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Religious Accomodation and Housing: Fair Housing After *Bloch v. Frischholz*

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NOTES

Religious Accommodation and Housing

FAIR HOUSING AFTER *BLOCH V. FRISCHHOLZ*

> Proper enforcement of the Fair Housing Act's promise of equal housing opportunity and of the First Amendment's guarantee to protect the practice of religion without the government establishing religion can help ensure that all persons live comfortably together in our pluralistic society and that all persons have access to safe, decent, sanitary housing where they can exercise their right to worship or not to worship as they choose.[1]

INTRODUCTION

As this quote astutely recognizes, the synergy of the distinct goals of the Fair Housing Act[2] and the Establishment Clause of the First Amendment[3] has the ability to produce an ideal situation—a nation where individuals of all religions have access to adequate housing in a place where they are free to exercise their religious beliefs. This utopia, however, has yet to be achieved. More than forty years after the passing of the Fair Housing Act, major barriers still exist and continue to be created, preventing individuals from living in places where they are free to act in accord with their religious beliefs. In fact, as evidenced by *Bloch v. Frischholz*,[4] where the Seventh Circuit initially upheld a condominium association's rule prohibiting

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[1] Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 TEX. J. C.L. & C.R. 1, 38 (2005).

[2] 42 U.S.C. §§ 3601-3619 (2006).

[3] The First Amendment's Establishment Clause states, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The religion clauses of the First Amendment are applicable to the states via incorporation by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[4] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

the display of anything, including religiously-mandated objects, in the doorways of the condominiums, judicial decisions have the power to further the rift between the allied goals of the First Amendment and the Fair Housing Act, namely providing equal housing opportunities and religious freedom to all Americans. Decisions such as these can, and in some cases have, made it harder for individuals in protected classes to obtain access to housing where they are free from religious persecution.[5] Today, some individuals in the United States are faced with the decision of compromising their religious beliefs or moving out of their homes.

In 1968, the Fair Housing Act was enacted as an effort to control the pervasive discrimination in the housing market.[6] Prohibiting discrimination by both public and private housing providers, the statute lays out protected classes of individuals, including the religiously observant, who may not be subject to discrimination.[7] Because the Fair Housing Act applies to both public and private housing, it creates First Amendment obligations for private entities that previously did not exist. The First Amendment's Free Exercise and Establishment Clauses prohibit laws that burden the practice of religion and government action which promotes religion, respectively.[8] As such, housing providers are required to provide non-discriminatory housing in a way that neither favors nor disadvantages the free exercise of religion.[9]

On July 10, 2008, the Seventh Circuit affirmed the constitutionality of a condominium association's rule that effectively achieves the opposite of the utopian dream described

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[5] *See* Boodram v. Md. Farms Condo., No. 93-1320, 1994 WL 31025, at *1 (4th Cir. Feb. 1, 1994) (affirming summary judgment in favor of defendant condominium association despite plaintiff's claim that the association's rule prohibiting storage on condominium balconies interfered with his religious duty to display red flags, known as "Jhandee," as compelled by the Hindu faith); *see also* Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1224, 1234 (S.D. Fla. 2005) (holding that homeowners' associations have the right to prohibit religious worship in the common areas of their communities).

[6] Seng, *supra* note 1, at 1; *see also* U.S. Dep't. of Housing and Urban Dev., *History of Fair Housing*, http://www.hud.gov/offices/fheo/aboutfheo/history.cfm (last visited Aug. 30, 2009).

[7] *See* 42 U.S.C. § 3604(a) (stating that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.").

[8] U.S. CONST. amend. I.

[9] Seng, *supra* note 1, at 1.

above.[10] In its initial review of *Bloch v. Frischholz* (*Bloch I*), a two-to-one decision, the court affirmed the Northern District of Illinois' grant of summary judgment in favor of a condominium association whose prohibition on the placement of anything in the doorways of the condominiums, including religiously-mandated objects, was challenged by one of the condominium owners.[11] The decision essentially held that condominium associations may make rules that inhibit the exercise of religion so long as the rule is "neutrally applicable."[12] In particular, the court found that even though observant Jewish condominium owners felt prohibited from living in their homes once the condominium rule was interpreted to prohibit the display of *mezuzot*,[13] the rule was not in violation of either the First Amendment or the Fair Housing Act, which, as currently written, does not require accommodation for religion.[14] On November 13, 2009, six months after the Seventh Circuit reheard the case en banc, the court decided that although the condominium's rule did not make the condominiums "unavailable," factual issues did exist with regard to the issue of intentional discrimination, rendering total summary judgment improper and remanding the case for further proceedings.[15]

This Note argues that the Seventh Circuit's en banc ruling in *Bloch v. Frischholz* (*Bloch II*) only partially remedies the potentially harsh policy implications that could have resulted from the circuit's initial ruling. The en banc decision failed to recognize that the actions taken by the condominium

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[10] *See* Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 565 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

[11] *Id.* at 563. Judges Easterbrook and Bauer were in the majority and Judge Wood wrote in dissent.

[12] *Id.* at 565 ("Plaintiffs would like us to treat failure to make an accommodation as a form of discrimination. That was one theme of Justice O'Connor's separate opinion in *Smith*—but the majority held that a neutral, exception-free rule is not discriminatory and is compatible with the Constitution's free exercise clause.").

[13] A *mezuzah* (the singular of *mezuzot*) is a "parchment scroll affixed to the doorposts of a Jewish home or business" that contains portions of a Jewish prayer. Chabad.org, Mezuzah—Definition, http://www.chabad.org/search/keyword_cdo/kid/2891/jewish/Mezuzah.htm (last visited Aug. 30, 2009). The Torah commands all Jews to place a *mezuzah* on the outer doorpost of the home, and in all doorways therein, as a reminder of the oneness of G-d and in order to protect the home and its inhabitants. Alexander Potorak, *Rooms and Doorposts*, http://www.chabad.org/library/article_cdo/aid/256734/jewish/Rooms-and-Doorposts.htm (last visited Aug. 30, 2009). *Mezuzot* is the plural form of the word *mezuzah*. Mezuzah—Definition, http://www.britannica.com/EBchecked/topic/379549/mezuzah (last visited Aug. 30, 2009).

