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (applying Title VII's burden-shifting framework to alleged discrimination under the FHA).

Courts have held that the "terms, conditions, or privileges" protected from discrimination in the employment context are not limited to initial hiring procedures, but extend throughout the employment relationship.[3] In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Supreme Court first recognized a claim for sex discrimination based on a hostile work environment under Title VII. *Id.* at 73. In doing so, the Court concluded that, "[t]he phrase

[3] The same language also appears in other federal employment-related legislation and 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) ("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.*, includes the prices of food sold on-site); *Simas* v. *First Citizens' Fed. Credit Union*, 170 F.3d 37, 43, 48 (1st Cir. 1999) (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).

'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." *Id.* at 64 (citation and internal quotation marks omitted).

Relying on the same Title VII language, several courts (including district courts within this circuit) have allowed post-acquisition sexual harassment claims under Section 3604(b) of the FHA. See, *e.g.*, *DiCenso* v. *Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996) (explaining 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"); *Honce* v. *Vigil*, 1 F.3d 1085, 1089 (10th Cir. 1993) (relying on Title VII to allow a plaintiff to bring a harassment claim under Section 3604(b) based on an ongoing hostile environment); *West* v. *DJ Mortg., LLC*, No. 1:15-CV-0397-AT, 2016 WL 827248, at *3-4 (N.D. Ga. Feb. 19, 2016) (relying on Title VII law to sustain a post-acquisition sexual harassment claim under Section 3604(b) and stating that "[s]exual harassment qualifies as sexual discrimination under the FHA if that harassment alters the terms or conditions of rental of the property for the tenant"); *Butler* v. *Carrero*, 1:12-cv-2743-WSD, 2013 WL 5200539, at *7 n.13 (N.D. Ga. Sept. 13, 2013) ("In sexual harassment cases under the FHA, courts often rely on sexual harassment cases arising under Title VII * * * because the conduct at issue in the housing setting is similar to that in

the working environment and similar interests are subject to legal protection under both acts.").

Civil rights statutes such as the FHA should be broadly construed to effect their remedial purposes. See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982) (rejecting an interpretation of the FHA that "undermines the broad remedial intent of Congress embodied in the Act"). Consistent with this canon, this Court should find that the prohibitions of discrimination in "terms, conditions, and privileges" and "services or facilities" in Sections 3604(b) and (f)(2) plainly apply post-acquisition.

B. HUD Regulations Support Application Of Sections 3604(b) And (f)(2) To Post-Acquisition Discrimination

Valid HUD regulations interpreting Sections 3604(b) and (f)(2) further support the application of these provisions to post-acquisition discrimination. For example, the regulations prohibit "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of" a protected characteristic and "[l]imiting the use of privileges, services or facilities associated with a dwelling" because of a protected characteristic. 24 C.F.R. 100.65(b)(2) and (4). They also prohibit "[r]efusing to provide municipal services or property * * * for dwellings or providing such services * * * differently because of" a protected characteristic. 24 C.F.R. 100.70(d)(4). These regulations prohibit discrimination in connection with the use or occupancy of a dwelling and are not limited to the dwelling's initial

sale or rental. A contrary interpretation would mean, for example, that a condominium association must permit a new African-American owner to use the property's clubhouse on the same terms as white owners immediately at the time of sale, but could prohibit him from doing so on account of his race after he has moved in. It would mean that a landlord could terminate a tenant's water service because the tenant had a Muslim houseguest, as long as the tenant has already resided in the home for some period of time. This court should decline to read the regulatory language to produce such "odd" results. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994).

Thus, even if Sections 3604(b) and (f)(2) were ambiguous, HUD's regulations support interpreting them to apply to post-acquisition conduct. An agency may, through rulemaking, "fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). Under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), a court may not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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." *Id.* at 843.

HUD's regulations must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at

844. Courts have recognized that HUD is the "agency primarily charged with the implementation and administration of the [FHA]" and that its regulations interpreting the statute are therefore entitled to *Chevron* deference. *Meyer* v. *Holley*, 537 U.S. at 287-288; see also *Massaro* v. *Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472, 1480 (11th Cir. 1993), cert. denied, 513 U.S. 808 (1994).

