15-1823

In The
United States Court of Appeals
For The Second Circuit

DONAHUE FRANCIS,

Plaintiff – Appellant,

v.

KINGS PARK MANOR, INC.;
CORRINE DOWNING,

Defendants – Appellees,

RAYMOND ENDRES,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
CASE NO. 14-cv-3555,
HON. ARTHUR D. SPATT, DISTRICT JUDGE, PRESIDING.

BRIEF OF *AMICUS CURIAE* NEW CIVIL LIBERTIES ALLIANCE ON BEHALF OF NEITHER PARTY ON REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the New Civil Liberties Alliance states that it is a nonprofit organization incorporated under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms from unlawful administrative power.[1] NCLA challenges constitutional defects in the modern administrative state by initiating original litigation, defending Americans from administrative actions, filing *amicus curiae* briefs, and with other advocacy. NCLA views the administrative state as an especially serious threat to civil liberties, because agencies too often refuse to play by the rules—and courts too often let them. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

The judicial practice of extending "deference" to administrative agencies' legal interpretations is particularly disturbing. Constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to another's views on how to interpret federal laws.

Defendants-Appellees have provided numerous legal and policy reasons why federal statutes ought not be construed to extend and expand liability to housing providers as urged by the plaintiff-appellant. (Dkt. 71 pp. 45-58). *Amicus* will not

[1] No party opposes the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

reiterate those arguments. NCLA notes that injecting expansive new liability into the housing market by reinterpreting settled federal law evades bicameralism and presentment and undercuts the predictability necessary for any legal system to function. When courts permit agencies to disrupt settled expectations under the guise of mere "interpretive" rules, an essential safeguard of our representative system of government vanishes. Retroactive application of HUD's new rule, which departs from settled case law, further creates unfair surprise for stakeholders relying on existing law and thereby violates their civil liberties. *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 142, 144 (2012).

This case invites retroactive application of a rule that calls itself "interpretive" but is plainly legislative in form and effect. Housing providers, landlords and tenants in this circuit affected by this seismic broadening of liability have been denied representative participation in the making of the law applied to them. A federal court's bold expansion of the New York state housing discrimination laws also raises glaring questions of federalism. Legislators, unlike bureaucrats or judges, would be accountable for exposing providers or recipients of housing to hostile-environment lawsuits that have sweeping effects on the management and availability of public and private housing, and legal duties imposed on landlords and their tenants.

The full court acknowledged the importance of this case by granting en banc review. When it rehears this case, the court must "faithfully and impartially

discharge" its fundamental duty "to say what the law is," respect the rule of lenity, and apply the statutes (and precedents construing them) without deference to anyone, and without bias for or against any party.

STATEMENT OF THE CASE

At issue is whether to recognize a cause of action against a landlord for tenant-on-tenant discrimination for a "racially hostile housing environment" under the Civil Rights Act of 1866, which provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens. 42 U.S.C. § 1981

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. 42 U.S.C. § 1982

And whether to recognize such a cause of action under §§ 3604(b) and 3617[2] of the Fair Housing Act of 1968 (FHA), which provides in pertinent part:

> it shall be unlawful … to discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race. 42 U.S.C. § 3604(b).

> [it is] 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

[2] These FHA sections provide for both civil *and criminal* penalties, *see* 42 U.S.C. § 3631.

> any other person in the exercise or enjoyment of, any right granted or protected by section … 3604.
> 42 U.S.C. § 3617.[3]

Factual Background

Plaintiff-appellant Donohue Francis (Francis), who is African-American, leased an apartment from Kings Park Manor, Inc. (KPM) in April 2010. Francis was a tenant of KPM when he brought this lawsuit and remains a tenant to this day.

The first 22 months of Francis's occupancy were uneventful. Beginning in February 2012, he alleges that his neighbor, Raymond Endres (Endres), harassed him verbally with racially motivated language on several occasions over the course of eight months. The alleged conduct, which included heinous racial epithets, verbal threats and disturbing behavior, led to four police interventions, on March 11, May 22, August 10 and September 2, 2012. Over three months after the harassment began, plaintiff sent a certified letter to KPM on May 23, and again on August 10 and September 3, 2012 relating the harassment and police activity. None of those letters

[3] Plaintiff also raises state law housing discrimination claims under N.Y. Exec. Law §§ 296(5) and 296(6), as well as state law claims in tort for negligent infliction of emotional distress and in contract for breach of quiet enjoyment. Although the panel asked HUD to construe these state law claims as part of its letter request for *amicus* support (See Dkt. 102 Letter to HUD requesting Amicus Curiae, attached hereto as Ex. A), HUD did not take up the court's invitation to venture into state or local law. For purposes of simplicity, NCLA notes that the court's jurisdiction over the state claims turns on whether plaintiff has sufficiently stated a federal cause of action, which is the central focus of this appeal.

requested any investigation or intervention by the landlord, such as relocating either tenant or commencing (or threatening) eviction proceedings against Endres.

