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Media Inquiries: [Judy Pino](mailto:judy.pino@ncla.org), 202-869-5218

NCLA *Amicus* Asks Full 2d. Cir. Bench to Course-Correct Wayward Panel’s Fair Housing Act Decision

Donahue Francis v. Kings Park Manor, Inc., et al.

Washington, DC (May 8, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed an [*amicus brief*](#) late last night in the U.S. Court of Appeals for the Second Circuit in *Donahue Francis v. Kings Park Manor, Inc., et al.*, on rehearing *en banc*. NCLA’s brief, which supports neither party, asks the bench to eschew *Chevron* deference in its decision, respect the rule of lenity, observe the principle of party presentation, and avoid the appearance of bias in this case.

At issue is whether to recognize a new cause of action against a landlord for egregious tenant-on-tenant discrimination for a “racially hostile housing environment” under the Civil Rights Act of 1866 and the Fair Housing Act of 1968 (FHA).

NCLA’s brief calls out the court for questionable actions that have left an unmistakable impression of deference and bias in favor of one party, Mr. Francis. These actions include: inviting the U.S. Department of Housing and Urban Development (HUD) to submit a pro-plaintiff *amicus* brief; allowing the plaintiff to raise a new issue for the first time on appeal; and, giving HUD a months-long extension of time so that it could promulgate a final rule to rely on in its *amicus* brief.

HUD’s brief to the panel argued “[a]s a reasonable interpretation of the FHA, HUD’s final rule is entitled to deference under *Chevron*.” A letter brief from the plaintiff likewise urged the court to apply *Chevron* deference. But affording *Chevron* or any other deference, in this case, violates judicial independence by forcing judges to abandon their oaths to provide their own judgment of the law’s meaning. Moreover, deference is only available when the statute being construed is ambiguous, yet no party or judge has ever claimed that these statutes (passed long before *Chevron*) are ambiguous.

Furthermore, because the FHA imposes both civil and *criminal* penalties, any expansive interpretation of it sought by the plaintiff-appellant violates the rule of lenity. Agency deference violates the separation of powers and, in a criminal context, offends due process under the Constitution by denying defendants fair warning of what conduct is illegal. Because the rule of lenity applies to resolve any ambiguity in the FHA, that is another reason why *Chevron* deference cannot apply.

Finally, in its eagerness to accommodate one point of view and one party, the court has inadvertently allowed bias to infect the proceedings. In particular, judicial appointment of *amici* to argue particular points suggested by the judges when a party already has competent counsel violates the party presentation principle, as just decided by a unanimous Supreme Court in an opinion by Justice Ginsburg.

NCLA released the following statement:

“Retroactive liability, in this case, would have seismic consequences for public and private housing markets. But the stakes are even bigger for the rule of law. Putting a case on hold long enough to defer to a newly issued HUD regulation—as the Second Circuit panel did—offends judicial independence, separation of powers, and due process. The court has also solicited and scripted amicus participation from non-party amici in a manner that appears to violate the party presentation principle, as just explained in a unanimous Supreme Court case this week. I hope that the Second Circuit’s grant of rehearing *en banc* signals that the full court is ready to course-correct the conduct that led to an expansion of liability that has no basis in any law passed by Congress.”

—**Peggy Little, Senior Litigation Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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