Here, HUD's regulations applying the FHA to post-acquisition discrimination are clearly reasonable because they incorporate a statutory reading that is "consistent with the broader context" and "primary purpose" of the FHA. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). Congress enacted the FHA to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. This purpose could not be achieved if housing providers could avoid liability by merely delaying discriminatory treatment until after a tenant has taken possession of a property.[4] The HUD regulations

[4] Other provisions of the FHA make clear that the Act is, as a whole, intended to apply to post-acquisition discrimination. For example, Section 3605 prohibits discrimination in residential real estate transactions, including loans for "improving, repairing, or maintaining a dwelling." 42 U.S.C. 3605(b)(1)(A). In addition, 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 and enjoyed" any right granted or protected by the FHA. 42 U.S.C. 3617 (emphasis added). Courts have interpreted this section to reach post-acquisition discrimination. See, *e.g.*, *Hidden Vill., LLC* v. *City of Lakewood*, 734 F.3d 519, 528 (6th Cir. 2013) (allowing claims alleging discrimination based on post-acquisition conduct to proceed under Section 3617); *Bloch* v. *Frischholz*, 587

(continued...)

interpreting Sections 3604(b) and (f)(2) are therefore entirely consistent with the FHA's purpose.

Moreover, HUD has consistently taken the position in litigation that Sections 3604(b) and (f)(2) apply to post-acquisition discrimination. For example, in enforcement actions, HUD has sought redress under Section 3604(b) where homeowners' associations have excluded residents from common areas due to familial status. See, *e.g.*, *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 [residents] with children and interfere with their enjoyment and use of the facilities" including pools), aff'd, 8 F.3d 36 (11th Cir. 1993); *HUD* v. *Murphy*, No. 02-89-0202-1, 1990 WL 456962, at *43 (HUDALJ July 13, 1990) (finding a mobile home park operator discriminated based on familial status in violation of 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). HUD has also brought cases based on housing providers' failure to reasonably accommodate the needs of existing residents with disabilities. See, *e.g.*, *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62, 66, 70 (1st Cir. 2010) (affirming administrative law judge's finding that

(...continued)
F.3d 771, 781 (7th Cir. 2009) (en banc); *Neudecker* v. *Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003).

condominium association violated Section 3604(f)(2) by failing to reasonably accommodate existing plaintiffs' need for permanent use of handicapped parking spaces); *Jankowski Lee & Assocs.* v. *HUD*, 91 F.3d 891, 895 (7th Cir. 1996) (same). HUD's position in adjudicating FHA claims is due judicial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); see also *Pfaff* v. *HUD*, 88 F.3d 739, 747 (9th Cir. 1996) ("We 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.").

This Court should defer to HUD's interpretation of Sections 3604(b) and (f)(2) even if it does not "conclude that the agency construction was the only one it permissibly could have adopted." *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 prospective residents and current residents facing similar discrimination. Accordingly, the regulations are not "arbitrary" or "capricious." *Id.* at 844.

C. Courts Have Correctly Interpreted Sections 3604(b) And (f)(2) To Encompass Post-Acquisition Discrimination

While it has yet to rule on whether post-acquisition claims are permitted under Sections 3604(b) and (f)(2), this Court has allowed such claims to proceed. See, *e.g.*, *Hunt* v. *Aimco Props., L.P.*, 814 F.3d at 1224 (allowing post-acquisition claim under Section 3604(f)(2) where plaintiffs alleged that staff of an apartment

complex yelled at a disabled tenant, forced him to do maintenance work around the complex, and barred him from common areas); *Woodard* v. *Fanboy, L.L.C.*, 298 F.3d 1261, 1265 n.4 (11th Cir. 2002) (reversing district court's judgment as a matter of law in favor of defendants on claims of post-acquisition discrimination based on familial status and sexual harassment because plaintiff had "presented sufficient evidence of a violation of the 'terms, conditions, or privileges' language of Section 3604(b)"). In addition, several district courts within this circuit have held that 3604(b) applies post-acquisition discrimination. See *Richards* v. *Bono*, No. 5:04-cv-484-OC-10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) ("To hold that § 3604(b) does not reach post-acquisition discrimination in the rental context would be inconsistent with the spirit of the Fair Housing Act, contrary to the Act's 'broad and inclusive' language, and at odds with a 'generous construction' of its provisions," as well as with HUD regulations, which are entitled to *Chevron* deference and "plainly contemplate[] making post-acquisition discrimination, including sexual harassment, actionable."); *Savanna Club Worship Serv., Inc.* v. *Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1230 (S.D. Fla. 2005) (applying Section 3604(b) to allegations of post-acquisition religious discrimination by a homeowners' association because "part and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community," and because such application