[14] *Bloch I*, 533 F.3d at 565.

[15] Bloch v Frischholz (*Bloch II*), 587 F.3d 771 (7th Cir. 2009).

board rendered the units unavailable to observant Jews.[16] Thus, the new ruling does not completely nullify the ability of housing associations to create rules like this in the future. Furthermore, if on remand the issue of intentional discrimination is not resolved in the Blochs' favor, the door will remain open for discriminatory housing practices to prevail. Finally, because this decision is not binding on all federal courts, courts outside the jurisdiction of the Seventh Circuit could easily render the same mistaken ruling as the *Bloch I* court, which would result in consequences inconsistent with both the congressional intent of the Fair Housing Act and the general common law on issues of religious accommodation in contexts parallel to housing. In order to prevent judicial decisions such as these from producing results adverse to those envisioned by the legislature, it is vital that the legislature take action to avert the disparaging consequences that would otherwise result.

Part I of this Note discusses the factual underpinnings of the *Bloch* decisions to give context to the Seventh Circuit's decision and the analysis contained herein. Part II briefly discusses the historical interaction between the Fair Housing Act and the First Amendment, focusing on how these laws work together and affect one another. Part III analyzes the legislative history and congressional intent of the Fair Housing Act and examines how religious accommodation has been dealt with in the employment context, where there is a statutorily imposed religious accommodation requirement. This analysis seeks to assess whether *Bloch I* and *II* were rightfully decided and explore the potential for a religious accommodation requirement under the Fair Housing Act in the future. Finally, Part IV discusses the implications of the *Bloch* decisions and suggests a road for moving forward. These suggestions aim to provide a way to overcome the harsh impact that such decisions could produce. In light of the disturbing potential consequences of the initial decision, and the fact that these consequences have not been completely obviated, it is imperative that Congress act to rectify the judiciary's failure to protect the spirit of the Fair Housing Act.

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[16] *Id.* at 776-84.

I. THE CASE: *BLOCH V. FRISCHHOLZ*

In a two-to-one decision in *Bloch v. Frischholz*, upon first review the Seventh Circuit held that a condominium association's rule of not allowing anything to be placed in condominium doorways, including religiously-mandated objects, did not violate either the First Amendment or the Fair Housing Act, and was therefore constitutional.[17] Finding the rule to be neutrally applicable to all condominium owners regardless of their religious beliefs, the court affirmed the district court's grant of summary judgment in favor of the condominium association.[18] This decision is incongruous with the legislative intent of the Fair Housing Act and the established legal precedent in parallel contexts. These incongruities were not completely remedied by the Seventh Circuit's en banc rehearing, where the court found that although issues of fact existed as to the Blochs' claim of intentional discrimination, the condominium association's rule was not in violation of the Fair Housing Act.[19]

A. Bloch v. Frischholz*: The Facts*

Lynne, Helen, and Nathan Bloch, observant Jews and residents of the Shoreline Towers condominium building in Chicago, Illinois, brought suit against the Shoreline Towers Condominium Association and its president, Edward Frischholz, alleging intentional discrimination in violation of the Fair Housing Act[20] and the Civil Rights Act.[21] The claims arose out of a "hallway rule" that the condominium association adopted in September 2001, while Lynne Bloch was the chair of the rules committee. The rule stated: "1. Mats, boots, shoes, carts, or objects of any sort are prohibited outside Unit entrance doors. 2. Signs or name plates must not be placed on Unit doors."[22] The rule did not become problematic until 2004, when the association began to interpret the rule as prohibiting

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[17] *Bloch I*, 533 F.3d at 565.

[18] *Id.* at 564-65.

[19] *Bloch II*, 587 F.3d 771.

[20] 42 U.S.C. §§ 3604(a)-(b), 3617 (2006).

[21] *Id.* § 1982; *Bloch I*, 533 F.3d at 569 (Wood, J. dissenting).

[22] *Bloch I*, 533 F.3d at 567 (Wood, J. dissenting).

the placement of *mezuzot* on the exterior doorposts of the units.[23]

During a renovation of the hallways of the Shoreline Towers in May 2004, the residents were instructed to remove all items from their doors so that construction could be completed.[24] The Blochs complied, and once the renovations were completed, proceeded to reaffix their *mezuzah* to the entrance of their unit.[25] Shortly thereafter, the condominium association began removing and confiscating *mezuzot* from entranceways in the building, claiming that they were in violation of the hallway rule.[26] Previously, the rule had only been used to prevent clutter in the hallway as well as "signs and name plates" as explicitly stated, but not *mezuzot*.[27] However, despite plaintiffs' objections, explaining the religious significance and importance of the *mezuzah*, the condominium association offered no relief. Instead, the condominium association continually removed plaintiffs' *mezuzot* and threatened monetary penalties if they continued to affix a *mezuzah* in their doorway.[28]

After the death of Marvin Bloch, Lynne's husband and Helen and Nathan's father, the Blochs specifically requested permission to display a *mezuzah* in accordance with Jewish mourning rituals.[29] Despite their request, the condominium association removed their *mezuzah* during this traumatic time.[30] Debra Glassman, another Shoreline Towers resident and observant Jew, was treated in a similar fashion, forcing her to move out of her unit.[31] She felt that "she had essentially been evicted from her home," because the condominium association prevented her from displaying her *mezuzah* as required by the laws of her religion.[32]

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 568.

