No. 06-3376

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LYNNE BLOCH, et al.,

Plaintiffs-Appellants

v.

EDWARD FRISCHHOLZ, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
CASE NO. 1:05-cv-05379
THE HONORABLE JUDGE GEORGE W. LINDBERG

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL AND REMAND ON FAIR HOUSING ACT CLAIMS

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

REGULATIONS:

RULES:

CODES: **PAGE**

LEGISLATIVE HISTORY:

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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, 24 C.F.R. 100.400(c)(2) and 24 C.F.R. 100.65(b)(4) validly apply the FHA.

3. Whether the plaintiffs presented adequate evidence of intentional discrimination to survive summary judgment.

4. Whether the FHA requires reasonable accommodation for religious practices.

STATEMENT OF THE CASE

Shoreline Towers Condominium Association (Association) repeatedly confiscated a mezuzah the Bloch family (plaintiffs) hung on their condominium doorpost in observance of their Jewish faith. The Blochs sued the Association under the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq*., 42 U.S.C. 1982, and state law. The family presented evidence to support their claims that the Association's removal of the mezuzah discriminated on the bases of race and religion. Plaintiffs also stated that banning mezuzot would prevent the Blochs and other observant Jews from living at Shoreline.

The district court granted defendants' motion for summary judgment, holding that the FHA's Section 804(b), 42 U.S.C. 3604(b), did not protect the plaintiffs from discrimination occurring after they purchased their condominiums. The court further held that the Association's rule was religiously neutral and uniformly enforced and that plaintiffs had not shown that its application was intentionally discriminatory.

A divided panel affirmed, and this Court granted rehearing en banc. The Court invited the United States' views as amicus curiae.

STATEMENT OF FACTS

The Bloch family has lived in Shoreline Towers in Chicago for more than 30 years. R. 32 at 2; R. 1-2 at 1.[1] Lynne Bloch and her son Nathan live in three adjacent units; Mrs. Bloch's husband, Marvin, died in June 2005. R. 32 at 2; R. 111-14 at 12; R. 131 at 1; R. 147-4 at 36. The Blochs are observant Jews and, as required by their faith, have kept a small religious symbol called a mezuzah (plural mezuzot) on the doorpost outside their entrance. R. 32 at 3; R. 147-4 at 10. The Blochs have had a mezuzah on their doorpost ever since they moved in. R. 147-4 at 10.

Shoreline Towers is governed by Shoreline Towers Condominium Association's Board of Directors (Board) elected from among the residents. R. 111-4 at 2-3. The Board makes rules, levies assessments, manages building finances, and reviews each sale and lease. R. 111-4 at 2-3; R. 111-3 at 6. With

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[1] "R. _" refers to documents by district court docket number, using the court's pagination. For R. 140, unpaginated, I cite documents by exhibit number. There are duplicative exhibit numbers; unless stated otherwise, my citation is to exhibits in Pls.' Resp. To Defs.' Am. Statement of Facts, contained in R. 140 and initially filed without its exhibits as R. 130.

some exceptions, the Board retains a right of refusal for sales and leases. R. 111-3 at 3, 6, 9.

1. The Association's Enforcement Of Its Hallway Rule

In September 2001, the Board of Directors adopted new rules for the building's hallway areas. Rule 1 provided "[m]ats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors." R. 111-9 at 6. Mrs. Bloch, who has served on the Board for over ten years, chaired the committee that set the rule, and for several years it did not affect Jewish residents' mezuzot. R. 111-11 at 4-6.

Witnesses stated that the Board decided not to enforce Hallway Rule 1, at least for items on doors and doorframes, until planned hallway renovations took place. R. 127 at 3. Board member Paul Chiarelli stated "we had agreed—we being the board—that we were not going to enforce the legislation until we had to begin the remodeling." R. 111-13 at 6; R. 170-2 at 59-61. The Board's president, Edward Frischholz, explained that nothing was removed from doorposts until renovations began, except for a swastika symbol and a "pot plant." R. 170-3 at 31. He said that using the renovations as a "the mechanism" to enforce the new hallway rule would assure that everything would be taken down "all at once," with no one fined. R. 141-3 at 35. Mrs. Bloch's daughter, Helen Bloch, stated that the

Association enforced the rule "as to such things as boots and carts, but never interpreted the rule to apply to religious articles" before 2004. R. 170-2 at 19.

It is unclear whether the Board intended Hallway Rule 1 to apply to mezuzot or other objects attached to doors and doorposts. When asked about the hallway rules and her involvement in drafting them, Mrs. Bloch stated that "[t]here was nothing ever specified about the door or the door frame." R. 170-2 at 5. Fellow Board member Paul Chiarelli stated that "[a]t the time that this rule was passed, I did not think about mezuzahs when I read this rule," and he felt "it was wrong" to prohibit mezuzot. R. 170-2 at 56-57, 62. Janet Treptow, another Board member, said when the rule was passed she did not think it precluded mezuzot. R. 147-3 at 17. Also in 2001, the Board passed a separate rule applicable to doors, which stated that "[s]igns or name plates must not be placed on Unit doors." R. 111-9 at 6.

In May 2004, the Association told residents it would begin painting the doors and asked residents to remove all objects from the doors and doorframes. R. 111-13 at 17. The Blochs removed the mezuzah. R. 32 at 3. Maintenance staff removed remaining items, including Christmas ornaments, mezuzot, and crosses. R. 111-13 at 21.

After the renovations were finished, the plaintiffs put the mezuzah back up.

R. 136 at 4. The Association removed it, relying on Hallway Rule 1. R. 32 at 3-4; R. 136 at 4. At Frischholz's request, the Blochs provided letters from various Jewish organizations explaining the religious significance of the mezuzah. R. 170-2 at 14, 49, 50.

The Blochs and their religious leaders explained to the Association that religious Jews must display a mezuzah on the outside of the door frame. R. 10 at 2; R. 84-2 at 44; R. 32 at 3; R. 11 at 2; R. 141-2 at 31; R. 141-3 at 9; R. 170 at 2. Some Jewish authorities, including a rabbi Frischholz consulted, maintain that the mezuzah may be placed inside the doorframe. R. 147-3 at 35.

Over the course of the next 16 months, the Association repeatedly confiscated the Blochs' mezuzah and threatened to fine them if they replaced it. R. 32 at 3-4; R. 141-2 at 2; R. 170-3 at 2. In 2004, the Board rejected Mrs. Bloch's request to consider a clarification to the hallway rule permitting mezuzot. R. 136 3-4; R. 131 at 3-4; R. 141-3 at 31.

On June 5, 2005, Mrs. Bloch's husband Marvin died. The next day, Frischholz and another Board member visited and, at the family's request, arranged for the Blochs' funeral guests to park in the building for free, loaned the Blochs extra chairs, and provided a coat rack and a table outside the Blochs' entrance where the funeral guests could wash their hands after returning from the

cemetery. R. 170-2 at 16-18.

The family also asked to be able to hang their mezuzah on one of their units during the traditional week-long Jewish mourning period. They allege that Frischholz agreed they could do so. R. 32 at 4; R. 131 at 5. According to fellow Board member Nourene Alper, Frischholz told Helen Bloch that maintenance would inspect the hallway around 10:00 a.m. and that she should put the mezuzah back up after that time. R. 140 Exh. 16 at 1[2]; R.131 at 5. The Blochs replaced their mezuzah on Monday, June 6. R. 109-2 at 18. Tuesday morning, when the family left for the funeral, the mezuzah was still in place.

When the family and guests returned, the mezuzah was gone. Carlos Reyes, a maintenance man at Shoreline, testified he removed the mezuzah around 11:00 a.m. that morning because of the rule. R. 170-3 at 3.[3] He also acknowledged he was told there was a change in policy regarding the mezuzah during the week-long

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[2] This exhibit is contained in Pls.' Statement Of Facts That Show Defs. Are Not Entitled To J. On The Pleadings And Not Entitled To Summ. J., filed as part of R. 140 and initially filed, without exhibits, as R. 131.

[3] There is some indication that Reyes was told not to remove the mezuzah. R. 170-3 at 4-5. If so, his actions may not show that the Association reneged on an agreement to temporarily permit the mezuzah. Defendants, however, deny they made any funeral exception to the hallway rule. R. 141 at 9. Thus, regardless of how one reads Reyes' statements, there is a dispute of fact regarding the Association's actions and motives.

mourning period but indicated he received notice somewhere in the "middle" of that period. R. 170-3 at 5. He did not remove the coat rack in the hallway. R. 170 Exh. 3 at 3.

A funeral guest retrieved the mezuzah from the condominium office. R. 141-2 at 2. The doorman returned the mezuzah because he had been asked to assist the Blochs during the mourning period. R. 141-2 at 2. The Blochs stated the Association later suspended the doorman for two days. R. 141-2 at 2.

Another funeral guest, attorney Howard Dakoff, wrote the Association's attorney on the Blochs' behalf on June 9, 2005. Dakoff stated that the hallway rule was illegal as applied to mezuzot and requested the Association allow mezuzot in order to avoid litigation. R. 170-2 at 52. Dakoff also referred to a previous discussion with the Association's attorney and thanked him for agreeing to allow the mezuzah to remain during the seven-day mourning period. R. 170-2 at 52. Mrs. Bloch's son, Nathan, also stated that Dakoff and the Association's attorney had agreed to keep the mezuzah up for seven days. R. 141-2 at 22. Shortly after Dakoff contacted the Association's attorney, however, the mezuzah was removed again. R. 141-2 at 2. Defendants dispute that the parties ever reached an agreement to allow the mezuzah to remain for the mourning period. R. 178 at 8.

Plaintiffs presented evidence that they had other confrontations with Association agents during the dispute over the mezuzah. Mrs. Bloch said Frischholz told her that if she did not like the Association's rules she should "get out" and called her a "racist." R. 10 at 2, 4; R. 147-6 at 6; R. 32 at 5. She alleged Frischholz encouraged residents to keep her off the Association's Board because she is Jewish, spat in her face, and scheduled Board meetings on Friday nights, which was during Jewish Sabbath observance, so that she could not attend. R. 32 at 5, 8; R. 10 at 4. After the Blochs brought suit, they reported, Frischholz did not allow Mrs. Bloch to attend a scheduled Board meeting. R. 32 at 5.

Another Jewish resident, Debra Gassman, also said she had problems with the Association's agents. When her mezuzah was removed, she believed that she had been the victim of a hate crime. *Bloch* v. *Frischholz*, 533 F.3d 562, 568 (7th Cir. 2008). After a later confrontation with Association agents, Gassman called police. In response, Frischholz called her "a psycho-resident," and the supervising property manager told her that if she knew what was good for her, she would "get out of here right now." R. 111-13 at 12. Gassman ultimately moved from the complex at least in part because the Association removed her mezuzah. *Bloch*, 533 F.3d at 568 (Woods, J., dissenting).

On September 12, 2005, the Board reviewed an amendment to hallway rules, allowing small religious items on doors and doorframes in some circumstances. R. 14 at 11; R. 140 Exh. 8 at 1. The Board voted to distribute the rule to unit owners. R. 140 Exh. 8 at 1.

2. The Proceedings Below

On September 16, 2005, the Blochs sued the Association to enjoin enforcement of Hallway Rule 1 against mezuzot and to recover compensatory damages. They alleged violations of 42 U.S.C. 1982, and of the Fair Housing Act, 42 U.S.C. 3604(a), 3604(b), and 3617. R. 32 at 7-9.

In late September 2005, at the request of the magistrate, the parties drafted a revision to the hallway rule allowing limited religious displays and on October 27, 2005, the Board agreed to accept the new hallway rule. R. 32 at 5-6; R. 130 at 16-17; R. 140 Exh. 25 at 1; R. 140 Exh. 26 at 1. Plaintiffs continued to pursue their case for damages and a permanent injunction to prevent removal of mezuzot.

On June 14, 2006, defendants moved for summary judgment. In response, the plaintiffs stated that they were entitled to relief because the Association had made their unit "unavailable" to them and alleged that, should the Association revert to its earlier rules and refuse to allow a mezuzah, the Blochs would have to move. R. 153 at 3. They explained that "[d]efendants' continued removal or other

interference with plaintiffs' mezuzah was an attempt to force plaintiffs to move from the premises." R. 132 at 4.

Plaintiffs also put forward a disparate impact theory, alleging that "[a]t the very least, the Association was fully aware that a complete ban on all items in the hallways impacted Jewish residents differently." R. 132 at 6-8.

On August 7, 2006, the district court granted the defendants' motion for summary judgment. The court held that Section 3604 of the FHA did not reach discrimination that occurred after an individual bought a unit. R. 186 at 2. The court further held that the plaintiffs could not state a claim under Section 3617 or HUD's regulations because the Blochs had not shown intentional discrimination, as there were no examples of non-Jewish objects allowed to remain during the time when the mezuzah was removed. R. 186 at 3. The hallway rule was "facially neutral," the court explained, and "was enforced equally beginning in 2004." R. 186 at 3. The court stated that between 2001 and 2004, the rule was enforced "unequally," as the Association "did not order mezuzahs to be removed from the hallways, but did order other items removed," and concluded that "[d]iscontinuing special treatment based on religion is not the equivalent of discrimination based on religion." R. 186 at 3. The court rejected the disparate impact claim, stating only that plaintiffs "offer no admissible evidence of the disparate impact they claim."

R. 186 at 3.

While the Blochs' appeal was pending, Chicago and Illinois passed laws and ordinances that would prevent Hallway Rule 1, and most such rules, from affecting mezuzot or similar religious symbols. *Bloch*, 533 F.3d at 564 (citing Chicago, Ill., Mun. Code 5-8-030 (2005); 765 Ill. Comp. Stat. 605/18.4(h) (2007)).

3. The Panel Decision

This Court upheld the district court in a divided decision, holding that the FHA "does not address discrimination after ownership has changed hands." *Bloch*, 533 F.3d at 563. It held that "religiously motivated harassment of owners or tenants does not violate the Fair Housing Act or its regulations." *Ibid*. This Court also held the Association's rule was "neutral with respect to religion," so it was not intentionally discriminatory. *Id*. at 564.

The majority also *sua sponte* construed plaintiffs' claim as a request for a religious accommodation under the Fair Housing Act. *Bloch*, 533 F.3d at 565. This Court held that although the FHA explicitly provided for accommodation of residents with disabilities, it did not require religious accommodation. Judge Wood dissented from the panel decision, stating that the Blochs were entitled to a trial on intentional discrimination and that the Association's behavior "gives rise to a strong inference of anti-Semitic animus." *Id*. at 567 (Wood, J., dissenting).

SUMMARY OF ARGUMENT

The Fair Housing Act may easily be read to bar discrimination because of race or religion occurring after the sale or rental of a dwelling. In particular, Section 3604(b) bars discrimination in the "provision of services or facilities in connection" with the sale or rental of a dwelling, as well as in the "terms, conditions, or privileges" of sale or rental. 42 U.S.C. 3604. "[P]rovision of services or facilities" is fairly read to encompass activities and benefits that are ongoing in nature and extend beyond the moment of sale or rental. Similarly, the "terms, conditions, or privileges" quite 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 on the plain language of the statute, 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 interference in the "enjoyment of a dwelling," even after acquisition is complete.

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 race [or] religion * * * of an owner, tenant or a person associated him or her." 24 C.F.R. 100.65(b)(4). This interpretation is entitled to deference under *Chevron, USA, Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

The district court here relied on this Court's opinion in *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n*, which – although it ultimately allowed plaintiffs' discrimination claims to proceed under HUD's regulations – wrongly suggested that the statute did not reach post-acquisition discrimination short of eviction. 388 F.3d 327 (7th Cir. 2004). Furthermore, the lower court in this case erred in concluding that plaintiffs had not presented evidence supporting their claims of religious discrimination and constructive eviction. Because the Blochs' evidence, if found credible, suggests the defendants exercised anti-Semitic bias, they presented evidence adequate to require a trial on the discrimination claims.

ARGUMENT

While this Court reviews a grant of summary judgment *de novo*, it "must evaluate the factual record in the light most favorable to the nonmovant," and "resolve all inferences in favor of that party." *Johnson* v. *City of Fort Wayne*, 91

F.3d 922, 930 (7th Cir. 1996); see also *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

I

FHA SECTIONS 3604 AND 3617 REACH POST-ACQUISITION DISCRIMINATION

The plain language of Section 804 of the FHA, 42 U.S.C. 3604, reaches post-acquisition discrimination. The Section 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 that it is limited to discrimination in the initial sale or rental transaction.

A. Section 3604(b)

1. Section 3604(b) is properly read to cover post-acquisition discrimination. Section 3604(b) 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). 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 inhabiting "a dwelling," or both. In the government's view, "provision of services or facilities in connection

therewith" is fairly read to encompass activities and benefits that are ongoing in nature, such as use of common areas, maintenance, and rules enforcement. To restrict "provision of services or facilities" to those surrounding the moment of sale or rental would severely and unnecessarily circumscribe the reach of the Act. Interpreting this "service or facilities" language as encompassing post-acquisition discrimination in delivery of services and use of common facilities therefore squares more fully with the text. This inclusive reading by the government is appropriate 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).

At least one court of appeals and other district courts adopted this reading even before HUD's regulations took effect. 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 (4th Cir. 1984) (superceded by regulation on other grounds); *Grieger* v. *Sheets*, 689 F. Supp. 835, 840 (N.D. Ill. 1988) (holding tenant may claim under Section 3604(b) where landlord demands sex in return for "tenancy and services" including repairs); *Concerned Tenants Ass'n of Indian*

Trails Apartments v. *Indian Trails Apartments*, 496 F. Supp. 522, 525 (N.D. Ill. 1980) (holding residents may state a claim under Section 3604(b) where they "have alleged that they are not getting the kinds of services and facilities that were available to tenants when the project was predominantly white") (superceded by statute on other grounds); see also Part II, *infra* (discussing HUD's interpretation); *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'" or religion) (citation omitted).

Similarly, municipalities are covered by the language of Section 3604(b) even though they do not typically rent or sell housing but regularly provide post-acquisition services. This Circuit has stated, in dicta, that Section 3604 reaches beyond sales and rentals to cover "services generally provided by governmental units such as police and fire protection or garbage collection." *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). The Fourth Circuit stated that "such things as garbage collection and other services of the kind usually provided by municipalities" would fall under the FHA. *Mackey*, 724 F.2d at 424; see also *Jersey Heights Neighborhood*

Ass'n v. *Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (holding that "[t]he Fair Housing Act's services provision" provides that municipal services "not be denied on a discriminatory basis"). The D.C. Circuit has also 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 (D.C. Cir. 1991). But see *Cox* v. *City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding a city's alleged refusal to enforce zoning laws and close an illegal dump near homes did not give rise to a Section 3604(b) claim), cert. denied, 547 U.S. 1130 (2006).

Section 3604(b) also protects against discrimination in the "terms, conditions, or privileges of sale or rental" and, for similar reasons, this language is also fairly read to provide post-acquisition protection. The "terms, conditions, or privileges" flowing from a real-estate transaction should be 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."). The term "privileges" is particularly suggestive of the right to enjoy the use of a dwelling and would have little

meaning if limited to simply the act of sale or rental. Indeed, this Court recognized that, as a "semantic matter," Section 3604 might reach beyond sales and rentals to protect against constructive eviction, as the "privileges of sale or rental might conceivably be thought to include the privilege of inhabiting the premises." *Halprin*, 388 F.3d 327, 328-329 (7th Cir. 2004) (internal quotation omitted).

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 landlord or the housing provider. A lease, for example, constitutes an ongoing rental relationship which can be renewed or terminated according to the terms of the lease or the applicable law. And in this case, in purchasing the condominium, the plaintiffs had an ongoing obligation to pay condominium association dues and follow condo association rules as a condition for continuing to enjoy the 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 ownership of the condominium unit. The Blochs' purchase included, as part of its terms, an agreement to bound by the Association's rules and pay fees. R. 111-2 at 10; R. 111-2 at 10; R. 111-3 at 1. Failure to observe the rules and pay assessments could result in fines and forced sale. R. 111-5 at 1-2; R. 111-9 at 6.

Accordingly, the "terms, conditions, or privileges of sale or rental" is reasonably construed to prohibit discrimination in these privileges that are part of ownership or leasehold, including nondiscriminatory enforcement of rules. There is therefore no basis for concluding, as defendants contend, that actionable discrimination "in connection" with the sale or rental of a dwelling can never occur after the initial sale or rental transaction is concluded and the plaintiff moves in. 42 U.S.C. 3604(b). Nondiscriminatory rules enforcement is reasonably a term, condition, or privilege of a condominium purchase, just as the right to inhabit the premises is.

The Association's responsibility for everyday management and monitoring of a housing complex places it in a unique position from which it may "alter the conditions of the housing arrangement" through post-acquisition discrimination against residents. *Honce* v. *Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993). The Board controls interpretation and enforcement of the rules and access to common areas. R. 111-3 at 3-4; R. 111-4 at 3-4. As one court has explained, "condominium associations, like landlords, are responsible for maintaining the common areas and enforcing the regulations of the association for the benefit of the residents." *Reeves* v. *Carrollsburg Condo. Unit Owners Ass'n*, No. 96-2495, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997). Indeed, courts have already recognized

that owners' associations or municipalities operating as exclusive providers of certain housing services to residents are covered by Section 3604(b) even where they do not sell or rent housing. "[P]art 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*. Indeed, 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 1992 WL 406531 (HUDALJ Oct. 15, 1992); see also *Landesman* v. *Keys Condo. Owners Ass'n*, No. 04-2685, 2004 WL 2370638 (N.D. Cal. Oct. 19, 2004) (similar suit).

Judicial interpretations of analogous statutory language support this reading of the "terms, conditions, or privileges" protected under the FHA. Courts have repeatedly turned to Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in employment, for guidance in the application of the FHA, as 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 (2d Cir.), aff'd, 488 U.S. 15 (1988); see also *DiCenso* v. *Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996); *Community Servs.* v. *Wind Gap Mun. Auth*., 421 F.3d 170, 174 n.3 (3d Cir. 2005). As the Sixth Circuit explained, "we generally should evaluate claims under the FHA by analogizing them to comparable claims under Title VII." *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 372 (2007).

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, and privileges are not limited to hiring procedures or even the duration of an employment contract. The "terms, conditions, or privileges" of employment, as "part and parcel of the employment relationship" "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) (overruled in part on other grounds).[4] The Supreme Court in *Hishon* pointed out that these

[4] The same language is also used in other federal employment legislation, where it encompasses such benefits as workplace cafeterias or protection from

"privileges" may even survive the employment relationship. "A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship." *Id*. at 77. The Supreme Court has stated that "terms, conditions, or privileges" are not "limited to 'economic' or 'tangible' discrimination," and reach outside the job contract. *Harris* v. *Forklift Sys.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986)).[5]

2. For the reasons stated above, this Court's previous analysis of Section 3604(b) in *Halprin* is incorrect, as it reads the statute in an unnecessarily restrictive manner. 388 F.3d at 328-330. The *Halprin* court ultimately reinstated

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assignment to "a remote cubicle." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979) (holding "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 (noting that 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").

[5] 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 the statute is not a purely temporal one bounded by whether discrimination comes before or after property acquisition. Actions "too remotely related to * * * housing" do not trigger liability. *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 192 (4th Cir. 1999). In *Jersey Heights*, the court ruled that planned highway construction, even if discriminatorily sited to run through a minority neighborhood, was too remote from housing interests for the FHA to apply. *Ibid.*

plaintiffs' claims, but it suggested that Section 3604 included post-acquisition claims only in certain cases of constructive eviction.

In *Halprin*, homeowners sued their neighborhood owners' association, alleging ethnic and religious discrimination. Plaintiffs charged that the association president had vandalized their home by writing derogatory graffiti on their wall. They alleged that the association both thwarted their attempts to investigate the offense and threatened plaintiffs with forced sale. This Court reasoned in dicta that Section 3604(b) was intended only to protect *access* to housing. "The language indicates concern with activities, such as redlining, that prevent people from acquiring property," this Court explained, although "[a]s a purely semantic matter" the statutory language might protect against constructive eviction because "privileges of sale or rental might conceivably be thought to include the privilege of inhabiting the premises." *Halprin*, 388 F.3d at 328-329 (internal quotations omitted).

This Court acknowledged that this Court and the Supreme Court had permitted some post-acquisition claims but concluded that those cases did not adequately consider the FHA's applicability after sale or rental. *Halprin*, 388 F.3d at 329. This Court also declined to rely on Seventh, Eighth, and Tenth Circuit precedent permitting post-acquisition claims, stating that none of the cases

"contains a *considered* holding on the scope of the Fair Housing Act." *Ibid*. This Court concluded that discrimination, short of constructive eviction, did not interfere with the "privileges" of a sale or rental, and because there was no violation of Section 3604, this Court stated, there could be no action under Section 3617. *Id*. at 330.

B. Section 3617

As explained above, in the government's view, the discussion in *Halprin* misinterprets Section 3604(b)'s statutory language. 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. Accordingly, 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 the tenancy, they have endured "interfere[nce]" with their "enjoyment" of their Section 3604(b) rights, actionable under Section 3617.

Contrary to this Court's observation in *Halprin*, Section 3617 does not require that a defendant also violate Section 3604 (or other listed sections) or

prevent a plaintiff from exercising his right to buy or rent a home. Instead, Section 3617 protects against "interfer[ence]" with Section 3604(b) rights, rather than denial of them.

A number of courts have interpreted Section 3617 in conjunction with Section 3604(b) to reach post-acquisition discrimination. Before *Halprin*, this Court twice held that the FHA reached post-acquisition sexual harassment under Sections 3604(b) and 3617. *Krueger* v. *Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso*, 96 F.3d at 1008; see also *East-Miller* v. *Lake County Highway Dep't*, 421 F.3d 558, 562-563 (7th Cir. 2005) (affirming that a post-acquisition claim under Section 3617 is available where plaintiff faces discrimination "in the exercise or enjoyment of * * * fair housing rights"). In *Honce*, the Tenth Circuit held that Section 3604(b) barred post-acquisition sexual harassment. 1 F.3d at 1088-1090; see also *Shellhammer* v. *Lewallen*, 770 F.2d 167 (6th Cir. 1985) (Table). The Eighth Circuit applied Sections 3604(b) and 3617 to post-acquisition action in *Neudecker* v. *Boisclair Corp*., where apartment managers threatened to evict a tenant who complained of harassment. 351 F.3d 361, 364 (8th Cir. 2003) (per curiam). 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).

Citing language in Title VII which is identical to language found in the FHA, the Supreme Court has recognized that sexual harassment creating a hostile environment constitutes employment discrimination. "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. *Meritor Sav. Bank, FSB*, 477 U.S. at 64 (internal quotations and citation omitted). This Court has appropriately applied the same principles to the FHA, holding 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." *DiCenso*, 96 F.3d at 1007.

C. Section 3604(a)

Section 3604(a) makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a) (emphasis added). The broad language of the statute encompasses post-acquisition action that prevents residents from using their dwelling and includes no restriction to

offences related to sales or rental transactions. This Court and others have stated that Section 3604(a) reaches constructive eviction. "If you burn down someone's house," *Halprin* explained, "you make it 'unavailable' to him." 388 F.3d at 329.[6] "The phrase 'otherwise make unavailable' has been interpreted to reach a wide variety of discriminatory housing practices." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (citation omitted).

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 County of Beaver*, 551 F. Supp. 746, 769 n.7 (W.D. Pa. 1982). What is available, however, belies this Court's statement in *Halprin* that "[t]here is nothing to suggest that Congress was trying to solve [the] future problem" of post-acquisition discrimination. 388 F.3d at 329.

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).

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[6] The panel in Bloch also endorsed this view. *Bloch* v. *Frischholz*, 533 F.3d 562, 564 (7th Cir. 2008) ("*Halprin* allowed that religious discrimination or harassment so severe that it amounts to constructive eviction might be equated to making a dwelling unavailable on religious grounds, and thus violate §804(b).").

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": "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," the broad intent remains, as there is nothing in the revisions that suggests a lessened degree of protection. 42 U.S.C. 3601.[7] 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 (1968)); see also 114 Cong. Rec. 2275-2276, 2279 (1968) (noting that the Congress was "committed to the principle of living together," and sought to promote neighborhoods with interracial "good harmony").

[7] The first three versions of the bill contained this original Declaration of Policy. The changes 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 Act also suggest Congress intended the statutory scheme to reach beyond sales and rentals. Section 3605 of the statute plainly indicates a concern with post-acquisition action; it bars discrimination in "real estate-related actions," including loans for "improving, repairing, or maintaining a dwelling." 42 U.S.C. 3605(b).

The Supreme Court has also held that where a statute is silent or "ambiguous as to whether it includes" certain claims, courts should adopt a reading "more 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. Congress's aim was "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. This Court stated that courts accordingly "have applied the Act broadly within its terms." *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984); see also *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977); *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (1968)); *Otero* v. *N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

In construing a statute, courts should also avoid unreasonable or illogical results. See *United States* v. *X-Citement Video, Inc*., 513 U.S. 64, 69-70 (1994) (stating that 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). Here, if this Court were to reject post-acquisition liability, discrimination would turn on whether a resident had yet completed a sale or rental transaction. If, as was alleged in *Halprin*, an owners' association vandalized property and wrote anti-Semitic graffiti on its walls, potential homebuyers shopping in the neighborhood could sue, claiming the association was attempting to prevent Jews from moving in. They could claim the association "unlawful[ly] * * * coerce[d], intimidate[d], threaten[ed], or interfere[d]" with their right to buy a home. 42 U.S.C. 3617. The victimized family living in the vandalized property, however, would have no claim under the FHA unless they moved out. Similarly in this case, if the Association's treatment of the Blochs amounts to intentional discrimination under the FHA, other Jewish families may claim that the interpretation and enforcement of the hallway rule coerced, intimidated, or interfered with their attempts to rent or buy in the complex, and that the discriminatory interpretation and enforcement of Association rules affects "the provision of services or facilities" for prospective

Jewish condominium residents. 42 U.S.C. 3604(b). Yet, if this Court were to reject post-acquisition liability, the Blochs themselves will not be able to state a claim unless they are first constructively evicted or alleged they were discouraged from buying additional units.

II

VALID HUD REGULATIONS SUPPORT POST-ACQUISITION APPLICATION

Additional support for the FHA's applicability to post-acquisition discrimination is that HUD, authorized by Congress in 1988 to enforce the statute and promulgate interpretive rules, has applied the Act to post-acquisition discrimination. See 42 U.S.C. 3614a, 3535(d); Implementation of the Fair Housing Act, 54 Fed. Reg. 3232 (Jan. 23, 1989). HUD's regulations interpret Section 3617, which protects against "interfere[nce]" with rights covered under Section 3604, to prohibit "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling," 24 C.F.R. 100.400(c)(2), and to 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). By anchoring the prohibitions against discrimination to what occurs in "a dwelling," the regulations

speak directly to post-acquisition events. Thus, even if this Court finds that Section 3604 does not unequivocally reach post-acquisition discrimination, applying *Chevron* deference it should nonetheless defer to HUD's conclusion that it does. *Chevron, USA, Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984).

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. Though the language of the FHA on the "precise question" of post-acquisition liability under Sections 3604 and 3617 is not completely clear, HUD has provided a reasonable interpretation that is entitled to substantial 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*.

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.

To the extent any congressional intent is evident in this case, HUD's interpretation of the FHA in 24 C.F.R. 100.40(c)(2) and 100.65(b)(4) does not

conflict with it. 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)); see also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, Sections 3617 and 3604 do not expressly impose temporal limitations on liability, and Section 3605 suggests that Congress intended the statutory scheme to reach beyond sales and rentals. The FHA's limited legislative history also 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*. 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), permitting HUD to "fill [the] gap." *Morton*, 415 U.S. at 231. As Section 3604 is broad and somewhat "pliable," as this Court has pointed out,

"[c]ourts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules." *American Family Mut. Ins. Co*., 978 F.2d at 300 (citing *Chevron*, 467 U.S. at 837); see also *Trafficante* v. *Metro. Life Ins. Co*., 409 U.S. 205, 210 (1972) (noting that HUD's views have "great weight" in interpreting the FHA).

HUD's regulations are 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"). Sections 3604 and 3617, taken together, can quite easily and logically be read to reach post-acquisition discrimination. Indeed, as stated in Section 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 without published opinion, 770 F.2d 167 (6th Cir. 1985); *Grieger* v. *Sheets*, 689 F. Supp. 835, 837 (N.D. Ill. 1988); *New York* v. *Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988).

If this Court were to conclude that Section 3604 cannot reach post-acquisition discrimination, that holding could well invalidate HUD regulations beyond 24 C.F.R. 100.400(c)(2) and 24 C.F.R. 100.65(b)(4). 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."

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 not "the reading the court 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 strained distinction between residents and prospective residents facing similar discrimination. See Section I.D, *supra*. Accordingly, the regulations are not "arbitrary" or "capricious." *Id*. at 844. 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). Neither the *Halprin* Court, nor the *Bloch* panel, held it invalid. *Bloch* v.

Frischholz, 533 F.3d 562, 571 (7th Cir. 2008). Indeed, the *Halprin* Court ultimately properly deferred to HUD's interpretation and reinstated plaintiffs' claims. 388 F.3d 327, 330.

III
A JURY SHOULD DECIDE WHETHER DEFENDANTS ENGAGED IN DISCRIMINATION

A. The Blochs Are Entitled To A Trial On Religious Discrimination

In this case, the majority held that the hallway rule was "neutral with respect to religion." *Bloch* v. *Frischholz*, 533 F.3d 562, 564 (7th Cir. 2008). However, even where a defendant's action is authorized by a generally applicable and neutral rule, a plaintiff may allege that the rule was interpreted or applied with discriminatory motives. *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 169 (3d Cir. 2002), cert. denied, 539 U.S. 942 (2003) (Mem.).[8] In this case, were the jury to find that the Association's actions were motivated in part by plaintiffs' race or religion, it does not matter that the Association acted under the aegis of neutral Hallway Rule 1. "If the motive is discriminatory," in an FHA claim "it is of no moment that the complained-of conduct would be permissible if

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[8] Although, as a private actor, the Association is not bound by the First Amendment, Constitutional cases can provide guidance as to whether a rule and its enforcement are religiously neutral or whether similar fact patterns support an inference of religious animus. *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 426 (2d Cir. 1995).

taken for nondiscriminatory reasons." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995); see also *United States* v. *Parma*, 661 F.2d 562, 575 (6th Cir. 1981).

Intentional discrimination is gleaned from "the totality of the circumstances, including 'the fact, if it is true, that the [rule] bears more heavily on one [group] than another.'" *LeBlanc-Sternberg*, 67 F.3d at 425 (quoting *Washington* v. *Davis*, 426 U.S. 229, 242, (1976)). The jury should also consider "the 'historical background'" of the allegedly discriminatory decision, statements of decisionmakers, and "the specific sequence of events leading up to the challenged decision." *Ibid*. (internal citation omitted). In this case, although the rule is religiously neutral and apparently enacted without discriminatory intent, a jury could find, as plaintiffs allege, that the defendants' implementations of the hallway rule to prohibit mezuzot was intentionally discriminatory. (And, in reviewing a grant of summary judgment for defendants, this Court must view all the evidence and reasonable inferences in favor of the plaintiffs.)

The rule states that "[m]ats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors," and its applicability to doorframes and mezuzot is unclear. R. 111-9 at 6. A jury should determine whether the Association "selected or reaffirmed a particular course of action at least in part

'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

If the plaintiffs' evidence is found credible, a jury could conclude some Board members believed that the rule was not even meant to reach mezuzot. Mrs. Bloch, who helped draft the rule, stated that "[t]here was nothing ever specified about the door or the door frame." R. 170-2 at 5. At least one non-Jewish Board member believed that applying the rule to mezuzot would violate residents' rights. R. 170-2 at 62. A jury could infer that the Association's decision to apply the rule to doorframes targeted the religious objects. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."); *Arlington Heights* v. *Metropolitan Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

In addition, a jury reasonably could find that the Association intentionally "[t]hreaten[ed], intimidate[d], or interfere[d]" with plaintiffs' enjoyment of their dwelling in enforcing the rule as it did, and that the manner of enforcement was motivated, at least in part, by plaintiffs' religion. The trier of fact must determine,

as Judge Wood explained, whether "the stand-off about Hallway Rule 1 was not *because* of the Blochs' religion, but rather *in spite* of it." *Bloch*, 533 F.3d at 569 (Wood, J., dissenting). As Judge Wood pointed out, some of the evidence provided "a strong inference of anti-Semitic animus." *Id.* at 567 (Wood, J., dissenting).

For example, plaintiffs allege that Frischholz spat at Mrs. Bloch, tried to keep her off the Association's Board of Directors because she is Jewish, and scheduled Board meetings on Friday nights during Jewish Sabbath observance so that Mrs. Bloch could not attend, thus "preclud[ing] Mrs. Bloch from performing her duties on the Board because of her religious beliefs." R. 131 at 6; R. 32 at 5. More troubling, if credible, is evidence that the Association repeatedly removed and confiscated the mezuzah during the mourning period for Marvin Bloch, and did so deliberately to antagonize the Blochs. Plaintiffs presented evidence that Frischholz – and later the Association's attorney – gave them permission to hang the mezuzah for the week-long funeral observance. The Association's staff removed the mezuzah during the funeral service. If a jury believes the Blochs' version of events, the Association misled the Blochs, allowed them to put up the mezuzah, and then enforced the rule in such a way as to maximize its negative

effects on them, and a jury easily could conclude that the Association's actions were motivated by religious animus.

Other evidence could support this view. When the maintenance man came to remove the Bloch's mezuzah, he left the secular items (coat rack, table) in place. Because the Association did not remove these secular items, but removed the much less-intrusive religious symbol, a jury could rely on this evidence to infer that the Association wished to cleanse the hallways of identifiably Jewish items, "singl[ing them] out for discriminatory treatment." *Tenafly*, 309 F.3d at 166 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 538).

Indeed, the Blochs are entitled to a trial of their discrimination claim even under this Court's holding in *Halprin*. There, plaintiffs alleged "a *pattern* of harassment, invidiously motivated, and, because backed by the homeowners' association to which the plaintiffs belong, a matter of the neighbors' ganging up on them." 388 F.3d at 330. As in *Halprin*, the allegations amount to "'threatening, intimidating or interfering' within the meaning of the statute and the regulation." *Ibid.* Plaintiffs allege a pattern of purportedly anti-Semitic abuse that lasted more than a year. Mrs. Bloch said she endured religious insults, abuse, and attempts to hinder her service on the Association's Board, along with confiscation

of the mezuzah. Accordingly, if the Blochs are to be believed, "[w]e are far from a simple quarrel between two neighbors or [an] isolated act of harassment." *Ibid*.

B. The Blochs May Claim Constructive Eviction Under Section 3604(a)

As explained in Section III.A, *supra*, in our view, the Blochs may claim religious discrimination under Section 3604(b). However, should this Court reject this interpretation, the Blochs are still entitled to have a jury decide whether the defendants attempted to make the unit "unavailable" to the Blochs under a constructive eviction theory. 42 U.S.C. 3604(a). See also *LeBlanc-Sternberg*, 67 F.3d at 424; *Clifton Terrace Assocs., Ltd.* v. *United Techs. Corp*., 929 F.2d 714, 719-720 (D.C. Cir. 1991); Section I.C, *supra*.

Here, plaintiffs stated that they were entitled to relief under a constructive eviction theory because if the Association were to revert to its earlier rules regime and refuse to allow a mezuzah, they would have to move. Plaintiffs' religious expert confirmed their belief that a Jew would violate important religious principles by living in an apartment without a mezuzah outside the door.[9]

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[9] The majority questioned whether plaintiffs' religion required them to place a mezuzah on the outer doorpost, suggesting that one inside the door might be sufficient. *Bloch*, 533 F.3d at 564. There does appear to be disagreement on this question among religious leaders. Compare R. 170-2 at 49 and R. 141-2 at 31 with R. 147-3 at 35. However, no one disputes that plaintiffs sincerely believe their faith mandates external placement, and this is sufficient.

Furthermore, Association agents told both Gassman and Mrs. Bloch that they should "get out." R. 10 at 2; R. 147-6 at 6; R. 111-13 at 12. If a jury were to find that the Association acted with discriminatory intent, it could find the interpretation and application of the rule would constructively evict the Blochs.[10]

IV

THE FHA CONTAINS NO RELIGIOUS ACCOMMODATION REQUIREMENT

The panel majority explained that because the Blochs objected to the application of the facially-neutral hallway rule to mezuzot, this suit can be construed as a request for a religious "accommodation" under the Fair Housing Act. *Bloch* v. *Frischholz*, 533 F.3d 562, 565 (7th Cir. 2008). The majority then, correctly in the government's view, decided that the FHA does not require accommodation for religious beliefs, observances, and practices. See *Hack* v. *President & Fellows of Yale College*, 237 F.3d 81, 88 (2d Cir. 2000) ("[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with

[10] Plaintiffs raised a "disparate impact" claim under Section 3604. This Court has long recognized a limited effects test for FHA violations. *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Southend Neighborhood Improvement Ass'n* v. *County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984). The trial court in this case rejected this claim in one sentence, stating that "plaintiffs offer no admissible evidence of the disparate impact they claim," even though the record suggested that prohibiting the placement of mezuzot affects only Jews. R. 186 at 3; see also R. 130 at 14. If this case is remanded, the court should be directed to reconsider this claim.

respect to an individual applicant's religion.") (Pooler and Leval, JJ., concurring), cert. denied, 534 U.S. 888 (2001). There is no provision of the FHA and no applicable regulation requiring a religious accommodation. Indeed, while the FHA explicitly requires reasonable accommodations for disability, 42 U.S.C. 3604(f)(3)(B), it is silent on religious accommodation. Reasonable accommodation of religious beliefs, observances, and practices is required under Title VII, but there, too, it is explicitly spelled out. 42 U.S.C. 2000e(j).[11]

Thus while interference with religious beliefs, observances, or practices can in various ways constitute discrimination in violation of the FHA, see Section III, *supra*, there is no affirmative duty of accommodation of such practices similar to what Congress has created for employment under Title VII.[12]

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[11] Congress added the religious accommodation language to Title VII in response to court rulings declining accommodation. See 118 Cong. Rec. 705-713, 7161 (1972); *Dewey* v. *Reynolds Metals Co*., 402 U.S. 689 (1971) (per curiam), aff'g by an equally divided court, 429 F.2d 324 (6th Cir. 1970).

[12] Because we understand the Court to have requested our views on the FHA (which we enforce), we express no opinion as to the merits of plaintiffs' 42 U.S.C. 1982 claim.

CONCLUSION

For the forgoing reasons, this court should reverse the decision of the district court and remand for further proceedings.

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 10,000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ April J. Anderson
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Date: January 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL AND REMAND ON FAIR HOUSING ACT CLAIMS were served by first class mail, postage prepaid, upon the following:

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