Soon after the August 10 incident, the Suffolk County Police Hate Crimes Unit arrested Endres and charged him with aggravated harassment. On November 14, 2012, KPM and its property manager Corinne Downing sent Endres a notice of non-renewal of his lease. Endres vacated the apartment complex on January 28, 2013. (JA 81). On April 2, 2013, Endres pled guilty to harassment, and a court order of protection was entered prohibiting Endres from having any contact with Francis.

District Court Proceedings

In June 2014, Francis brought a complaint in eight counts against KPM asking the district court to construe the Civil Rights Act of 1866 and the Fair Housing Act of 1968 to impose a duty on housing providers and landlords to investigate and remediate racial conflict between co-tenants on pain of incurring liability for damages, costs and attorney's fees. Borrowing case law from Title VII, plaintiff asked the court to recognize a cause of action for a "racially hostile housing environment" created by one tenant against another regardless of the lack of any allegation of discriminatory intent or racial animus on the part of the landlord.

The district court dismissed the §§ 1981 and 1982 claims for failure to allege facts sufficient to support an inference that the KPM defendants, rather than Endres, intentionally discriminated against him on the basis of his race. *Francis v. Kings Park Manor, Inc.*, 91 F. Supp. 3d 420, 426-7 (E.D.N.Y. 2015). Noting that the Second

Circuit had yet to rule on whether §§ 3604(a) and (b) or 3617 reached post-acquisition discrimination[4] at all, the district court declined to reach that question. It instead noted that neither the Second Circuit nor any district courts within the circuit had ever held that a landlord's knowing failure to intervene to address such harassment was actionable. The district court accordingly concluded that, under the plain terms of §§ 3604 and 3617, Francis had failed to allege: (i) a basis to impute Endres' conduct to KPM; or (ii) that the KPM defendants had refused to intervene on account of their own racial animus toward the plaintiff.

The district court dismissed all federal claims and likewise dismissed the NY statutory housing discrimination claims (on the same basis that state law required that the landlord or his agent actively participate in the discrimination). The district court further held that simply being made aware of the harassment did not impose a common law duty to intervene or evict that would support a claim for negligent infliction of emotional distress. On the remaining contract claim for breach of covenant of quiet enjoyment, the district court allowed the plaintiff to reconstrue his claim as a breach of an implied warranty of habitability and denied the KPM defendants' motion to dismiss that state law contract claim. Francis voluntarily withdrew that claim, and judgment was granted in favor of the KPM defendants "so

[4] Post-acquisition discrimination means discrimination that occurs after a plaintiff acquires housing. The district court noted that district courts in this circuit have recognized certain types of post-acquisition discrimination, although the circuit has not reached the question. 91 F. Supp. 3d at 428-29.

that Francis could pursue this appeal." *Francis v. Kings Park Manor, Inc.*, 917 F.3d 109, 116 (2d Cir. 2019). Plaintiff filed his notice of appeal on June 4, 2015.

Proceedings at the Circuit

What was a landlord-tenant dispute with an available state-law claim sounding in contract became significantly more complex at the circuit court. Both parties briefed their claims to the court with nary a reference to deference under *Chevron*, *Auer*, *Skidmore* or any other doctrine. The plaintiff did newly raise on appeal that a rule proposed by the Department of Housing and Urban Development (HUD), pending since 2000, might be promulgated soon in a form that would provide support for recognizing a cause of action for a "hostile housing environment":

> This past April [2016], HUD submitted a Notice of Proposed Rulemaking on the subject of "Standards Governing Harassment Under the Fair Housing Act" to the Executive Office of the President for approval. It is expected to publish the proposed rule soon. Because the proposed rule has not been published, its precise language is not yet public. It is likely, however, that HUD will propose language similar to its earlier version of the rule, which it proposed but never finalized. That proposal, which would have applied only to sexual harassment cases (unlike the current proposal), provided: A person shall be responsible for acts of sexual harassment by third parties, where he or she, or his or her agent, knew or should have known of the conduct and failed to take immediate and appropriate corrective action, and had a duty to do so.

Fair Housing Act Regulations Amendments: Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67666 (proposed Nov. 13, 2000) (Dkt. 37 App. Br., p. 18).

In the next sentence, plaintiff argued that this unpromulgated sexual harassment rule, not yet enlarged to include racial harassment, only stated what the FHA had always provided: "HUD thus has stated what would be evident in any event: The Fair

Housing Act [of 1968] imposes on a landlord the obligation to take reasonable steps to provide a non-discriminatory housing environment." (Dkt. 37 p. 18-19).