is supported by HUD regulations); *Smith* v. *Zacco*, No. 5:10-cv-360-TJC-JRK, 2011 WL 12450317, at *6-7 (M.D. Fla. Mar. 8, 2011) (holding that Section 3604(b) applied to plaintiffs' post-acquisition claims of discrimination related to their residence in a gated community).

Two circuit courts that have squarely addressed the issue have held that Sections 3604(b) and (f)(2) of the FHA encompass discrimination that occurs post-acquisition. In *Bloch* v. *Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc), the plaintiffs challenged a condominium rule prohibiting the placement of "objects of any sort" outside entrance unit doors as applied to a mezuzah—a Jewish religious symbol. *Id.* at 772-773. After the condominium association repeatedly removed the mezuzah from their doorframe, the plaintiffs sued under various provisions of the FHA, including Section 3604(b). *Id.* at 773-774. In a unanimous en banc decision, the Seventh Circuit held that Section 3604(b) reaches post-acquisition discrimination. The court explained that, in purchasing their condominium, the plaintiffs had agreed to be subject to the rules of the condominium association. The court held that the agreement was a "term or condition of sale" under Section 3604(b) because it gave the condominium association the power to "restrict the buyer's rights in the future." *Id.* at 779-780. The court also explained that its holding was consistent with applicable HUD regulations. *Id.* at 780-781.

In holding that Section 3604(b) reaches post-acquisition discrimination, the en banc court distinguished an earlier panel opinion in *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330-331 (7th Cir. 2004). The *Halprin* panel held that Section 3604(b) did not apply to plaintiffs' post-acquisition claims that the president of a homeowner's association harassed them based on their religion. *Ibid.* The *Bloch* en banc court explained that *Halprin* had involved "isolated acts of discrimination by other private property owners" and not, as in *Bloch*, a "contractual connection" between the plaintiffs and the condominium association. 587 F.3d at 780. Accordingly, the *Bloch* en banc court explained that the holding in *Halprin* meant only that Section 3604(b) "is not broad enough to provide a blanket 'privilege' to be free from all discrimination from *any source*." *Ibid.* (emphasis added). In the case of a rental property, an ongoing "contractual connection" remains throughout the terms of the lease. *Ibid.* Accordingly, as clarified in *Bloch*, *Halprin* has no relevance in the rental context. And its relevance in the post-sale context is limited to situations that do not involve any ongoing relationship affecting the "terms, conditions, or privileges" or the "provision of services or facilities" in connection with a dwelling.

The Ninth Circuit has also concluded that the FHA reaches post-acquisition discrimination. In *City of Modesto*, residents of predominantly Latino unincorporated neighborhoods alleged that the defendants had failed to provide

them with certain municipal services based on race, color, and national origin, in violation of the FHA. 583 F.3d at 711. The court held that a "natural reading" of the text of Section 3604(b) supports its application to post-acquisition discrimination, reasoning that "[t]he inclusion of the word 'privileges' [in Section 3604(b)] implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling." *Id.* at 713. The court correctly pointed out that "[t]here 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." *Ibid.*

The court held that HUD regulations further supported post-acquisition claims. In particular, the court explained that regulations prohibiting "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" and "[l]imiting the use of privileges, services or facilities associated with a dwelling," "appear to embrace claims about problems arising after the tenant or owner has acquired the property." *City of Modesto*, 583 F.3d at 713-714 (discussing 24 C.F.R. 100.65(f)(2) and (4)). The court also explained that reading Section 3604(b) to exclude post-acquisition discrimination would mean that, for example, a landlord could "refuse to provide maintenance to his Hispanic tenants" or "raise the rent of only Jewish tenants." *Id.* at 714 (quoting Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of*