[32] *Id.*; *see also Deuteronomy* 6:5-9 (instructing all Jews that "[y]ou shall write [the commandments] on the doorposts of your house and on your gates"). Both orthodox and non-orthodox Jews affix the prayer to their doorpost, as required, in a *mezuzah*. Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education*, 30 J. LEGAL STUD. 253, 263 n.27 (2001). *Mezuzot* are required because they serve as a constant reminder of the

In the aftermath, Lynne Bloch proposed an amendment to the hallway rule that would allow *mezuzot* to be displayed on exterior doorways, to no avail.[33] In December 2006, the Blochs filed suit in the Northern District of Illinois.[34] Before the Blochs filed their suit, however, the Shoreline Towers Condominium Association's board adopted a religious exception to the hallway rules.[35] Thus, the relief sought by the Blochs merely consisted of damages for the distress suffered before the exception was enacted, as well as an injunction to prevent the association from restoring the old interpretation of the rule.[36] Additionally, about a year before the Blochs filed their complaint, the city of Chicago enacted an ordinance prohibiting residential building owners from restricting the placement of religious objects in the doorways of homes, unless necessary to avoid property damage or undue hardship to other unit owners.[37] This ordinance made it illegal for the Association to revert to its prior version of the rule. Thus, the Blochs' suit essentially only involved a quest for damages, allowing the issue raised by the Blochs to remain ripe for adjudication.[38]

B. Bloch v. Frischholz*: The Suit*

The district court granted summary judgment in favor of the condominium association and Frischholz based on the Seventh Circuit's holding in *Halprin v. Prairie Single Family Homes of Dearborn Park Association*,[39] and the Seventh Circuit affirmed.[40] Writing for the circuit court, Chief Judge Frank Easterbrook explained that *Halprin* stood for the proposition that harassment of owners or tenants, even though religiously motivated, was not a Fair Housing Act violation.[41] Only when

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"Divine Presence and of the obligation to observe all the commandments." James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALI. L. REV. 91, 106 n.123 (1991); *supra* note 13.

[33] *Bloch I*, 533 F.3d at 568 (Wood, J. dissenting).

[34] Bloch v. Frischholz, No. 06-C-4472, 2008 WL 244287 (N.D. Ill. Jan. 24, 2008).

[35] *Bloch I*, 533 F.3d at 563.

[36] *Id.*

[37] *Id.* at 564; *see also* CHI., ILL., MUN. CODE § 05-8-030(H) (2005).

[38] *Bloch I*, 533 F.3d at 564.

[39] 388 F.3d 327, 328-30 (7th Cir. 2004) (holding that the Fair Housing Act was not violated by religiously-based harassment of homeowners because it was not discrimination in the "sale or rental" of a dwelling).

[40] *Bloch I*, 533 F.3d at 565.

[41] *Id.* at 563.

the harassment is so severe as to amount to constructive eviction can a violation be found.[42] Finding the hallway rule neutral with respect to religion because it was generally applicable to all condominium owners, the court held that a determination of whether the rule resulted in the constructive eviction of the Blochs was unnecessary.[43] Finally, the court explained that it saw the suit as seeking a religious exception to a neutral rule—a religious accommodation—something not required by the language of the Fair Housing Act.[44] Because the Fair Housing Act sees discrimination as more than a "failure to accommodate," the court found no violation of the Fair Housing Act or the First Amendment in Shoreline Towers' refusal to accommodate the religious beliefs of the Jewish homeowners.[45]

In a vehement dissent, Judge Diane Wood disagreed with the majority's grant of summary judgment.[46] She noted that the court wrongly framed the issue on appeal and thus did not properly address the claims asserted by the plaintiffs.[47] According to Judge Wood, instead of viewing the Blochs' claim as a quest for religious accommodation, the court should have reached the question of whether the inability to display a *mezuzah* in one's doorway resulted in the constructive eviction of observant Jewish residents, and should have found that plaintiffs produced sufficient evidence to prove constructive eviction.[48] Judge Wood found the hallway rule to be the equivalent of a sign outside the building reading "No observant Jews allowed," and as such, the situation presented in the case was exactly that imagined by Fair Housing Act's Section 3604(a) as interpreted in *Halprin*.[49] Furthermore, Judge Wood

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[42] *Id.* at 564.

[43] *Id.*

[44] *Id.* at 565 (explaining that the language of the Fair Housing Act only requires accommodations for handicaps and not for religion or the other classes protected by the Act).

[45] *Id.*

[46] *Id.* at 566.

[47] *Id.* (The Court addressed the issue of whether the condominium association had a duty to accommodate plaintiffs' religious beliefs rather than analyzing the actual issue, that is, whether the association intentionally discriminated against plaintiffs based on their religious beliefs.).

[48] *Id.* at 570.

[49] *Id.* In *Halprin*, the Seventh Circuit found that religiously motivated harassment of owners and tenants did not to violate the Fair Housing Act after it gave a limited interpretation of Section 3604(b) and refused to look beyond the plain meaning of the words contained in the statute. *See Bloch*, 533 F.3d at 563; *see also* Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004) (affirming summary judgment in favor of defendant homeowners' association,

noted that the Section 3604(b) claim asserted by the Blochs was factually sufficient because the Fair Housing Act prohibited, among other things, religious discrimination in "the terms, conditions, or privileges of sale or rental of a dwelling," and the agency responsible for regulating the implementation of the Fair Housing Act, the United States Department of Housing and Urban Development ("HUD"), had interpreted this language to protect "an owner, tenant, or a person associated with him or her."[50]

Judge Wood argued that summary judgment was incorrect because the question of whether the hallway rule applied to *mezuzot* was both material and in dispute.[51] Thus, the majority's characterization of the rule as being facially neutral was improper, since that would require a finding that the rule does include a prohibition on the display of *mezuzot*.[52] According to Judge Wood, the whole point of the case is that the Association took a neutral rule and started interpreting it in a way that exclusively affected observant Jewish owners.[53] In such a situation, it is not just the fact that a rule is neutral that is of importance. Rather, she argued that it is necessary to assess whether the rule "target[s] the practices of a particular religion for discriminatory treatment" in order to determine if the Free Exercise Clause of the First Amendment has been violated.[54] In Judge Wood's opinion, this was exactly the situation at bar—the rule may have been facially neutral, but it had a disparate impact on observant Jews, therefore invaliding its neutrality.[55] Finally, Judge Wood opined that the Blochs' claim under 42 U.S.C. § 1982 was also sustainable.[56]

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and finding that religious harassment of plaintiff homeowners by association president did not violate § 3604(b) because it was not harassment that "prevented [people] from acquiring property" since the couple already owned their home).