Two months after the case had been fully briefed and then argued on April 7, 2016, at an unusual point in the case, the Court issued a letter to HUD in June requesting an *amicus curiae* brief. (Dkt. No. 102 Ex. A). The Court specified five topics for HUD to brief in great detail under state, federal and local law. That order must be read in its entirety to fully grasp its scope and granularity. See Addendum to this brief, pp. A01-03.

The Court granted HUD a generous extension of time (from June to October) to file its *amicus*. Apparently that interval was designed to enable HUD to promulgate its 2000 proposed rule as a final rule, as the Court gave the agency 45 days from "completion of the rulemaking process" to file its *amicus*. (Dkt. 112). Although the Court notified the Solicitor General that it had requested an *amicus curiae* brief from HUD, it made no such request to the Justice Department or Congress, or any other relevant part of the federal government that might have taken a different point of view.

HUD's *amicus* was docketed on November 4, 2016. (Dkt. 120). In that brief, HUD argued "[a]s a reasonable interpretation of the FHA, HUD's final rule is entitled to deference under *Chevron*." (Dkt. 120 p. 5). Post-argument letter briefs from both parties addressed *Chevron* deference, with the plaintiff-appellant urging the Court to apply *Chevron* deference (Dkt. 125 at p. 2), and the defendants-appellees opposing

both deference and retroactive application of the rule and the agency's interpretation thereof. (Dkt. 124).

Two-and-a-half years later, the panel decision reversed the district court's dismissal of the federal (and state) statutory housing discrimination claims (over a vigorous dissent), according "great" deference to HUD's interpretation of a rule that HUD promulgated after the litigation began, while styling its ruling as plain statutory interpretation. *Francis*, 917 F.3d 109. The dissent averred that the majority "steers the FHA into 'uncharted territory' where courts improbably discover new causes of action in half-century-old provisions … heedless of the deleterious consequences for parties, courts, and the housing market." *Id.* at 126-7 (citations omitted). "New rights cannot be suddenly 'discovered' years later in a document, unless everyone affected by the document had somehow overlooked an applicable provision that was there all along." Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 80-81 (2012). The dissent also took the majority to task for retroactive application of, and deference to, a rule that is not merely "interpretive" but "legislative." One month later, the panel withdrew its opinions. (Dkt. 157).

Nine months after the original decision, on December 6, 2019, the panel majority issued a second opinion in which the two-judge majority (again, over a vigorous dissent) reversed the district court, citing a new rationale not pled in the complaint:

> a landlord may be liable under the FHA for intentionally discriminating against a tenant by, as is alleged to have occurred here, choosing not to take any reasonable steps within its control to address tenant-on-tenant harassment of which it has actual notice that is specifically based on race, even though it chooses to take steps to address other forms of tenant misconduct unrelated to race.

Francis v. Kings Park Manor, Inc., 944 F.3d 370, 378 (2d Cir. 2019). The new circuit opinion abandoned reliance on the HUD rule, relegating it to a footnote in which the majority pronounced that it "need not and [does] not rely on [the Rule] to resolve this appeal." 944 F.3d at 379 n. 7. The vigorous dissent noted that the majority had substituted a new rationale and that its new theory jettisoned controlling pleading standards required under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), amongst other errors. By substituting a new theory of liability in the replacement decision, the panel deprived the defendants-appellees of a fair briefing and argument opportunity to rebut the very rationale ultimately used against them.

Defendants-appellees timely moved for rehearing en banc, and the petition was granted on February 3, 2020. (Dkt. 200). *Amicus* briefs were ordered to be filed by April 16, 2020, with argument scheduled for May 14, 2020. On March 18, 2020, an order adjourning en banc argument to September 24, 2020 was issued because of the COVID-19 disruption. The briefing schedule was adjusted with *amicus curiae* briefs extended to May 7, 2020. On April 3, 2020 the court issued an order inviting Debo Adegbile, Esq. "to brief and argue this case as amicus curiae in support of the view that the federal Fair Housing Act prohibits landlords from selectively intervening

against tenants who violate their leases or the law based on race, and otherwise in support of Donohue Francis." (Dkt. 220).[5] The court issued no order inviting an *amicus* brief in support of KPM or its interpretation of the Fair Housing Act.

SUMMARY OF THE ARGUMENT

Article III of the Constitution places the judiciary in a separate branch with life tenure and salary protection to ensure that judicial decisions will reflect a court's independent judgment rather than the desires of the political branches. The Due Process Clause also forbids judges to display any type of bias for or against a litigant. These statements of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument.

The court-created *Chevron* and other deference regimes lead to acute constitutional violations of due process and the separation of powers. Unsurprisingly, therefore, the Supreme Court is slowly reconsidering *Chevron* and many lower-court judges are openly skeptical of it.[6]

Affording *Chevron* or any other deference in this case is particularly egregious because the statutes at issue—the Civil Rights Act of 1866 and the Fair Housing Act

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[5] The Court recently ordered "that given the breadth of the Court's invitation to the amicus curiae, the brief shall contain no more than 14,000 words." All other *amici* are limited to 7,000 words under Second Circuit rules. *See United States v. Sineneng-Smith*, 590 U.S. __, slip op. at 7 (2020).