Occupants Under the Fair Housing Act, 43 Harv. C.R.-C.L. L. Rev. 1, 32-33 (2008)).[5]

Other circuits, without directly deciding the issue, have also indicated that post-acquisition claims are permitted under Sections 3604(b) and (f)(2). See, *e.g.*, *Clifton Terrace Assocs., Ltd.* v. *United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (Sections 3604(b) and (f)(2) "address habitability" and "are directed at those who provide housing *and then* discriminate in the provision of attendant services or facilities." (emphasis added)); *Honce*, 1 F.3d at 1088 (concluding that Section 3604(b) prohibits discrimination in "the rental of a dwelling, or in the provision of services in connection with a rental," including sexual harassment of existing tenant); *Castillo Condo. Ass'n*, 821 F.3d 92, 98 (1st Cir. 2016) ("[W]e conclude that substantial evidence supports the Secretary's finding that the Association's failure to provide a reasonable accommodation constituted discrimination * * *

[5] See also *United States* v. *Avatar Props., Inc.*, No. 14-cv-502-LM, 2015 WL 2130540, at *2-3 (D.N.H. May 7, 2015) (adopting the reasoning in *City of Modesto* and holding that Section 3604(f)(2) reaches post-acquisition discrimination); *Guevara* v. *UMH Props., Inc.*, No. 2:11-cv-2339-SHL-tmp, 2014 WL 5488918, at *4-5 (W.D. Tenn. Oct. 29, 2014) (application to post-acquisition discrimination is the "most natural reading" of Section 3604(b) and the one "that best achieves the broad remedial goals of the Fair Housing Act"); *Davis* v. *City of N.Y.*, 902 F. Supp. 2d 405, 436-437 (S.D.N.Y. 2012); *Neals* v. *Mortgage Guar. Ins. Corp.*, No. 10-1291, 2011 WL 1897442, at *3-5 (W.D. Pa. Apr. 6, 2011); *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.").

in the terms and conditions of housing due to his disability, and, thus, violated [Section 3604(f)(2)]."); *Astralis Condo. Ass'n*, 620 F.3d at 66, 70; *Jankowski Lee & Assocs.*, 91 F.3d at 895.

Cox v. *City of Dallas*, 430 F.3d 734 (5th Cir. 2005), cert. denied, 547 U.S. 1130 (2006), appears to be the sole court of appeals decision questioning the applicability of Section 3604(b) to post-acquisition claims. In that case, minority residents sued the city under the FHA for its failure to police illegal dumping at a gravel pit in their neighborhood. The court concluded that "the alleged service here was not 'connected' to the sale or rental of a dwelling, as the statute requires." *Id.* at 747.[6] But the court in *Cox* did not hold that claims alleging post-acquisition

[6] The court in *Cox* suggested that Section 3604(b) may not apply to municipal services at all, see 430 F.3d at 745 n.34, but then acknowledged that "one can still conceivably connect police and fire protection to the 'sale or rental of a dwelling' (especially rental)," *id.* at 745 n.36 (citation omitted). In any case, interpreting the statute to exclude *all* municipal services would be inconsistent with 24 C.F.R. 100.70(d)(4), which prohibits "[r]efusing to provide municipal services * * * for dwellings or providing such services * * * differently because of" a protected characteristic. See also *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (Section 3604(b) applies to "garbage collection and other services of the kind usually provided by municipalities"); *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). Indeed, the district court in this case acknowledged that "[c]ourts have consistently construed [the 'provision of services' language in Section 3604(b)] as referring to services generally provided by local governmental units, such as police or fire protection and garbage collection." Doc. 26, at 28. This acknowledgment makes the court's conclusion that Section 3604(b) does not apply to post-acquisition discrimination even more

(continued...)