[50] *Bloch I*, 533 F.3d at 570-71 (Wood, J., dissenting); 42 U.S.C. § 3604(b) (2008); 24 C.F.R. § 100.65(b)(4) (2008).

[51] *Bloch I*, 533 F.3d at 572 (Wood, J., dissenting).

[52] *Id.*

[53] *Id.*

[54] *Id.* at 573 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993)).

[55] *Id.*

[56] *Id.* Judge Wood explained that the Blochs' claim under 42 U.S.C. § 1982 was also sustainable because the language of the statute leads to the same end result as would be the outcome under the Fair Housing Act claims. Under Section 1982 or the Fair Housing Act, the Blochs must prove intentional discrimination, an issue of which they have provided ample evidence, surely enough to withstand a motion for summary judgment from the association. *Id.*

On May 13, 2009, the Seventh Circuit reheard the Blochs' case en banc.[57] The United States government felt so strongly that the Seventh Circuit erred in its initial ruling that it submitted an amicus brief urging the en banc panel to reverse and remand the case.[58] In its brief, the government argued that the Seventh Circuit's ruling is out of line with the congressional intent of the Fair Housing Act and that summary judgment was inappropriate because enough questions of fact existed to make the case ripe for jury determination as to the existence of discrimination.[59] The government conceded that the text of the Fair Housing Act does not currently require religious accommodation, but remained silent on the issue of whether such a clause is inferred by the spirit of the Act or the Constitution.[60]

Six months after hearing the case en banc, the Seventh Circuit partially amended its initial ruling.[61] The en banc court saw the case as presenting two distinct issues. The first issue was which, if any, of the Fair Housing Act provisions could be a potential source of relief for the Blochs.[62] The second issue was whether the Blochs put forth sufficient evidence of discrimination to create an issue of fact to be resolved at trial.[63] As to the first issue, the court looked at whether the Fair Housing Act can afford relief for claims of post-sale discrimination.[64] While the court acknowledged that Section 3604(a) can be violated post-acquisition in extreme cases of "constructive eviction," it found that the condominium at issue here was never actually made "unavailable" to the Blochs, and therefore affirmed the grant of summary judgment on this issue.[65] On the issue of intentional discrimination, the court

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[57] Bloch v. Frischholz (*Bloch II*), 587 F.3d 771 (7th Cir. 2009). For an audio version of the argument, see 2009 WL 1472344.

[58] Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376).

[59] *Id.* at *13-14.

[60] *Id.* at *43-44. This Note seeks to argue that although the Fair Housing Act does not contain a religious accommodation clause, such a clause is necessary for the Act to be congruent with the congressional intent of the statute, the First Amendment, and how religious accommodation is handled in parallel contexts, namely employment under Title VI. *See infra* Part III.A-C.

[61] *Bloch II*, 587 F.3d at 787.

[62] *Id.* at 775.

[63] *Id.* at 775-76.

[64] *Id.* at 775.

[65] *Id.* at 777-78 ("To establish a claim for constructive eviction, a tenant need not move out the minute the landlord's conduct begins to render the dwelling

found that the Blochs had presented sufficient evidence of genuine issues of fact to warrant a trial.[66] Consequently, the district court's grant of summary judgment and the circuit panel's affirmation was reversed, and the Blochs' case was remanded.[67]

II. THE FAIR HOUSING ACT AND THE FIRST AMENDMENT

Title VIII of the Civil Rights Act, or the Fair Housing Act,[68] was enacted in 1968 during the height of the Civil Rights Movement, and in the aftermath of the assassination of Martin Luther King, Jr., as a congressional effort to curb rampant discrimination in the housing market.[69] The Act prohibits discrimination in the sale, rental, and housing provisions of both public and private housing providers, subject to certain exemptions,[70] on the basis of "race, color, religion, sex, familial status, [and] national origin."[71] Through the inclusion of religion in the list of protected classes, the drafters implicated the First Amendment in the Fair Housing Act's interpretation.[72] Although the First Amendment generally applies only to public entities, because the Fair Housing Act outlaws discrimination in both private and public housing, it effectively creates First Amendment obligations for private housing authorities. Therefore, in applying the Fair Housing Act, a delicate balance must be struck between neither favoring nor disadvantaging religion, as mandated by the First Amendment.[73]

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uninhabitable—in this case, when the defendants began enforcing the Hallway Rule to take down the Blochs' mezuzot. Tenants have a reasonable time to vacate the premises. Nonetheless, it is well-understood that constructive eviction requires surrender of possession by the tenant. Still, the Blochs never moved out." (internal citations omitted)).

[66] *Id.* at 785 ("Although the Blochs' case is no slam dunk, we think the record contains sufficient evidence, with reasonable inferences drawn in the Blochs' favor, that there are genuine issues for trial on intentional discrimination.").

[67] *Id.* at 787.

[68] 42 U.S.C. §§ 3601-3619 (2006).

[69] Seng, *supra* note 1, at 1; *see also* U.S. Dep't. of Housing and Urban Dev., *History of Fair Housing*, http://www.hud.gov/offices/fheo/aboutfheo/history.cfm (last visited Aug. 30, 2009).

[70] *See* 42 U.S.C. § 3603(b).

[71] *Id.* § 3604(a)-(b).

[72] *See, e.g.*, *id.* § 3604(a) (stating 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").

[73] Seng, *supra* note 1, at 1.