[6] Abbe R. Gluck & Richard Posner, *Statutory Interpretation on the Bench*: *A Survey of Forty-two Judges on Federal Courts of Appeal*, 131 Harv. L. Rev. 1298 (2018) ("*Most of the judges we interviewed are not fans of Chevron, except for the judges on the D.C. Circuit* ….").

of 1968—were passed long before *Chevron*. Deferring to HUD's interpretation thoroughly debases judicial independence and respect for the separation of powers. Moreover, *Chevron* only arises when the statute being construed is ambiguous, and yet *no party or judge has claimed that the federal statutes are ambiguous.*

Affording retroactive deference to a newly issued regulation—which a panel of this court deferred briefing on until it could be promulgated as a final rule—offends both judicial independence and due process whether it travels by the name of *Chevron* or *Skidmore* or just operates *sub silentio*.

Because the FHA imposes both civil and *criminal* penalties, the rule of lenity requires that any statutory ambiguities be resolved against expansion of regulation—particularly when, as here, a new statutory interpretation would apply retroactively to conduct that preceded adoption of the regulation.

The judges of this court should not abandon their duty of judicial independence; nor should they apply any deference that violates the due process of law or the rule of lenity, creates even the appearance of bias or that violates the party presentation doctrine.

ARGUMENT

The court cannot adopt plaintiff-appellant's interpretation of the statutes for three separate reasons. First, judicial deference to HUD's interpretation of the law violates the Constitution. Second, deference would disregard the rule of lenity and thereby deny the due process of law. Third, deferring to HUD's interpretation would

create an unacceptable appearance of bias. The panel openly solicited the very HUD interpretation to which it deferred (and to which the en banc court is now asked to defer) and significantly delayed its resolution of these proceedings to give HUD an opportunity to complete rulemaking proceedings and submit an *amicus curiae* brief in support of Francis.

I. DEFERENCE VIOLATES ARTICLE III BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Judicial deference to administrative agencies' interpretation of the law—whether asserted in terms of *Chevron* or *Skidmore* or pursued via actions that speak louder than words—violates the Constitution in two separate ways. First, deference requires judges to abandon their duty of independent judgment, in violation of Article III and their judicial oaths. Second, the deference requested by HUD's *amicus* (Dkt. 120) and the plaintiff-appellant's letter brief (Dkt. 125) violates the separation of powers and the Due Process Clause by commanding judicial bias in favor of a coordinate branch of government's view of the law against a litigant entitled to independent judicial consideration.

A. Judicial Office Includes a Duty of Independent Judgment

Article III vests "the judicial power of the United States" in the courts and creates the judicial office held by "[t]he judges, both of the Supreme Court and inferior courts." U.S. Const., art. III, § 1. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It

is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule.").

Judicial independence has been a touchstone of legitimate governance at least since English judges resisted King James I's insistence that "[t]he King being the author of the Lawe is the interpreter of the Lawe." *See* Philip Hamburger, Law and Judicial Duty 149-50, 223 (2008). Although all judicial power was exercised in the name of the monarch, judges maintained the power rested solely with the judges. *Prohibition del Roy*, 12 Co. Rep. 63, 65 (1608).

The American colonists objected to judges "dependent on [King George III's] will alone." The Declaration of Independence, ¶ 3. The Founders cast their first substantive vote at the Constitutional Convention of 1787 to create a government that separated power among three co-equal branches. *See* 1 Records of the Federal Convention of 1787 30-31 (Max Farrand ed., Yale Univ. Press 1911). Separating governmental power preserves liberty, in part, because each branch jealously checks any attempt by the other branches to shift the power balance set by the Constitution.

Article III guards the judiciary's independence by adopting the common-law tradition of independent judicial office and by protecting that office through life tenure and undiminished salary, U.S. CONST., art. III, § 1, which carries with it a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the duty of judges as "[t]he duty of the power"). Each judge who holds the

judicial office under Article III swears an oath to the Constitution and is duty-bound to exercise his or her own office independently. *See* Law and Judicial Duty, 507-12.

The Founders ensured independent judicial office so that judges would not administer justice based on someone else's interpretation of the law. *See* 2 Records of the Federal Convention of 1787, 79 (Nathaniel Gorham explaining that "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them"); The Federalist No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). This duty of independence is reflected in the opinions of the founding era's finest jurists. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties."); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.) ("[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.").

Judicial independence is the personal duty of each judge. Yet what *Chevron* and its ilk require is a breach of that duty: judicial dependence on a non-judicial entity's interpretation of the law.

