

## MEMORANDUM

**From:** Arjun Prakash

**To:** Jay Clayton

**Date:** August 15, 2021

**Re:** Topic Analysis #1 (on Pak's Topic Proposal #1): Do the protections of the Fair Housing Act apply to individuals who do not pay rent or other consideration for their dwelling?

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### I. INTRODUCTION

The Fair Housing Act (FHA) states that it is unlawful “to 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.”<sup>1</sup> The inclusion of the phrase “to sell or rent” in this provision and in numerous other provisions within the FHA makes it clear that the Act’s various protections against housing discrimination apply to home buyers and renters. It is, however, far less clear which groups aside from buyers and renters receive FHA protections. In particular, a circuit split has very recently emerged between the District of Columbia Circuit and the Ninth Circuit regarding whether individuals who do not themselves pay rent or any other form of consideration qualify for protections under the FHA.<sup>2</sup>

Given the newness of the split, there is no existing scholarship that answers this precise issue regarding the FHA’s scope, making it ripe for a Commentator to address. Moreover, given that many of those who do not pay rent and do not own their own dwellings are likely either housing insecure or are in temporary housing situations, this circuit split has tangible impacts on particularly marginalized and vulnerable populations.

While Jilliann Pak’s Topic Proposal puts forth some interesting approaches that a Commentator could take in addressing this topic, in order to make a more creative and meaningful contribution to the literature on the FHA, I would suggest taking a different approach to resolve the circuit split. Namely, a Commentator, taking inspiration from existing caselaw on FHA protections in the homeless shelter context, could propose a middle-ground solution to the circuit split by arguing that consideration paid by a third-party on behalf of a dwelling’s occupant qualifies the occupant for FHA protections as a “renter.” Alternatively, a Commentator could resolve the circuit split by asserting that although individuals who do not pay rent should be protected under § 3604(a), they should not be protected under § 3604(f)(1) because the FHA employs different language in these two sections, explaining the difference in outcomes between the Ninth and D.C. Circuits’ cases.

### II. ANALYSIS OF CURRENT LAW

Pak’s Topic Proposal adequately discusses most of the case law related to this circuit split. Therefore, this Part will briefly highlight the most important cases mentioned in the Proposal and

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<sup>1</sup> Pub. L. No. 90-284, 82 Stat. 81 (1968), codified as amended at 42 U.S.C. § 3601 et seq.

<sup>2</sup> See generally *Webb v. U.S. Veterans Initiative*, 993 F.3d 970 (D.C. Cir. 2021); *Salisbury v. City of Santa Monica*, 994 F.3d 1056 (9th Cir. 2021), amended by 998 F.3d 852 (9th Cir. 2021).

then will present a few cases that were not previously mentioned but are useful in providing a more complete understanding of the circuit split.

On one side of the split, in Salisbury v. City of Santa Monica,<sup>3</sup> the Ninth Circuit concluded that “the FHAA applies only in cases involving a ‘sale’ or ‘rental’ of a dwelling to a buyer or tenant”<sup>4</sup> and that it “applies to rentals only when the landlord or his designee has received consideration in exchange for granting the right to occupy the premises.”<sup>5</sup> Thus, the plaintiff, who never entered a lease or paid rent for the dwelling he was occupying, did not qualify for FHAA protections.<sup>6</sup> In arriving at this conclusion, the court focused exclusively on the words “sale” and “rental” in the FHAA<sup>7</sup> and only cited the Oxford English Dictionary and caselaw related to statutory interpretation, asserting that the court’s holding was based on the plain language and ordinary meaning of the Act.<sup>8</sup>

On the other side of the circuit split, in Webb v. United States Veterans Initiative,<sup>9</sup> which was decided on the very same day as Salisbury, the D.C. Circuit held that anyone who faces unlawful housing discrimination qualifies “as an aggrieved person who may bring suit under the” FHA, “whether he paid rent or not.”<sup>10</sup> In reaching this conclusion, the court noted that the phrase “otherwise make unavailable”<sup>11</sup> in the FHA extends the scope of the Act beyond buying or leasing and extends the Act’s protections beyond buyers and sellers.<sup>12</sup> The court supported this proposition by citing two different cases: 2922 Sherman Avenue Tenants Ass’n v. District of Columbia<sup>13</sup> and Bank of America Corp. v. City of Miami.<sup>14</sup> Both of these cases are instances in which housing was made unavailable in a method that did not involve direct lease or sale transactions,<sup>15</sup> and in Bank of America the Supreme Court concluded that the City of Miami could sue under the FHA in response to Bank of America’s discriminatory mortgage lending practices, even though Miami was neither a direct home buyer nor a renter.<sup>16</sup>

A number of other courts have reached decisions similar to those in Sherman and Bank of America, holding that the FHA extends to transactions outside of just buying and selling homes.<sup>17</sup> For example, as the Topic Proposal notes, the Seventh Circuit in N.A.A.C.P. v. American Family Mutual Insurance Co.<sup>18</sup> determined that discriminatory insurance redlining practices qualify as violations of the FHA. However, it is important to note that cases, like N.A.A.C.P., that discuss the various types of transactions or practices that fall within the scope of the FHA’s protections are dealing with a different question than the one that is the subject of the circuit split. Namely, the split

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<sup>3</sup> 994 F.3d 1056 (9th Cir. 2021), amended by 998 F.3d 852 (9th Cir. 2021).

<sup>4</sup> Id. at 1062.

<sup>5</sup> Id. at 1064.

<sup>6</sup> See id.

<sup>7</sup> 42 U.S.C. § 3604(f)(1). The full text of this section of the FHAA states that it is unlawful to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because a handicap.”

<sup>8</sup> See Salisbury, 994 F.3d at 1062–1063.

<sup>9</sup> 993 F.3d 970 (D.C. Cir. 2021).

<sup>10</sup> Id. at 972.

<sup>11</sup> 42 U.S.C. § 3604(a).

<sup>12</sup> See Webb, 993 F.3d at 972.

<sup>13</sup> 444 F.3d 673 (D.C. Cir. 2006).

<sup>14</sup> 137 S. Ct. 1296 (2017).

<sup>15</sup> See id. at 1302–1303; 2922 Sherman, 444 F.3d at 677

<sup>16</sup> See Webb, 993 F.3d at 972 (citing Bank of America, 137 S. Ct. at 1303).

<sup>17</sup> See e.g. Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1359–60 (6th Cir. 1995) (holding that the FHA covers discriminatory practices in homeowners’ insurance sales).

<sup>18</sup> 978 F.2d 287 (7th Cir. 1992).

is dealing with whether individual occupants of dwellings, not banks, cities, or institutions, who do not and have not paid rent or any other form of consideration qualify for FHA protections. Thus, although these two issues are often linked, the circuit split is dealing with who is protected rather than what types of activities or transactions can serve as violations of the FHA.

Pak's Topic Proposal also mentions cases that discuss whether homeless individuals, who are neither buyers nor traditional renters, qualify for FHA protections. However, in addition to the cases that the Proposal discusses—Woods v. Foster<sup>19</sup> and Defiore v. City Rescue Mission of New Castle<sup>20</sup>—which conclude that homeless individuals can qualify as “renters” under the FHA if a third party pays consideration to the homeless shelter on their behalf,<sup>21</sup> there are also cases that have reached the opposite conclusion. For example, in Jenkins v. New York City Department of Homeless Services,<sup>22</sup> the Southern District of New York stated that because the plaintiff himself was “not offering any consideration in exchange for a room in the shelter and the government agency that awarded money used to keep the shelter open did not intend to occupy the premises,” the plaintiff was not a “renter” and therefore did not qualify for FHA protections.<sup>23</sup> Similarly, in Johnson v. Dixon<sup>24</sup> the D.C. District Court held that inhabitants of homeless shelters are not “buyers” or “renters” under the FHA because their accommodations “have been provided *gratis*.”<sup>25</sup> Thus, district courts that have weighed in on whether homeless populations qualify for FHA protections do not all fall on one side of the circuit split created by the Webb and Salisbury decisions. Rather, the district courts are themselves split on the issue, at least as it pertains to homeless plaintiffs.

### III. EXISTING COMMENTARY

As the Topic Proposal states, there appears to be no existing commentary directly on this topic, which is unsurprising given the recency of the circuit split. Thus, a Commentator would face little direct preemption risk when addressing this topic. However, there is a significant amount of scholarship on topics that are closely related to, or just slightly different from, the subject of the circuit split. Therefore, in order to avoid preemption, the Commentator would have to cabin her analysis to resolving the split and take care not to veer into other topics that have already been discussed at length by others.

Numerous commentators have already discussed the topic of standing to sue under the FHA. However, these discussions of standing have largely centered on more theoretical constitutional law discussions involving Article III.<sup>26</sup> When scholars have chosen to examine whether more specific groups of people have standing to sue, they have not chosen to examine occupants who do not pay rent or any other consideration. For example, in Standing on Shaky Ground: Standing under the Fair Housing Act, Douglas Dash begins with a broader discussion of Article III and its requirements for standing and then proceeds to more specifically discuss whether and how two groups—testers and

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<sup>19</sup> 884 F. Supp. 1169 (N.D. Ill. 1995).

<sup>20</sup> 995 F. Supp. 2d 413 (W.D. Pa. 2013).

<sup>21</sup> See Woods, 884 F. Supp. at 1175; Defiore, 995 F. Supp. 2d at 419.

<sup>22</sup> 643 F. Supp. 2d 507 (S.D.N.Y. 2009).

<sup>23</sup> Id. at 519.

<sup>24</sup> 786 F. Supp. 1 (D.D.C. 1991).

<sup>25</sup> Id. at 4.

<sup>26</sup> See e.g., Michael E. Rosman, Standing Alone: Standing Under the Fair Housing Act, 60 MO. L. REV. 547, 549–50 (1995).

fair housing organizations—can gain standing to sue under the FHA.<sup>27</sup> To avoid preemption by articles like Dash’s, the Commentator needs to avoid more generalized discussions regarding standing under the FHA and should instead focus exclusively on the protections afforded to the group of occupants that are at the core of the circuit split.

As the Topic Proposal mentions, FHA post-acquisition rights is also an area in which other commentators have already extensively written.<sup>28</sup> But post-acquisition rights, while related, is distinct from the subject of the circuit split because the topic of post-acquisition rights deals with individuals’ protections once the individuals have already bought or rented a dwelling and have then become occupants. Therefore, once again, adherence to the topic at hand is critical for a Commentator to avoid preemption issues. By focusing only on the protections afforded to those who never bought or paid rent for a dwelling in the first place rather than those who clearly qualified for FHA protections during their initial housing transactions but now seek further protections as occupants, the Commentator would avoid preemption.

The first proposed line of analysis discussed in the next Part requires the Commentator to extend some of the logic presented in the caselaw on whether homeless individuals are protected by the FHA. Thus, it is worth mentioning that there are several articles that already directly discuss the application of the FHA to homeless shelters.<sup>29</sup> However, these articles do not pose much preemption risk because whereas the proposed line of analysis extends courts’ reasoning that homeless individuals qualify as “renters” under the FHA, the articles focus largely on whether homeless shelters do and should qualify as “dwellings,” which is a distinct question. For instance, in Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act, Greg Cheyne supports his argument that “all homeless shelters” should be given “FHA protection” by noting that precedent “favors including homeless shelters as dwellings.”<sup>30</sup> Moreover, the circuit split concerns all occupants of dwellings who do not pay rent or other consideration, not just homeless individuals, so this topic is broader than, and diverges from, existing articles that only discuss the FHA’s application to homeless populations.

#### IV. EVALUATION OF THE TOPIC AS THE BASIS OF A COMMENT

Preemption is not a major concern with this topic; however, I believe that a Commentator would have been sure to provide creative and tailored solutions to the circuit split in order to produce a substantial and meaningful Comment, especially given that this topic is relatively niche. With that in mind, although Pak’s Topic Proposal provides a few possible lines of analysis for a Commentator to pursue, I believe that there are other, potentially more topic-specific and interesting ways to resolve the circuit split. If these lines of analysis were pursued instead of, or perhaps in conjunction with, Pak’s suggested lines of analysis, then I believe that this topic would certainly make for a viable comment. Namely, a Commentator, drawing on reasoning presented in caselaw on FHA protections

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<sup>27</sup> See generally Dash T. Douglas, Standing on Shaky Ground: Standing Under the Fair Housing Act, 34 AKRON L. REV. 613 (2001).

<sup>28</sup> See e.g., Scott N. Gilbert, You Can Move in But You Can’t Stay: To Protect Occupancy Rights After Halprin, The Fair Housing Act Needs to be Amended to Prohibit Post-Acquisition Discrimination, 42 JOHN MARSHALL L. REV. 751 (2009); Aric Short, Post-Acquisition Harassment and the Scope of the Fair Housing Act, 58 ALA. L. REV. 203 (2006).

<sup>29</sup> See e.g., Katherine Brinson, Justifying Discrimination: How the Ninth Circuit Circumvented the Intent of the Fair Housing Act, 38 GOLDEN GATE U. L. REV. 489 (2008).

<sup>30</sup> Greg C. Cheyne, Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act, 1 U. CHI. LEGAL F. 459, 497 (2009).

for homeless people, could argue that an occupant need not personally pay rent or any other form of consideration in order to qualify for FHA protections, as long as someone else has paid consideration of some form in exchange for the occupant's right to remain in the dwelling. Alternatively, the Commentator could resolve the circuit split by asserting that the Ninth and D.C. Circuits are not in disagreement at all because they are addressing different sections of the FHA, sections that use different language and offer protection to different groups of people.

#### A. Third-Party Consideration

As previously mentioned, a number of district courts have come to the conclusion that many homeless individuals in shelters qualify for protections under the FHA because although they do not personally pay rent, some other entity is funding or paying the shelter in exchange for the shelter providing housing to its occupants, making the housing “rented.”<sup>31</sup> For instance, in Woods, the Northern District of Illinois pointed to the definition of “to rent” in the FHA, which states: “To rent’ includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.”<sup>32</sup> The court then went on note that “this definition does not require that the consideration be paid by the occupant.”<sup>33</sup> And because the shelter in question in the case “received \$125,000 from HUD . . . in return for providing a shelter for the homeless,” the court concluded that this money “is undoubtedly ‘consideration’ granted for the right to occupy the premises of the Shelter,” establishing that the shelter was “rented.”<sup>34</sup> Framing the issue succinctly, the court in Defiore stated that whether a resident of a homeless shelter qualifies for FHA protection turns on whether the shelter “receives consideration for a resident’s stay—whether it be from federal or other funding directed to subsidizing the costs of providing housing to the homeless or whether shelter residents provide some form of consideration for their stay.”<sup>35</sup>

This caselaw provides a strong foundation on which a Commentator could build, extending the logic of these district courts beyond the occupants of homeless shelter to argue that FHA protections should be available whenever an occupant has been granted the right to stay in a dwelling in exchange for some consideration, whether or not he personally paid that consideration. In addition to referencing and explaining previous district court decisions, the Commentator could herself engage in textual analysis, personally dissecting the FHA’s statutory definition of “to rent” to prove that consideration provided by a third-party qualifies occupants for FHA protections. With this line of analysis, the Commentator would be putting forth a middle-ground solution that splits the difference between Webb and Salisbury, expanding the group of people protected by the FHA beyond Salisbury but still retaining that case’s emphasis on consideration being paid in exchange for occupancy rights.<sup>36</sup> Then, to further explain the practical impact that this solution would have on individuals, the Commentator could also apply the solution to various previously decided FHA cases to illustrate how the outcomes would have changed under this third-party consideration regime.

#### B. Varying Protections by Section

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<sup>31</sup> See e.g., Woods v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995); Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013).

<sup>32</sup> 42 U.S.C. § 3602(e).

<sup>33</sup> Woods, 884 F. Supp. at 1175.

<sup>34</sup> *Id.*

<sup>35</sup> Defiore, 995 F. Supp. 2d at 419.

<sup>36</sup> See Salisbury v. City of Santa Monica, 994 F.3d 1056, 1064 (9th Cir. 2021), amended by 998 F.3d 852 (9th Cir. 2021).

Another way that a Commentator could resolve the circuit split is by arguing that § 3604(a), which is the section of the FHA in question in Webb, offers protections to a broader group of people than § 3604(f), which is the focus of Salisbury. Thus, rather than taking one court's side over the other, the Commentator could conclude that both courts arrived at correct decisions due to the difference in statutory language between the two relevant sections of the FHA.

Section 3604(a) of the FHA makes it unlawful “to refuse to sell or rent after making 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.”<sup>37</sup> On the other hand, § 3604(f) states it is unlawful to “discriminate in the sale or rental, or to other make unavailable or deny, a dwelling to any buyer or renter because of a handicap.”<sup>38</sup> Clearly the two sections deal with different protected classes, but another major difference between the two sections is that whereas § 3604(a) says “to any person,” that phrase is replaced by “to any buyer or renter” in § 3604(f). Although neither Webb nor Salisbury makes this argument, a Commentator could argue that this difference in language between the two sections was intentional and alters who is protected and can sue under each of the two sections. Specifically, § 3604(a) gives the right to sue not only to renters and buyers but also to occupants who do not pay either rent or other consideration for their dwellings. But § 3604(f) offers a narrower scope of protection, only giving buyers and renters the ability to sue for relief under the FHA.

In making this argument, the Commentator could draw on and cite several district court cases that conduct analysis along these lines and reach similar conclusions. For instance, the court in Jenkins noted that there is “a crucial difference in the language of the two provisions” and that § 3604(f)(1) “requires that a handicapped person be either a renter or a buyer in order to bring a Fair Housing Act claim.”<sup>39</sup> The court went on to say that although the “otherwise make unavailable” language in § 3604(a) expands the protected class to include individuals other than just buyers and renters, when the same phrase is used in § 3604(f)(1), it “does not expand the class of individuals who are protected from discrimination on the basis of a handicap beyond renters or buyers” because of the aforementioned language difference between the two sections.<sup>40</sup> Similarly, in Hunter ex rel. A.H. v. District of Columbia,<sup>41</sup> the court identified the textual difference between § 3604(a) and § 3604(f)(1), noting that while the former section “reaches a broad range of actors whose actions affect the opportunity to buy or rent a dwelling,” the latter section “restricts the class of people who can bring a claim under section 3604(f)(1) to a ‘buyer or renter.’”<sup>42</sup> Thus, a Commentator would have a solid foundation of district court caselaw supporting her argument that although occupants of dwellings who do not pay rent or other consideration are protected under the FHA, they are not protected under all sections of the Act due to the differences in language among the Act's various provisions.

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<sup>37</sup> 42 U.S.C. § 3604(a) (emphasis added).

<sup>38</sup> 42 U.S.C. § 3604(f)(1) (emphasis added).

<sup>39</sup> Jenkins v. N.Y.C. Dep't of Homeless Services, 643 F. Supp. 2d 507, 519–20 (S.D.N.Y. 2009).

<sup>40</sup> Id. at 520.

<sup>41</sup> 64 F. Supp. 3d 158 (D.D.C. 2014).

<sup>42</sup> Id. at 178.

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