Congress intended the Fair Housing Act to "provide, within constitutional limitations, for fair housing throughout the United States,"[74] in an effort to promote racially integrated housing.[75] Although primarily designed as a remedial tool to deal with segregated housing patterns in the United States,[76] the statute not only sought fair housing for individuals discriminated against on the basis of race, but also took on the broader task of providing fair housing to other individuals who are likely to be the subject of discrimination.[77] Both the Department of Justice, by way of the Attorney General, and individuals are eligible to bring suit under the Fair Housing Act.[78] However, while individuals are only required to show that they have been victims to an illegal housing practice, the Department of Justice must point to a "pattern or practice" of discrimination in order to establish a cause of action.[79]

The Supreme Court has had surprisingly minimal interaction with substantive Fair Housing Act claims in the forty years since its enactment.[80] Circuit courts, however, have had extensive engagement with Fair Housing claims and have developed standards under which evaluation of such claims are to be assessed. Specifically, these courts have determined that violations of the Fair Housing Act can be established on one of two grounds—disparate impact or disparate treatment.[81]

Generally, to establish a disparate impact claim, a claimant must make a prima facie showing of discrimination, demonstrating that the defendant's conduct has a discriminatory effect.[82] More specifically, a claimant must prove that the challenged practice "actually or predictably" results in

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[74] 42 U.S.C. § 3601.

[75] Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

[76] U.S. Dep't of Justice Civil Rights Div. Housing and Civil Enforcement Section, *The Fair Housing Act*, http://www.usdoj.gov/crt/housing/housing_coverage.htm (last visited Aug. 30, 2009) [hereinafter *The Fair Housing Act*].

[77] *See* 42 U.S.C. § 3604 (prohibiting discrimination on the basis of "race, color, religion, sex, familial status, or national origin").

[78] *See id.* §§ 3613-14.

[79] *The Fair Housing Act*, *supra* note 76.

[80] Supreme Court cases on the Fair Housing Act have mostly been limited to addressing procedural issues such as standing under the Fair Housing Act. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 (1981); Gladstone, Realtors v. Bellwood, 441 U.S. 91, 93 (1978); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972).

[81] Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995).

[82] This is similar to the requirement for alleging a cause of action under Title VII of the Civil Rights Act. *See* Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974); *see also infra* Part III.C.

discrimination based on one of the prohibited classifications.[83] A claimant need not show that such action is discriminatorily motivated, but merely that the defendant's action has a discriminatory effect.[84] For these types of claims, a claimant is required to prove a "causal connection" between the questionable policy and the resulting disparate impact on the protected group.[85]

Alternatively, Fair Housing Act violations can be established based on a disparate treatment theory. Under this theory, a claimant can establish a prima facie showing of discrimination by "showing that animus against the protected group 'was a significant factor in the position taken.'"[86] Allegations of discriminatory intent must be analyzed based on the totality of the circumstances, taking into account the fact that some "law[s] bear more heavily" on one group of people than others.[87] Other factors considered in this analysis are the historical background of the decision, the events leading up to the decision, and statements made by individuals involved in the decision-making.[88]

The type of evidence used to make out a claim of religious discrimination under the Fair Housing Act is the same type used in assessing the religious animus of a law for the purpose of assessing its constitutionality under the First Amendment.[89] Therefore, claims of religious discrimination in the sale, rental, or privileges of the sale or rental of a dwelling lead to the intersection of the Fair Housing Act and the First Amendment.[90] Under the First Amendment, in order for a facially neutral rule to constitutionally prohibit conduct that inhibits the practice of religion, there must be a religiously

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[83] United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184-85 (8th Cir. 1975); *see also* United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974).

[84] *City of Black Jack, Mo.*, 508 F.2d at 1184-85.

[85] Brown v. Coach Stores, Inc., 163 F.3d 706, 712 (2d Cir. 1998) (citing Lopez v. Metro. Life Ins. Co., 930 F.2d 157, 160 (2d Cir. 1991)).

[86] *Leblanc-Sternberg*, 67 F.3d at 425 (quoting United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1226 (2d Cir. 1987)).

[87] Washington v. Davis, 426 U.S. 229, 242 (1976).

[88] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977).

[89] *Leblanc-Sternberg*, 67 F.3d at 426 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993)). Specifically, this type of evidence is used to prove religious animus for disparate treatment claims. *See id.*

[90] *See* 42 U.S.C. § 3604(a)-(b) (2006); *see also* U.S. CONST. amend. I.

neutral reason to justify the rule.[91] Thus, claims of religious discrimination brought under the Fair Housing Act necessarily implicate the right to the free exercise of religion guaranteed by First Amendment.[92]

III. THE SEVENTH CIRCUIT'S MISSTEP: ANALYSIS OF *BLOCH*

The Seventh Circuit's decisions in *Bloch I* and *II* were wrongly decided for a number of reasons. To begin, the court's consistent conclusion that the Fair Housing Act does not require accommodation for religion fails to look beyond the words of the statute in assessing its applicability to the situation faced by the Blochs. In addition, the *Bloch I* panel's classification of the hallway rule in question as neutrally-applicable, and thus consistent with the requirements of the First Amendment, fails to consider disparate impact analysis.[93] Furthermore, the decision is inconsistent with how religious accommodation has been dealt with in the parallel context of workplace discrimination. Finally, the policy implications of the initial holding are problematic, and have vast consequences for the future of the housing market that the en banc ruling did not ameliorate. Depending on how the case is decided on remand and whether other circuits follow the rehearing of the Seventh Circuit's initial ruling, the private housing market may now be able to effectively exclude protected classes, making the Fair Housing Act's goal of rendering adequate housing to all individuals, regardless of their religious beliefs, unachievable.

Part A of this Section discusses why the congressional intent of the Fair Housing Act requires religious accommodation, despite the absence of explicit language to this effect. Part B analyzes the need for a religious accommodation clause under the Fair Housing Act because of the First Amendment implications in the absence of such a requirement. Next, Part C assesses how religious accommodation is dealt with under Title VII of the Civil Rights Act, where religious accommodation is statutorily mandated, in an effort to prove that such a requirement is consistent with First Amendment jurisprudence in the employment context. Finally, Part D looks

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[91] *See Church of Lukumi Babalu*, 508 U.S. at 531-32.

[92] U.S. CONST. amend. I.

[93] *See* Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 573 (7th Cir. 2008) (Wood, J., dissenting), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

at disparate impact analysis to show why the Seventh Circuit twice erred in its failure to assess the Blochs' claim on these grounds.