B. Deference Requires Judges to Abdicate Their Duty of Independence

Chevron and other deference doctrines command Article III judges to abandon their independence by giving controlling weight to an agency's opinion of what a statute means—not because of the agency's persuasiveness, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (""The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' … *Chevron* deference precludes judges from exercising that judgment.") (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)). Deference doctrines that require courts to "defer" to the government's legal interpretation violate the opposing party's right to due process. *Cf.* Philip Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. 1187 (2016).

This abandonment of judicial responsibility has not been tolerated in any other context—and it should never be accepted by a truly independent judiciary. *Chevron* or any other deference practice allows a non-judicial entity to usurp the judiciary's power of interpretation, and then commands judges to "defer" or give special "respect" to the legal pronouncements of a supposed "expert" body entirely external to the judiciary.

The only time "*Chevron* deference" comes into play is when the underlying statutory language is *ambiguous*. *See Chevron*, 467 U.S. at 844. *But not once, whether in the parties' briefing to this court, nor in the two panel decisions, does any party or judge assert that §§ 1981 and 1982 of the Civil Rights Act of 1866 or §§ 3604(b) and 3617 of the FHA are ambiguous.* Indeed, both panel decisions purport to adopt plain textual application of the statutes! 917 F.3d at 116-24; 944 F.3d at 375, 378.

This ambiguity justification allows agencies to essentially make law and count on *Chevron* deference. And lurking in the background is the generic utility player, *Mead-Skidmore* deference—"unctuously described as 'respect.'"[7] The notion that ambiguity itself creates an "implied delegation" of lawmaking or interpretation to administrative agencies is a transparent fiction, as jurists and commentators have repeatedly acknowledged.[8] *See generally* Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 V. &. L. REV. 77, 90 (2018). "Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how

[7] *See* Philip Hamburger, *Ambiguity about Ambiguity*, Notice and Comment, YALE J. REG., March 11, 2020 at https://bit.ly/2A2lR5v

[8] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (describing "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

best to allocate interpretive authority." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 S. Ct. Rev. 201, 212. An agency's authority to act must be granted by Congress, and one cannot concoct that congressional authority when there is no statutory language that empowers the agency to act in a particular manner.

The Supreme Court has sought to alleviate this problem by claiming that *Chevron* deference depends on a "congressional intent" to delegate. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). But congressional intent must be discerned most basically from Congress's statutes and their words. In the ambiguous statutes to which *Chevron* applies, Congress does not grant agency lawmaking or interpretive power. This is precisely what Congress does *not* do in laws subject to *Chevron*.

So, in the end, *Chevron* and its cousins are nothing more than a judicial command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. They are no different from an instruction insisting that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *Wall Street Journal* editorial page.

Article III not merely empowers but requires independent judges to resolve "cases" and "controversies" that come before them.[9] Article III makes no allowance

[9] *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

for judges to abandon their duty to exercise their own independent judgment, let alone for relying upon the judgment of entities that are not judges and do not enjoy life tenure or salary protection.

Here, the agency had no standing or direct interest in the dispute. The judges issued an extraordinary invitation for the agency or other *amicus* to appear and assist the court in doing its job. But the judicial power cannot and must not be delegated to an administrative agency lodged in a different branch of government. That not only violates the judges' duty of independent judgment but also the separation of powers.

II. DEFERENCE THAT SUPPLANTS THE RULE OF LENITY DENIES THE DUE PROCESS OF LAW WHEN A STATUTE HAS CRIMINAL PENALTIES

Plaintiff-appellant stresses in its opening en banc brief that this court's ruling will extend to criminal penalties and sanctions under the FHA:

> The Act imposes both civil and criminal sanctions on those whose harassing behavior interferes with the accomplishment of the Act's objectives. *See* 42 U.S.C. §§ 3617 (making it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment … any right granted or protected by" Fair Housing Act); 3631 (criminal sanctions for similar conduct.)

Dkt. 217, En Banc Opening Brief of Plaintiff-appellant Donahue Francis, p. 42.

So, applying deference to HUD's position in this case would require the judiciary to construe ambiguities in criminal laws *against* the accused. This practice runs counter to the rule of lenity and violates the due process of law. FHA must be strictly, not expansively, construed.

Lenity is a rule of construction "perhaps not much less old than construction itself,"[10] *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76, 95 (1820). In simple terms, lenity "obligate[s]" courts "to construe criminal statutes narrowly[.]" *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (citation omitted). Two constitutional principles underlie the rule of lenity: due process and the separation of governmental powers. Lenity safeguards due process by "ensur[ing] that criminal statutes will provide fair warning of what constitutes criminal conduct" and by "minmiz[ing] the risk of selective or arbitrary enforcement[.]" *Id.* at 523. Lenity also promotes liberty by ensuring the separation of powers: the legislature criminalizes conduct and sets statutory penalties, and the judiciary sentences defendants within the applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971). Lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Lenity "embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 347 (citation omitted). "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014); *see also United States v. Apel*, 571 U.S.

[10] Lenity in the common law dates back at least to the fifteenth century and jurist William Paston's pronouncement that penalties should not increase through interpretation. *See A Discourse Upon the Exposicion & Understandinge of Statutes*, Thomas Egerton Additions 155 (Samuel E. Thorne ed. 1942) ("[W]hen the law is penall, for in those it is true that Paston saiethe, *Poenas interpretation augeri non debere*[.]").

359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

The Supreme Court has repeatedly applied the rule of lenity to ambiguous statutes with both civil and criminal penalties, without regard to *Chevron* deference. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United States v. Thompson/Center Arms Co.*, p, 517-18 (1992) (plurality op.); *id.* at 519 (Scalia, J., concurring). Applying deference instead of the rule of lenity would "upend ordinary principles of interpretation" and allow "federal administrators [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., statement regarding denial of certiorari, joined by Thomas, J.). As Justice Gorsuch has noted, "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

Like deference, lenity applies only when Congress' intent remains ambiguous after exhausting other modes of statutory interpretation. *Valle*, 807 F.3d at 523. Lenity takes "priority" over agency deference for two main reasons. *First*, lenity allows courts to avoid the constitutional concerns inherent in applying an ambiguous statute against a criminal defendant. In this way, lenity and the canon of constitutional avoidance operate symbiotically when a criminal statute is ambiguous. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (describing the doctrines as "traditionally sympathetic";

"Applying constitutional avoidance to narrow a criminal statute, as the Court has historically done, accords with the rule of lenity.").

No similar constitutional concerns necessitate the application of deference doctrines, which lack any constitutional underpinning and are rooted instead in a rebuttable presumption concerning Congress' intent. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019). This presumption, in the criminal context, must give way to a strict reading of the statute. *Wiltberger*, 18 U.S. at 95; *see also M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946) (plurality) (holding, one year after *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), that when an agency's rules carry criminal sanctions, "to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action"); *United States v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018) (holding that *Auer* and its progeny do not apply in criminal cases). Again, Congress must state its intent clearly if it wishes to criminalize conduct.

Second, as a matter of statutory interpretation, a court cannot defer to an agency until after it empties its "legal toolkit" of "all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2418. Lenity is a traditional "rule of statutory construction" in this Court's toolkit. *Thompson/Ctr. Arms Co.*, 504 U.S. at 518 (cleaned up). So, lenity, like other "presumptions, substantive canons and clear-statement rules" must "take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (collecting precedents that prioritize various interpretive tools over deference). Agency deference must come last because

"an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Id.*

No party or judge has, to date, made any claim that the Civil Rights Act or FHA is ambiguous, but even if they were, doubts must be "resolved in favor of the defendant." *Bass*, 404 U.S. at 347. No binding precedent requires this Court to discard lenity in favor of deference. *Cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (arguing that deference "has no role to play when liberty is at stake" and announcing that the Court's waiting to consider a case "afflicted with the same problems ... should not be mistaken for lack of concern"). This case is similarly afflicted. The Court must not flout the rule of lenity and the constitutional rights that rule protects.

III. THE COURT MUST AVOID EVEN THE APPEARANCE OF BIAS

The Due Process Clause requires judges not only to avoid bias but also to avoid even its mere appearance. *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). *See also Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (agreeing the Constitution forbids adjudicatory proceedings that are "infected by … bias"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice … is at the core of due process."). Due process "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been

done.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Judicial bias need not be personal to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pervasive, as it systematically subjects parties across the entire judiciary to bias rather than a single party before a particular judge.

No rationale can defend a practice that weights the scales in favor of the government. Doctrines, like *Chevron, Kisor-Auer, or Skidmore* deference, deny due process by favoring the government's litigation position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure" that might lead a judge "not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.").

In this instance, after the case was fully briefed and oral argument was completed, a panel of this circuit—on the basis of an allusion to a yet-to-be-enacted proposed Rule from 2000 mentioned by the plaintiff for the first time on appeal—requested an *amicus curiae* brief from HUD on the questions before the court. The panel thereby scrapped well-settled law that arguments first raised on appeal but not made to the district court are generally forfeited. *See United States v. Robinson*, 430 F.3d 537, 537 (2d Cir. 2005). The panel, moreover, gave HUD an extension to promulgate a final rule interpreting the statute that would retroactively affect the case.

The panel of this circuit said that it accorded "great" deference to HUD's interpretation of the statute while simultaneously protesting that it was engaging in

plain statutory interpretation. *Francis*, 917 F.3d at 120. One month later, that opinion was withdrawn. (Dkt. 157). And eight months after that, a second opinion of the circuit neatly removed any allusion to deference, this time urging in a footnote that it "need not and do[es] not rely on [HUD's interpretation] to resolve this appeal." *Francis*, 944 F.3d at 379 n.7. That second opinion substituted a new rationale for the same outcome, which the dissent describes as "a theory not even relied on by the Plaintiff in this case." *Id.* at 384.

After defendants-appellees moved for rehearing en banc, and after *amicus* briefs were ordered to be filed by April 16, 2020, the court on April 3, 2020, issued an order inviting an *amicus curiae* brief "in support of the view that the federal Fair Housing Act prohibits landlords from selectively intervening against tenants who violate their leases or the law based on race, and otherwise in support of Donohue Francis." (Dkt. 220).

Although the judges of this circuit presumably have always acted with the best of intentions in this case, it is difficult to avoid concern for at least the appearance of prejudice—if not in favor of the plaintiff as an individual, then in favor of the plaintiff's legal position. The undercurrent of deference—initially explicit and then transparently concealed—is bad enough. Making it worse is the eagerness of the bench (contrary to well settled law) to accept and advance the plaintiff's new argument on appeal. Even worse are the efforts of the bench to secure participation and even retrospective rulemaking by a government agency sympathetic to the

plaintiff's position. Topping it off is the last minute one-sided official invitation for *amicus* support—for one point of view and one party. Any one of these deviations from justice would be worrisome; taken together, they leave an unavoidable impression of bias that cannot be reconciled with the due process of law.

IV. THE COURT'S INVITATION OF AMICUS PARTICIPATION ABUSED ITS DISCRETION AND VIOLATED THE PARTY PRESENTATION PRINCIPLE

On May 7, 2020, the United States Supreme Court issued a unanimous decision holding that circuit court solicitation of *amicus* briefs with court formulation of the issues to be addressed by *amici* violates the party presentation principle. In holding that the Ninth Circuit's invitation to non-party *amici* to answer questions framed by the court had constituted an abuse of discretion the Court stated:

> '[C]ourts are essentially passive instruments of government.' … They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.'

United States v. Sineneng-Smith, 590 U.S. __, __ (2020) (slip op., at 4) (citation omitted) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987)).

The court has twice solicited *amicus* briefs from non-parties in support of the plaintiff-appellant, and it has provided a detailed formulation of topics to be addressed by such *amici* that were never properly raised in the district court by competent counsel for the plaintiff. Under *Sineneng-Smith*, that is an abuse of discretion. The court has thus far failed to adhere to the party presentation doctrine,

but it is bound by the Supreme Court's recent holding in its future conduct and consideration of this appeal.

CONCLUSION

For the foregoing reasons, this court should decline to defer to anyone in its decision, it should respect the rule of lenity, should avoid even the appearance of prejudice, and should adhere to the party presentation doctrine. The judges of this court must live up to the constitutional requirements of independent judgment, separation of powers, due process, and their judicial oaths to "administer justice without respect to persons, … and … faithfully and impartially discharge and perform [their] … duties"—in particular, the duty to "say what the law is."

Respectfully submitted,

/s/ Margaret A. Little
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because:

- This Brief contains 6,970 words, excluding the parts of the brief exempted by FRAP 32(f), and within the word limit of 7,000 under Second Circuit Rule 29.1(c).

This Brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because:

- This Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

Dated: May 7, 2020

/s/ Margaret A. Little
MARGARET A. LITTLE
NEW CIVIL LIBERTIES ALLIANCE

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for Second Circuit on May 7, 2020. Until further notice from this Court, NCLA has deferred filing paper copies of the brief based on the Court's March 26, 2020 Notice addressing the COVID-19 pandemic. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully,

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Addendum

TABLE OF CONTENTS

PAGE

UNITED STATES COURT OF APPEALS
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June 6, 2016

Helen R. Kanovsky
General Counsel
U.S. Department of Housing and Urban Development
Office of the General Counsel
451 7th Street S.W.
Washington, DC 20410

Re: Francis v. Kings Park Manor, Inc., 15-1823

Dear Ms. Kanovsky,

On April 7, 2016, a panel of the Second Circuit heard the case Francis v. Kings Park Manor, Inc., 15-1823-cv. Francis, the plaintiff and a tenant in the defendant's housing complex, alleged that he experienced persistent racial harassment at the hands of another tenant. Francis, who is African American, filed suit against the owner and property manager of Kings Park Manor, claiming, *inter alia*, that they were liable under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-19, for failing to intervene in the harassment and thus creating a "hostile housing environment." The United States District Court for the Eastern District of New York assumed, without deciding, that a hostile housing environment claim was cognizable under the FHA and that an owner or property manager could be held liable not only for his or his agents' direct racial discrimination against a tenant, but also for failing to intervene in tenant-on-tenant harassment; the court concluded, however, that to succeed on the latter claim a plaintiff would have to show that the failure to intervene was motivated by the landlord's own racial animus. See Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420, 433 (E.D.N.Y. 2015).