discrimination could *never* be actionable under Section 3604(b); on the contrary, it left open the possibility that they could be, as long as the discrimination was connected to the sale or rental of a dwelling. See *id.* at 746-747 (citing *Woods-Drake* v. *Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (sustaining a claim under Section 3604(b) where landlord agreed to lease an apartment to tenants only on the condition that they agree not to entertain black guests and evicted them when they did so)). The court in *Cox* held merely that Section 3604(b) did not encompass the plaintiffs' claims in that case "that the value or 'habitability' of their houses ha[d] decreased" because of the city's failure to police the gravel pit. 430 F.3d at 746.[7]

The district court in this case did not cite *Cox* or any other court of appeals decision for its holding that Section 3604(b) does not apply to post-acquisition discrimination. Instead, it cited three district court cases, all of which were

---

(...continued)
curious, as these services are typically provided only after a resident has taken possession of a dwelling.

[7] The court in *Cox* also suggested, in dicta, that a current owner or renter may be able to make out a valid Section 3604(b) claim only where the discriminatory terms and conditions of which he complains amount to a constructive eviction. 430 F.3d at 746-747 & n.37. Such a reading is untenable, as it would render Section 3604(b) essentially duplicative of another section of the FHA, 42 U.S.C. 3604(a), which forbids discrimination that "make[s] unavailable or den[ies]" housing. This language prohibits both actual and constructive eviction on the basis of a protected characteristic. See, *e.g.*, *Bloch*, 587 F.3d at 776. Accordingly, "[i]f the farthest that § 3604(b)'s terms and conditions provision can extend is to encompass residing in a dwelling, it remains congruent with § 3604(a), and * * * is superfluous." Oliveri, 43 Harv. C.R.-C.L. L. Rev. at 20-21.

decided before the Seventh Circuit's decision in *Bloch* and the Ninth Circuit's decision in *City of Modesto*. See Doc. 26, at 27-28 (citing *Steele* v. *City of Port Wentworth*, No. CV 405-135, 2008 WL 717813, at *12 (S.D. Ga. Mar. 17, 2008); *Lawrence* v. *Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133, 1142 (S.D. Fla. 2004); *Gourlay* v. *Forest Lake Estates Civic Ass'n of Port Richey*, 276 F. Supp. 2d 1222, 1233 (M.D. Fla. 2003), vacated on other grounds, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003)).

These cases are either inapposite because they do not apply to rental situations or wrongly decided, or both. See *Gourlay*, 276 F. Supp. 2d at 1233 n.20 (holding before, and contrary to, *Bloch*, that post-acquisition discrimination claims against homeowners' associations were not actionable under Section 3604(b), but acknowledging that, "[i]n connection with a rental, the plain meaning of Section 3604(b) would likely extend past the initial rental of a dwelling"); *Lawrence*, 318 F. Supp. 2d at 1142-1143 (relying on *Gourlay* for the same); *Steele*, 2008 WL 171813, at *12 (holding, contrary to but without addressing applicable HUD regulations, that "the alleged deprivation of water, sewer, and drainage" was not actionable under the FHA because it did "not affect the availability of housing").

* * * * *

Accordingly, the district court was incorrect to conclude that Sections 3604(b) and (f)(2) of the FHA do not reach discrimination that occurs after the initial sale or rental of a dwelling.[8]

CONCLUSION

If the Court reaches the question addressed herein, the Court should hold that Sections 3604(b) and (f)(2) of the FHA apply to post-acquisition discrimination.

Respectfully submitted,

HELEN R. KANOVSKY
General Counsel
Department of Housing and
Urban Development

VANITA GUPTA
Principal Deputy Assistant
Attorney General

Elizabeth P. Hecker
TOVAH R. CALDERON
ELIZABETH P. HECKER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3734
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5550

[8] This is not to say that the language of Sections 3604(b) and (f)(2) of the FHA extend to every act of discrimination that touches residents. It simply means that the statute is not a purely temporal one bounded by whether discrimination occurs before or after property acquisition. See, *e.g.*, *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210 (rejecting application of Section 3604(b) to "County decisions regarding how to administer properties it holds by tax deeds").

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief contains 6530 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point font and Times New Roman.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Symantec Endpoint Protection (version 12.1.6) and is virus-free.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

Date: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh 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.

I further certify that on September 6, 2016, seven paper copies of the same were sent via Federal Express two-day delivery to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney