IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| JACOB GEORGE, *et al.*, | ) | |
| | ) | No. 1:05-cv-05899 |
| Plaintiffs | ) | |
| | ) | Honorable Judge: Harry D. Leinenweber |
| v. | ) | |
| | ) | Magistrate Judge: Michael T. Mason |
| COLONY LAKES PROPERTY OWNERS ASSOCIATION, an Illinois Not-for-Profit Corporation, | ) | |
| | ) | |
| Defendant | ) | |

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANT'S 12(b)(6) MOTION TO DISMISS

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## INTEREST OF THE UNITED STATES

In their motion to dismiss defendant raises the question whether a HUD regulation, 24 C.F.R. 100.400(c)(2), permissibly interprets Section 3617 of the Fair Housing Act to cover discrimination that occurs after a dwelling has been acquired. The United States, in particular the United States Department of Justice and the Department of Housing and Urban Development, has responsibility for enforcing the Fair Housing Act. See 42 U.S.C. 3610, 3612, and 3614. Accordingly, the United States has a substantial interest in the proper resolution of this issue.

## STATEMENT OF THE ISSUE

The brief for the United States will address:

Whether a HUD regulation, 24 C.F.R. 100.400(c)(2), permissibly interprets Section 3617 of the Fair Housing Act to cover discrimination that occurs post-acquisition of a dwelling.

## STATEMENT OF FACTS

*1. Plaintiffs' Statement Of Facts*

Plaintiffs allege the following facts, which must be accepted as true for purposes of the Court's consideration of Defendant's Rule 12(b)(6) Motion To Dismiss:[1]

The Colony Lakes subdivision consists of a large number of single family unconnected homes and a comparatively small number of duplex connected homes. The residents of single family, unconnected homes are overwhelmingly white. During the year 2003, plaintiffs Karla Woodward, Kecia Barnes-Glass, and Vivian Mosby, who are tenants in three individual townhouse units in duplex residences owned by plaintiffs Rekha George and Jacob George (Georges), signed leases extending the term of their leases for five years to the year 2008. Plaintiffs' Complaint (Complaint) at ¶ 46. The three duplex townhouses in the Colony Lakes subdivision were purchased by the Georges to rent to such tenants.

All of the Georges' tenants have been and are single African American female heads of households with black children, with the exception of plaintiff Woodward who is Puerto Rican/Latina with black children. Plaintiffs Barnes-Glass and her children suffer from numerous disabilities including ovarian and uterine cancers, sciatic nerve damage, leucopenia (chronic low white blood cell count), and various learning disabilities.

In November 2003, after all of the leases were signed, Colony Lakes Property Owner's Association (Association or defendant) discussed amending the bylaws to prevent the rental of

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[1] Plaintiffs' Statement of Facts closely tracks the statement of facts in Plaintiffs' Response To Defendant's 12(b)(6) Motion To Dismiss Plaintiffs' Complaint. The United States takes no position on the veracity of these claims.

such homes after the leases expired in 2008. The Association sent ballots to homeowners to vote on such action labeled an amendment. The Georges, unable to go to the meeting to drop off their vote, asked Ms. Barnes-Glass to drop it off for them. When Ms. Barnes-Glass went to the meeting, she was the only African American in the room and was the only person questioned about whether she was a homeowner or a renter. She was treated in a very rude manner even after explaining that she was dropping off her landlord's ballot. The ballot was opened, examined, and then tossed aside and not counted in the vote. The amendment passed. Complaint ¶¶ 58-70.

In 2004, defendant introduced and passed another alleged amendment to the bylaws. This amendment prohibited the rental of any unit after October 4, 2005, regardless of leases signed by homeowners and their tenants. Complaint ¶¶ 79-81. The action as alleged in the Complaint was intended to remove and would have the effect of removing all of the African Americans from the townhouses. Plaintiff George asked the president of the Board why the bylaws were amended a second time. The president stated that the "quality of life was going down in the subdivision" — a statement relating to perceived problems with too many African Americans in the area. Complaint ¶ 83.

Other statements made by Caucasian homeowners showed racial animus, such as, "Those people need to go back to where they came from if they are going to act like that." Complaint ¶ 99. Chris Crane, who was a member of defendant's board, made false complaints about plaintiff Woodward and previous tenants who were all African American or had African American children. Complaint ¶¶ 55-57. Plaintiff Barnes-Glass wrote a letter to defendant requesting reasonable accommodations so that she could schedule surgeries for her cancers. Defendant did

not respond to the letter and therefore refused and denied her reasonable accommodations. Complaint ¶¶ 103-104.

*2. Defendant's Motion*

On February 3, 2006, Colony Lakes Property Owners Association filed a Rule 12(b)(6) Motion To Dismiss. Fed. R. Civ. P. 12(b)(6). Defendant argues that plaintiffs have failed to plead a claim for discrimination under 42 U.S.C. 3604, 42 U.S.C. 3617, 42 U.S.C. 1981, and 42 U.S.C. 1982. Of particular interest to the United States, defendant argues that Section 3617 can be violated only when Section 3603, 3604, 3605, or 3606 has also been violated, and urges this Court to declare 24 C.F.R. 100.400(c)(2) invalid. DM 9-12.[2]

## ARGUMENT

## I

## STANDARD OF REVIEW

When deciding a Rule 12(b)(6) Motion, the Court must "accept all well-pleaded facts as true, and * * * draw all reasonable inferences in [plaintiffs'] favor." *Pugel* v. *Board of Tr. of Univ. of Ill.*, 378 F.3d 659, 662 (7th Cir. 2004). The Court should grant the motion only if "the plaintiff[s] can prove no set of facts in support of [their] claim that would entitle [them] to relief." *Ibid.*

## II

## 24 C.F.R. 100.400(c)(2) PERMISSIBLY INTERPRETS 42 U.S.C. 3617 TO REACH POST-ACQUISITION DISCRIMINATION

[2] This brief uses the abbreviation "DM" for Defendant's Memorandum In Support Of Its Rule 12(b)(6) Motion To Dismiss Plaintiff's Complaint.

Section 3617 of the Fair Housing Act 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, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

In 24 C.F.R. 100.400(c)(2), ("Regulation 100.400(c)(2)"), HUD interprets Section 3617 to prohibit "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons." The parties agree that this regulation applies to discrimination against persons on one of these prohibited bases that occurs after such persons acquire a dwelling. See DM 10. However, defendant argues, relying on dicta in *Halprin* v. *The Praire Single Family Homes of Dearborn Park Association*, 388 F.3d 327 (7th Cir. 2004), that the regulation is invalid because Section 3617 cannot be interpreted to apply to post-acquisition discrimination. DM 10-11.

Defendant's argument is unavailing. As did *United States* v. *Altmayer*, 368 F. Supp. 2d 862 (N.D. Ill. 2005), this Court should recognize *Halprin*'s discussion regarding the reach of Section 3617 as dicta. By its plain language, Section 3617 applies to post-acquisition discrimination, and this reading is supported by the legislative history of the Fair Housing Act and cases interpreting Section 3617. Additionally, acceptance of defendant's argument would violate principles of statutory construction by rendering Section 3617 superfluous. And, moreover, the regulation is a permissible construction of Section 3617 under the principles of *Chevron* v. *Natural Resources Defense Counsel*, 467 U.S. 837, 842 (1984).

*A.* Halprin *Does Not Support Defendant's Position*

The court in *Halprin* did not reach the question of the scope Section 3617 or the validity of Regulation 100.400(c)(2). In *Halprin*, the court held that Section 3604 of the Fair Housing Act did not reach religiously motivated vandalism and other harassment of Jewish homeowners by the neighborhood homeowners association.[3] 388 F.3d at 328-330. The court reinstated the plaintiffs' Section 3617 claim because of Regulation 100.400(c)(2), which, as noted previously, interprets Section 3617 as covering post-acquisition discrimination. *Id.* at 330-331; 24 C.F.R. 100.400(c)(2). Though it reinstated plaintiffs' Section 3617 claim, the court suggested that Section 3617 should be interpreted narrowly and, as a result, questioned whether Regulation 100.400(c)(2) was valid. *Id.* at 330. The court declined to consider that question, however, as the defendants in the case had not challenged the validity of the regulation and as a result had waived that argument. *Ibid.*

The result in *Halprin* makes clear that the court's doubts about both the scope of Section 3617 and the validity of Regulation 100.400(c)(2) were dicta. The court allowed the plaintiffs' Section 3617 claim to go forward by requiring the district court to reinstate that claim. *Halprin*, 388 F.3d at 330-331. Clearly, if the court had ruled either that Section 3617 does not reach post-acquisition discrimination or that the regulation was invalid, it would not have required the district court to reinstate the plaintiffs' Section 3617 claim. The result also indicates that the

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[3] Section 3604 prohibits discrimination in "the provision of services or facilities in connection" with a dwelling. Accordingly, it expressly applies to obligations that generally continue to apply after a dwelling has been acquired. For this reason and others, we believe that Section 3604 applies to post-acquisition discrimination. We concede, however, that in *Halprin* the court of appeals held that "section 3604 is not addressed to post-acquisition discrimination." 388 F.3d at 330. While we disagree with that conclusion, we recognize that this Court is bound by it.

court reached no definitive conclusion about the reach of Section 3617. If the court had reached a definitive conclusion that Section 3617 cannot be interpreted as reaching post-acquisition discrimination, it would have been obligated to uphold the dismissal of plaintiffs' Section 3617 claim irrespective of defendant's failure to challenge the validity of the regulation. Indeed, the court could have based dismissal of the Section 3617 claim on its reading of that section without expressly addressing the regulation. Instead, the court allowed the Section 3617 claim to proceed.

In *United States* v. *Altmayer*, 368 F. Supp. 2d 862 (N.D. Ill. 2005), the court specifically considered whether, in light of *Halprin*, a complaint alleging post-acquisition discrimination on the basis of religion by a next-door neighbor should be dismissed as failing to state a claim. See also Complaint (No. 05-cv-1239). The court relied on Regulation 100.400(c)(2) and allowed the claim to go forward. 368 F. Supp. 2d at 863. In *Altmayer*, the court noted that *Halprin* had "raised a question as to the validity of 24 C.F.R. § 100.400(c)(2)," but also recognized that the court of appeals did not hold in *Halprin* that the regulation was invalid and allowed the claim under Section 3617 to proceed. *Id.* at 862-863. In *Altmayer*, the court indicated that Section 3617 "by its terms" supports the interpretation given it by the regulation. *Id.* at 863. Further, the court determined that allowing the claim to go forward would permit the court of appeals to "ultimately address the matter [of the validity of the regulation] on a fully-fleshed-out record." *Ibid.* The court determined that "unless and until" the court of appeals holds Regulation 100.400(c)(2) invalid, "this Court will apply the Regulation as written." *Ibid*[4]; *C. F. Gonzalez* v.

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[4] *Altmayer* was settled on December 19, 2005, Notification of Docket Entry (No. 05-cv-

(continued...)

*Lee County Hous. Auth.*, 161 F.3d 1290, 1304-1305 (11th Cir. 1998) (applying 24 C.F.R. 100.400(c)(3) as written).

In *Halprin*, the court did not have the opportunity to consider the validity of Regulation 100.400(c)(2) or the arguments in favor of its validity presented herein. As did *Altmayer*, this Court should apply the regulation as written and allow the claim to proceed.

*B. Section 3617 Reaches Post-Acquisition Conduct*

*1. The Statutory Language And Legislative History Of Section 3617 Make Clear That It Reaches Discrimination That Occurs Post-Acquisition Of A Dwelling*

Moreover, as the court suggested in *Altmayer*, 368 F. Supp. 2d at 863, the language of Section 3617 supports the interpretation accorded to it by Regulation 100.400(c)(2). Under its plain language, Section 3617 applies to post-acquisition discrimination. Section 3617 makes it unlawful, in relevant part, "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 Section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. 3617 (emphasis added). Defendant's assertion that Section 3617 does not apply to post-acquisition discrimination fails to account for Section 3617's prohibition against coercion, intimidation, threats, or interference with a person "on account of his having exercised or enjoyed" the rights conferred by the enumerated sections. In order for a person to be coerced, intimidated, threatened, or interfered with "on account of his having exercised or enjoyed" the right to purchase or rent a dwelling on equal terms, conferred by Section 3604, the person must

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[4](...continued)
1239), and the case was closed on January 18, 2006, Docket Entry (No. 05-cv-1239). Therefore, the case was not appealed.

necessarily have already "exercised or enjoyed" a Section 3604 right. By its terms, therefore, Section 3617 reaches post-acquisition discrimination.

Further, the legislative history and text of the Fair Housing Act also supports Section 3617's application to post-acquisition discrimination. Contrary to *Halprin*'s narrow characterization of the legislative history of the Fair Housing Act, 388 F.3d at 329, the history and text of the Act indicate an intent to provide broad protection against all forms of housing discrimination, not only discrimination in access to housing. The Act itself defines its intent broadly "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. The Supreme Court has explained that the language of the Fair Housing Act "is broad and inclusive" and that its intent is to replace ghettos with "truly integrated and balanced living patterns." *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211 (1972) (quoting 114 Cong. Rec. 2706 (1968)). Further, as pointed out by *United States* v. *Koch*, 352 F. Supp. 2d 970, 977 (D. Neb. 2004), at least one section of the Fair Housing Act, other than Sections 3617 and 3604, expressly reaches post-acquisition discrimination. Section 3605 bars discrimination in "real estate-related transactions," including "the making of loans * * * for * * * improving, repairing, or maintaining a dwelling."

### 2. *Courts Have Consistently Applied Section 3617 To Post-Acquisition Discrimination*

Courts considering this issue have consistently held that Section 3617 applies to post-acquisition discrimination.[5] For instance, in this District, *Stackhouse* v. *DeSitter*, 620 F. Supp.

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[5] We are not aware of any case which holds that Section 3617 does not apply to post-acquisition conduct or which holds the HUD regulation invalid. In *Reule* v. *Sherwood Valley I*

(continued...)

208 (N.D. Ill. 1985) held that Section 3617 applies to post-acquisition discrimination. The court first explicitly held "that § 3617 may be violated absent a violation of § 3603, 3604, 3605, or 3606." 620 F. Supp. at 210. The court clarified the prohibitions of the statute by stating that Section 3617 "makes it 'unlawful to coerce, intimidate, threaten, or interfere with any person' in three distinct circumstances: (1) in the exercise or enjoyment of any right protected by §§ 3603-3606; (2) on account of the person's having exercised or enjoyed such a right; and (3) on account of his having aided or encouraged any other person in the exercise or enjoyment of such a right." *Id.* at 210-211. The court then explained that "[i]n the second and third circumstances * * * the coercive or threatening conduct which violates § 3617 occurs *after* the enumerated rights have been exercised, and these rights might not be violated themselves." *Id.* at 211. The court further explained that "the second phrase prohibits coercive acts taken against persons who already have exercised their rights to fair housing." *Ibid.* Therefore, it was possible for the white defendant who had allegedly firebombed the black plaintiff's car in order to scare him out of an all-white neighborhood to be liable under Section 3617 because the firebombing was done "on account of" the plaintiff's "having exercised or enjoyed" his Section 3604 right to obtain and reside in a dwelling in that neighborhood. *Ibid.*

This reasoning has led other decisions in this District to hold that Section 3617 reaches post-acquisition conduct. See, *e.g.*, *Johnson* v. *Smith*, 810 F. Supp. 235, 238-239 (N.D. Ill. 1992)

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[5](...continued)
*Council of Co-Owners, Inc.*, No. Civ. A. H-05-3197, 2005 WL 2669480 (S.D. Tex. Oct. 19, 2005), the court, relying on *Halprin*, opined in a footnote that the regulation was invalid but rested its decision on the fact that "[d]efendants' conduct as alleged by Plaintiff does not rise to the level of coercion, intimidation, threats or interference necessary to state a claim under § 3617." *Id.* at *4.

(determining that cross-burning is actionable under Section 3617 and characterizing earlier decisions as holding "that even though a defendant has not interfered with a plaintiff's *initial* exercise of his or her right to rent or purchase housing free of racial discrimination, the defendant's later effort to drive the plaintiff out of such housing will nonetheless run afoul of the statute"); *Stirgus* v. *Benoit*, 720 F. Supp. 119, 123 (N.D. Ill. 1989) (citing *Stackhouse* for the proposition that "section 3617 may still be violated absent a violation of section 3604 or any of the other sections enumerated in section 3617" and determining that "[w]hether or not the firebombing of Stirgus' house violated any other section of the Fair Housing Act, this brutal act falls squarely within the parameters of section 3617"); *Seaphus* v. *Lilly*, 691 F. Supp. 127, 139 (N.D. Ill. 1988) (analogizing to *Stackhouse* and determining that post-acquisition acts of vandalism allegedly motivated by race were actionable under Section 3617).

Indeed, the Seventh Circuit seems to support *Stackhouse*'s reading of the statute in *Krueger* v. *Cuomo*, 115 F.3d 487 (7th Cir. 1997), which upheld an ALJ's determination that post-acquisition sexual harassment by a landlord was actionable under Section 3617. See also *East-Miller* v. *Lake County Highway Dept.*, 421 F.3d 558, 563 (7th Cir. 2005) (determining that a plaintiff alleging discriminatory mailbox vandalism had met her burden of showing that she was engaged in the exercise of her fair housing rights for purposes of Section 3617, but affirming the district court's grant of summary judgment because plaintiff failed to prove discriminatory intent); *ibid.* (implying that cross burning can be actionable under 3617).

Many courts in other circuits similarly have allowed claims under Section 3617 for post-acquisition discrimination to proceed. See, *e.g.*, *Neudecker* v. *Boisclair Corp.*, 351 F.3d 361, 363-364 (8th Cir. 2003) (concluding that a plaintiff asserting harassment by the children of his

landlord's management team motivated by the tenant's mental disability stated a claim under Section 3617); *Harris* v. *Itzhaki*, 183 F.3d 1043 (9th Cir. 1999) (tenant's discriminatory eviction claim against landlord established a prima facie case of discrimination under 42 U.S.C. § 3617); *Koch*, 352 F. Supp. 2d at 978-979 ("I conclude that the plain language of section 3617 should be read to prohibit unlawful discriminatory conduct after a person has taken possession of a dwelling."); *Ohana* v. *180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 242 (E.D.N.Y. 1998) (discussing *Stackhouse* and allowing a claim of post-acquisition discrimination consisting of "racial and anti-Jewish slurs and epithets, threats of bodily harm, and noise disturbances" to proceed under Section 3617).

In *Walton* v. *Claybridge Homeowners Association, Inc.*, No. 1:03-CV-69-LJM-WTL, 2004 WL 192106, at *4 (S.D. Ind. Jan. 22, 2004), the court explained the reasoning of *Stackhouse* and its holding that "that § 3617 may be violated absent a violation of § 3603, 3604, 3605, or 3606." The court also noted that "[m]ost courts have followed Judge Aspen's lead" and cited, *inter alia*, *Michigan Protection & Advocacy Service* v. *Babin*, 799 F. Supp. 695 (E.D. Mich. 1992), aff'd, 18 F.3d 337 (6th Cir. 1994); *Bryant* v. *Polston*, No. IP 00-1064-C-T/G, 2000 WL 1670938 (S.D. Ind. Nov. 2, 2000); *Cass* v. *American Props., Inc.*, No. 94 C 2977, 1995 WL 132166 (N.D. Ill. Feb. 27, 1995); *Waheed* v. *Kalafut*, No. 86 C 6674, 1988 WL 9092 (N.D. Ill. Feb. 2, 1988). *Ibid.* The court in *Walton* then described *Stackhouse*'s interpretation of Section 3617 as "well-settled" and concluded that it was supported by the plain text of the statute. *Id.* at *5.

A determination that Section 3617 applies to post-acquisition discrimination is, therefore, supported by the language of the statute specifically as well as the Fair Housing Act as a whole,

the legislative history, and the holdings of courts considering this issue.

### *3. Section 3617 Should Not Be Interpreted In A Way That Would Render It Superfluous*

Relying on *Halprin*'s dicta, defendant premises its argument that Section 3617 does not apply to post-acquisition discrimination on the conclusion that Section 3617 is only violated when one of its enumerated sections is also violated. DM 9-12; see also *Halprin*, 388 F.3d at 330 (opining that Section 3617 "provides legal protection only against acts that interfere with one or more of the other sections of the Act that are referred to"). In addition to ignoring the plain meaning of Section 3617, such an interpretation renders Section 3617 superfluous.

It is a basic principle of statutory construction that statutory language should not be interpreted in a way that renders it superfluous. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879)). If Section 3617 can only be violated when one of the enumerated sections is violated, Section 3617 has no independent function and is therefore superfluous to the enumerated sections. By making it illegal "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," Section 3604 already prohibits conduct that would interfere on the basis of a protected category with the right to buy or rent a dwelling or the provision of services in connection with the dwelling. It is hard to see what additional right Section 3617 would grant if it did not apply in some cases which are not also covered by Section 3603, 3604, 3605, or 3606. *Koch*, 352 F.

Supp. 2d at 978 (stating that making Section 3617 completely dependant on a violation of one of the enumerated sections "renders § 3617 a redundant section"); *Stackhouse*, 620 F. Supp. at 210 ("reading § 3617 as dependent on a violation of the enumerated sections would render § 3617 superfluous"); *Laufman* v. *Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 498 (D. Ohio 1976) (determining that requiring a violation of one of the enumerated sections in order to find a violation of Section 3617 "would render [Section] 3617 a mere redundancy — in violation of another salutary rule of statutory construction that whenever possible, each provision of a legislative enactment is to be interpreted as meaningful and not as surplusage").

*C. Under* Chevron*, The Regulation Would Be Valid Even If Section 3617's Application To Post-Acquisition Conduct Were Not Clear On Its Face*

In *Chevron*, 467 U.S. at 842, the Supreme Court established a framework that must be followed where, as here, a court "reviews an agency's construction of the statute which it administers." The first question to be answered is "whether Congress has directly spoken to the precise question at issue." *Ibid.* The question at issue here is whether Section 3617 can cover post-acquisition discrimination. By including in the statute a prohibition against coercion, intimidation, threats, or interference with a person "on account of his having exercised or enjoyed" a right granted by one of the enumerated sections, Congress directly and explicitly included a right to be free from post-acquisition discrimination in the text of Section 3617. Under *Chevron*, because "the intent of Congress is clear, that is the end of the matter." *Ibid.*

Regulation 100.400(c)(2) merely gives specificity to a protection the plain text of Section 3617 already grants. The regulation protects persons and their visitors and associates from threats, intimidation, or interference with "their enjoyment of a dwelling because of race, color,

religion, sex, handicap, familial status, or national origin." 24 C.F.R. 100.400(c)(2). This gives specificity to the right already granted by Section 3617 to be free from coercion, intimidation, threats, or interference "on account of * * * having exercised or enjoyed" the Section 3604 right to obtain a dwelling free from discrimination. Discriminatory interference with "enjoyment of a dwelling" necessarily occurs "on account of" a persons having first obtained the dwelling and is, therefore, already included within the protection granted by Section 3617.

If the Court determines that the text of Section 3617 does not clearly provide a right against post-acquisition discrimination, it should reach the second question in the *Chevron* framework: "whether the agency's answer [to the question at issue concerning interpretation of the statute] is based on a permissible construction of the statute." 467 U.S. at 843. In answering this question the court should be mindful "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. To the extent that there is any uncertainty or ambiguity about the question of whether Section 3617 grants protection against post-acquisition discrimination, the court should conclude that Regulation 100.400(c)(2) is a permissible construction of the statute in view of the deference to HUD mandated by *Chevron*. As explained above, a conclusion that Section 3617 clearly precludes actions for post-acquisition discrimination would be contrary to the plain language of the statute and the holdings of those courts that have considered the issue.

Other courts ruling on the validity of 24 C.F.R 100.400(c)(2) have found it valid under the principles of *Chevron*. In *Koch*, the court found:

> After carefully considering the Fair Housing Act, its stated purpose, and its legislative history, I find that 24 C.F.R. § 100.400(c)(2) is a reasonable interpretation of section 3617. I see no indication that it is contrary to Congress's

> intent in enacting the Fair Housing Act. Therefore, I conclude that the regulation is not invalid, and that it provides a vehicle for the aggrieved persons' 'post-residence acquisition' claims to proceed under section 3617.

352 F. Supp. 2d at 980; see also *Bryant*, 2000 WL 1670938 at *4 (concluding that the regulation is "a reasonable construction of [section 3617]" and that the regulation is therefore "entitled to deference" under *Chevron*); *Ohana*, 996 F. Supp. at 242 ("Since the reach of § 3617 is not free from doubt, [HUD's] interpretation, which is a plausible construction of the statute and is compatible with Congress' expressed broad purpose in enacting the FHA, is entitled to deference."). This Court should reach the same conclusion.

**CONCLUSION**

The Motion To Dismiss should be denied.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

JOAN LASER
Assistant U.S. Attorney
Northern District of Illinois
Chicago, IL
Tel: (312) 353-1857

WAN J. KIM
Assistant Attorney General

__________________________
DAVID K. FLYNN
NATHANIEL S. POLLOCK
Attorneys
Civil Rights Division
Department of Justice
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0333

## CERTIFICATE OF SERVICE

I certify that two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S 12(b)(6) MOTION TO DISMISS were sent by overnight mail, postage prepaid, on April 14, 2006, to the following counsel:

F. Willis Caruso, Esq.
John Marshall Fair Housing Clinic
28 East Jackson Boulevard
Suite 500
Chicago, IL 60604
(312) 786-2267

Lewis W. Powell, III, Esq.
John Marshall Fair Housing Clinic
28 East Jackson Boulevard
Suite 500
Chicago, IL 60604
(312) 786-2267

Douglas John Sury, Esq.
Keay & Costello, P.C.
128 South County Farm Road
Suite 200
Wheaton, IL 60187
(708) 690-6446

_________________________
NATHANIEL S. POLLOCK
Attorney