Our Circuit has not previously addressed the issues presented in this case, including whether a hostile housing environment claim is cognizable under the FHA and whether, if so, a landlord may be held liable not only for directly creating such an environment through his or her own discrimination, but also for failing to intervene in tenant-on-tenant harassment in certain circumstances. Given the importance of these issues and the extent to which they may hinge on an interpretation of the FHA, the Court hereby solicits the views of the Department of Housing and Urban Development in an *amicus curiae* brief on the following questions:

(1) Whether a landlord may be liable under the FHA for failing to intervene in tenant-on-tenant racial harassment of which it knew or reasonably should have known and, if so, whether all landlords subject to the FHA may be liable for failure to intervene, or only certain landlords in discrete circumstances; if so,

(2) whether the landlord's liability must be predicated on a duty arising from federal, state, or local law; and, if so,

(3) whether federal law imposes such a duty, and, if that is the case, what the source of that federal duty is; and

(4) what provisions of state or local law are sufficient – if any – to impose such a duty. In particular, in answering this question, it would be helpful to address two questions (in addition to any guidance the Department believes material), which we precede with context. Assume that a state, in its warranty of habitability, permits a tenant to defend against rent collection or sue for rent abatement or recovery of previously paid rent, see Elkman v. Southgate Owners Corp., 649 N.Y.S.2d 138, 139-40 (N.Y. App. Div. 1st Dep't 1996) ("The measure of damages for breach of the warranty of habitability is limited to the difference between the rent reserved in the lease and the fair market rental value during the period of the breach . . . . Loss or diminution in value of personal property as well as personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b"), on the basis of the disruptive acts of a co-tenant in at least some circumstances, see, e.g., Poyck v. Bryant, 13 Misc. 3d 699, 705 (N.Y. Civ. Ct. 2006) ("The gravamen of plaintiff's motion is that he cannot be held liable [for breach of the warranty of habitability] for the actions of third parties beyond his control such as the neighbors in unit 5-C. This argument is misplaced . . . [C]ourts have continuously held that the implied warranty of habitability can apply to conditions beyond a landlord's control."). The warranty of habitability is incorporated, by statute, into all leases, but, under this state's law, is not the source of a duty sounding in tort. See Carpenter v. Smith, 191 A.D.2d 1036, 1036 (4th Dep't 1993) ("Real Property Law § 235-b does not create a new cause of action in strict tort liability that permits a tenant to recover damages for personal injuries resulting from a breach of that warranty."). Although the Second Circuit and the New York Court of Appeals have not addressed the question, the lower-level appellate courts that have reached the question in this state have concluded that a landlord has no duty in tort to "protect a tenant from the conduct of another tenant," on the basis of the premise that a landlord would lack sufficient control for a reasonable *tort* duty to arise. Siino v. Reices, 216 A.D.2d 552, 553 (N.Y. App. Div. 2d Dep't 1995) ("Absent authority to control the conduct of a third person, a landowner does not have a duty to protect a tenant from the conduct of another tenant. A reasonable opportunity or effective means to control a third person does not arise from the mere power to evict." (internal citations omitted)). For this reason, please consider if it is relevant whether a state permits a tenant to sue for an action sounding in tort for actions of third parties, or whether FHA liability can still arise even if a state's courts have held that a landlord has no duty in tort to intervene, or otherwise protect a tenant, in a case of tenant-on-tenant harassment. Assuming this legal background, we have two questions: (i) Can the warranty of habitability, standing alone, impose a duty on a landlord to intervene in tenant-on-tenant harassment in the absence of an analogous tort duty; and (ii) May a contract, more generally, impose a duty on a landlord to intervene in tenant-on-tenant harassment for purposes of the FHA absent an analogous tort duty, and if so, (a) what contract provisions would be necessary for such a duty to arise; and (b) is it relevant what degree of control the contract provides the landlord over the harassing co-tenant?

(5) Finally, we ask whether, if a landlord may be liable under the FHA for failing to intervene in tenant-on-tenant racial harassment of which it knew or reasonably should have known, the failure to intervene must be motivated by racial animus on the part of the landlord.

We would appreciate a response of no more than thirty double-spaced pages by July 1, 2016. However, we are aware of the Department's proposed rule, "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act," and that the rule is set to be published in August 2016. If the Department agrees to submit an amicus but prefers to submit its response following the rule's publication, we ask that the Department file a letter alerting us to its preferred response date no later than June 24, 2016.

Very truly yours,

Catherine O'Hagan Wolfe

Catherine O'Hagan Wolfe
Clerk of Court

cc: Donald B. Verilli
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