A. Reconciling Bloch *and the Congressional Intent of the Fair Housing Act*

The Fair Housing Act does not contain an explicit requirement that public or private housing providers make accommodations for religious individuals.[94] But looking beyond the plain meaning of the words contained in the Act—to the congressional intent in enacting this legislation—reveals that such a requirement is essential in order for the Act to achieve its stated goals.[95] Expanding the scope of statutory interpretation afforded to the Fair Housing Act by the Seventh Circuit exposes the fact that its narrow reading fails to give proper breadth to the Act, and consequently fails to grant relief to those individuals who are harmed by housing providers' failure to make reasonable accommodations for the religiously observant. These results are in direct conflict with the spirit of the Act, and its ability to "provide . . . for fair housing throughout the United States."[96] Indeed, the Supreme Court has itself endorsed a liberal reading of the Act, providing more evidence that the Seventh Circuit's narrow interpretation was mistaken.[97]

When the Fair Housing Act was enacted in 1968, it only prohibited discrimination in the "sale, rental and financing" of housing on the basis of "race, color, religion, sex or national origin."[98] In 1988, the Fair Housing Act was amended to increase the number of protected classes and to provide better guidelines for enforcement of the statute and the rights provided therein.[99] The amendments extended the guarantees of the statute to cover individuals with disabilities and to protect against discrimination on the basis of familial status.[100] Initially, the statute contained no mention of the concept of "accommodation" for any of the protected classes, but with the

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[94] *See* 42 U.S.C. §§ 3601-3619; *see also Bloch I*, 533 F.3d at 565; Hack v. President of Yale Coll., 237 F.3d 81, 88 (2d Cir. 2000).

[95] *See supra* note 75 and accompanying text.

[96] 42 U.S.C. § 3601.

[97] *See infra* note 106 and accompanying text.

[98] *The Fair Housing Act*, *supra* note 76.

[99] *Id.*

[100] *Id.*

1988 amendment, a clause was added that stated that "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling," constituted discrimination against individuals on the basis of a handicap.[101] Accordingly, accommodations for handicapped individuals must be made where the modification is necessary for the individual to use and fully enjoy the dwelling and the modification does not pose an undue cost or administrative burden.[102]

Although the accommodation clause of the Fair Housing Act appears only under the requirements for providing housing to individuals with handicaps, whether this distinction was intended is unclear. Specifically, it is unclear whether Congress intended for the accommodation language to apply retroactively to all forms of discrimination prohibited by the statute. In fact, there are indications that this intent was present, since to provide otherwise would inhibit the stated purpose of the statute, "to provide . . . for fair housing throughout the United States."[103]

In *Bloch I*, the Seventh Circuit indicated that because the word "accommodate" only appears under the requirements for handicaps, Congress intended the word "discriminate" to have a distinctly different meaning than "failure to accommodate."[104] However, although the Seventh Circuit is correct that the statutory language does not equate "discrimination" and "failure to accommodate," and that not all failures to accommodate would rise to the level of discrimination, there may be instances where a failure to accommodate does reach the level of discrimination. Thus, the question of whether an accommodation requirement does, or should, exist for the protected class of religious individuals becomes central to analyzing whether the conduct of the Shoreline Towers Condominium Association rose to the level of

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[101] 42 U.S.C. § 3604(f)(3)(B).

[102] The cost of the accommodation must also be paid for by the individual requiring the modification. *Id.* § 3604(f)(3)(A)-(B).

[103] *Id.* § 3601(1).

[104] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 565 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7 Cir. 2009) (en banc) ("It would be especially inappropriate to adopt in the name of the Fair Housing Act a principle that lack of accommodation = discrimination, since the FHA itself distinguishes the two. By requiring accommodation of handicap but not race, sex, or religion, the statute's structure tells us that the FHA uses the word 'discriminate' to mean something other than 'failure to accommodate.'").

discrimination. By incorrectly granting summary judgment, the Seventh Circuit did not reach this key question.

Case law in the Seventh Circuit is consistent with this narrow interpretation of the language of the Fair Housing Act, but Supreme Court precedent is not. The Seventh Circuit has routinely refused to look beyond the words of the Fair Housing Act to the legislative history to give additional breadth to the statute.[105] In contrast, the Supreme Court has held that the Fair Housing Act should be interpreted broadly and has looked to the legislative history in assessing procedural Fair Housing Act questions.[106] It is reasonable, therefore, to suggest that the congressional intent of the statute may require a broader interpretation of the statute's language than the words alone may indicate.

The Blochs' request to display their *mezuzah* may be construed as a request for an accommodation to a facially neutral rule. Although a right to accommodation is not explicitly conferred in the statute, such a right may be implicit, given the law's purpose. To begin, the Blochs merely requested the right to display their *mezuzah* in their doorway. Accommodation of this request would not cost the condominium association any money, present any administrative burden to change the rule, nor make an exception for the display of religiously-mandated objects.[107] In

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[105] *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) ("Reference to legislative history is criticized when it is used to give a statute a reach that exceeds what its words suggest. Our use here is the opposite; it is to confirm that the words mean what they seem to mean."). It is a Seventh Circuit trend to advocate for "plain meaning" interpretation of statutes. Judge Easterbrook, who writes for the majority in *Bloch I*, routinely advocates for narrowing the scope of statutory interpretation with his philosophy of "new textualism." Easterbrook believes that "it is misleading to speak of legislative intent," and, as a result, he has advocated for "a limit on the use of legislative history." James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 287-88 (1995). Similarly, Judge Posner has "caution[ed] against judicial reliance upon broad statutory purpose." *Id.*

[106] *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (noting awareness of "the [Fair Housing] Act's stated policy 'to provide, within constitutional limitations, for fair housing throughout the United States'" and "precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision") (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209-10 (1972) (assessing the standing of complainants to bring suits under the Fair Housing Act)); *see also* Griffen v. Breckinridge, 403 U.S. 88, 97-98 (1971) (acknowledging that the Court has broadly interpreted all civil rights statutes).

[107] The requested accommodation therefore meets the statutory requirements for accommodation as laid out for handicaps. *See* 42 U.S.C. § 3604(f)(3)(A)-(B).

addition, failure to accommodate this request prevents the Blochs from "enjoy[ing their] dwelling,"[108] further rendering it unusable to them. The words of the Fair Housing Act explicitly state that it is unlawful "[t]o refuse to sell or rent . . . or *otherwise make unavailable*" a dwelling on the basis of religion.[109] Contrary to the holding in *Bloch II*,[110] the Shoreline Towers Condominium Association's hallway rule effectively made the condominiums unavailable to observant Jewish individuals who are required by the tenets of their religion to display a *mezuzah* in the doorway of their homes. Although the Blochs did not move out of their condo, as the Seventh Circuit asserts would necessarily need to be shown here for a claim of constructive eviction,[111] the hallway rule's treatment of observant Jews is discrimination on the basis of religion—the exact conduct the Fair Housing Act prohibits.[112] In fact, despite the finding that the Blochs' home was not made "unavailable," the court in *Bloch II* specifically acknowledged that "Section 3604(a) is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons,"[113] a proposition aptly describing the situation facing the Blochs. If a facially neutral rule results in a discriminatory impact on people's religion, there *should* be a cause of action under the Fair Housing Act, even if no duty exists to accommodate for religious observance.[114]

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[108] *Id.* § 3604(f)(3)(B).

[109] *Id.* § 3604(a) (emphasis added). The full text of this clause states that it shall be 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." *Id.*

[110] Bloch v. Frischholz (*Bloch II*), 587 F.3d 771, 777-78 (7th Cir. 2009); *see supra* note 62 and accompanying text. The en banc decision asserts that "[w]hether 'unavailability' means that a plaintiff must, in every case, vacate the premises to have a § 3604(a) claim is an issue we refrain from reaching." *Bloch II*, 587 F.3d at 778. Yet despite this statement, that is precisely the onus put on the Blochs, as the court noted "the Blochs never moved out [and] gave no reason why they failed to vacate," and concluded that "based on these facts, we see no possibility that a reasonable jury could conclude that the defendants' conduct rendered Shoreline Towers 'unavailable' to the Blochs." *Id*.

[111] *Bloch II*, 587 F.3d at 777-78; *see supra* note 62 and accompanying text.

[112] The en banc decision noted that "if the Blochs produced sufficient evidence of discrimination, we conclude that § 3604(b) could support the Blochs' claim," yet the court never reached this issue. *Bloch II*, 587 F.3d at 781.

[113] *Bloch II*, 587 F.3d at 776 (internal quotation marks omitted) (quoting Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984)).

[114] *See* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 103-04 (2d Cir. 2000) (Moran, J., dissenting) (asserting that although the college may not be compelled

Similarly, the Fair Housing Act makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section 3603, 3604, 3605, or 3606 of [the Act]."[115] Section 3604 makes it unlawful to discriminate against individuals in the sale, rental, and privileges of sale or rental of a dwelling on the basis of religion.[116] Seventh Circuit case law interpreting this clause of the Fair Housing Act has prohibited harassment that amounts to constructive eviction, analogizing such conduct to constructive discharge, which is prohibited under Title VII of the Civil Rights Act.[117] In the case of the Blochs, their inability to display their *mezuzah* in their doorway was constructive eviction because they were no longer able to live in their condominium and simultaneously adhere to the rules of their religion. At least one other tenant in Shoreline felt similarly, as she moved out and told her neighbors that she had "essentially been evicted from her home."[118] Because of Shoreline's persistent removal of the *mezuzot* from the Blochs' doorway and prevention of Lynn's display of a *mezuzah* while she was mourning the death of her husband, these actions may be classified as harassment and result in a cause of action under the Fair Housing Act, which various courts in the country have allowed.[119]

Finally, although § 3604 does not explicitly address post-acquisition discrimination,[120] hindrance of one's ability to

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by the Fair Housing Act to make religious accommodations, where plaintiff makes a prima facie showing of the unavailability of housing to observant Jewish students, the case should proceed to discovery and be left to the fact finder to determine whether the rule has had a discriminatory effect).

[115] 42 U.S.C. § 3617.

[116] *Id.* § 3604(a)-(b).

[117] DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996). For a more in-depth discussion of the parallels between Title VII constructive discharge claims and the potential for creating a Title VII constructive eviction cause of action, see *infra* Part III.C.

[118] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 568 (7th Cir. 2008) (Wood, J., dissenting), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir 2009) (en banc).

[119] *DiCenso*, 96 F.3d at 1008 (noting that several other courts have found harassment to be an actionable form of housing discrimination (citing Beliveau v. Caras, 873 F. Supp. 1393, 1396-97 (C.D. Cal. 1995); People v. Merlino, 694 F. Supp. 1101 (S.D.N.Y. 1988))).

[120] In *Bloch II*, the Seventh Circuit created a case for a claim of post-acquisition discrimination under § 3604 when it noted that, "[a]s a purely semantic matter the statutory language [of Section 3604(a)] might be stretched far enough to reach a case of 'constructive eviction.'" Bloch v. Frischholz (*Bloch II*), 587 F.3d 771, 776 (7th Cir. 2009) (internal quotation marks omitted) (quoting Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004)). The court went on to explicitly state that "§ 3604(a) may reach post-acquisition discriminatory

enjoy the rights guaranteed in this section can take place after acquisition of the dwelling, creating a cause of action under § 3617, which prohibits coercion, intimidation, and interference with one's enjoyment of his dwelling.[121] While the Seventh Circuit has "routinely reserved" the issue of whether a plaintiff may assert a cause of action under § 3617 even in the absence of violations of §§ 3603, 3604, 3605, or 3606,[122] at least two courts have found a valid cause of action in these circumstances.[123] Furthermore, as the United States pointed out in its amicus brief to the Seventh Circuit prior to the en banc re-hearing, the Department of Housing and Urban Development has itself interpreted the Fair Housing Act to apply to "post-acquisition discrimination."[124] Affording *Chevron* deference to HUD's interpretation of the Fair Housing Act forces the conclusion that "post-acquisition discrimination" is protected under the Act.[125]

Thus, the Seventh Circuit's consideration of the Blochs' Fair Housing Act claims in both *Bloch I* and *II* wrongly affirmed the grant of summary judgment because they failed to fully and properly consider the various theories discussed herein that would support a cause of action for discrimination under the Fair Housing Act. A look into the congressional intent of the Fair Housing Act reveals that, in order to achieve the stated goal of the statute, a broader interpretation of the statutory language is necessary.[126] The discriminatory

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conduct that makes a dwelling unavailable to the owner or tenant, somewhat like a constructive eviction." *Bloch II*, 587 F.3d at 776. However, finding no "unavailability" here, the Blochs' claim under § 3604(a) was dismissed.

[121] *See Halprin*, 388 F.3d at 330.

[122] *Bloch II*, 587 F.3d at 781.

[123] *See* United States v. Koch, 352 F. Supp. 2d 970, 978-79 (D. Neb. 2004); Stackhouse v. DeSitter, 620 F. Supp. 208, 210 (N.D. Ill. 1985). Additionally, in *Bloch II*, the Seventh Circuit stated that "a § 3617 claim might stand on its own," and in applying that idea to the Blochs, noted that a claim under this section could only prevail after proof of intentional discrimination, an issue remanded for determination at trial. *Bloch II*, 587 F.3d at 782-83. Once discrimination was established, the Blochs would be able to proceed under § 3617, but that issue has yet to be reached. *Id*.

[124] Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims at 32, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376) (citing 24 C.F.R. 100.400(c)(2) and 24 C.F.R. 100.65(b)(4)).

[125] *Id.* at 33 (citing Chevron, USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)). *Chevron* sets forth a legal test for determining whether deference should be given to a government agency's interpretation of their statutory law. *See Chevron*, 467 U.S. 837. Deference is given to the agency when a statute is ambiguous and the agency's interpretation is reasonable. *See id*.

[126] The Supreme Court has recognized the importance of expanding the scope of interpretation of the Civil Right Act of 1964. *See* Griffen v. Breckinridge, 403 U.S.

treatment to which the Blochs were subject is exactly the type of conduct that the Fair Housing Act seeks to prohibit, and by granting summary judgment, the Seventh Circuit effectively undermined the ability of the Fair Housing Act to "provide . . . fair housing throughout the United States."[127]

B. The Necessity for Religious Accommodation Under the First Amendment

While the Fair Housing Act may not explicitly require religious accommodation, the question of whether the First Amendment requires such an accommodation in the housing context is a separate but equally important issue. As discussed in Part II, the First Amendment is implicated here because housing discrimination occurred on the basis of religion. Analyzing how courts have dealt with religious accommodation in other contexts sheds some light on whether the situation in *Bloch* was appropriately analyzed under the First Amendment. First Amendment jurisprudence, specifically the religious accommodation requirement of Title VII of the Civil Rights Act,[128] demonstrates that not only would a parallel requirement under the Fair Housing Act be constitutional, but it would also further the Act's goals. In failing to recognize the necessity of a religious accommodation requirement under the First Amendment, the Seventh Circuit panel in *Bloch I* rashly and inappropriately granted summary judgment, and only partially nullified the effects of this harsh judgment in *Bloch II* by remanding the case in part, underscoring the need for action.

The religion line of the First Amendment is generally analyzed as two separate clauses—the Free Exercise Clause and the Establishment Clause.[129] The Free Exercise Clause prohibits the creation of laws that burden the practice of

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88, 97-98 (1971) (acknowledging that the Court has broadly interpreted Civil Rights statutes); *see also supra* note 106 and accompanying text.

[127] 42 U.S.C. § 3601 (2006). While *Bloch II* leaves open the possibility for the Blochs to establish claims under § 3604(b) and § 3617 if a finding of intentional discrimination is made on remand, no relief is presently available to the Blochs under the Fair Housing Act without further litigation pending a favoring outcome on remand. *Bloch II*, 587 F.3d at 781, 783.

[128] *Id.* § 2000e-1 to -17.

[129] The Religion Clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The first ten words of the Amendment have been deemed the "Establishment Clause" and the remainder the "Free Exercise Clause." *See* Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947).

religion, while the Establishment Clause prohibits the government from promoting or showing favoritism towards one religion.[130] When a law places an incidental burden on the practice of religion, the Free Exercise Clause merely requires that such a law be neutral and generally applicable in order to be deemed constitutional.[131] When this test cannot be met and a law is not religiously neutral, the government must prove that the law is necessary to achieve a compelling government interest and is narrowly-tailored to meet this interest.[132] Finally, the government must prove that the achievement of the interest at stake would be undermined by the creation of a religious exception to the rule.[133] Similarly, the Establishment Clause forbids a law from promoting or disadvantaging any particular religion.[134] The Supreme Court has stated that there are three ways of proving that a law suppresses religion or religious conduct: (1) the law is facially biased; (2) the law targets one or more religious groups; or (3) the law prohibits more conduct than is necessary to achieve the stated compelling government interest.[135]

The Shoreline Towers Condominium Association rule violates the First Amendment's Free Exercise Clause and may be deemed unconstitutional under two of the theories that the Supreme Court has approved for proving that the purpose of a law is to suppress religious conduct. First, the condominium rule targets a religious group. While not expressly targeting Jews, the rule effectively prohibits observant Jews from living at Shoreline Towers in accordance with the tenets of their religion. As Justice Wood pointed out in her dissent in *Bloch I*, just as a rule that forbids individuals from wearing headscarves in the common areas of the condominium would single out observant Muslim women whose religion requires them to cover their heads, so too does the prohibition of the display of religiously mandated objects in the doorways of one's home disproportionately affect observant Jews.[136] Second, the

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[130] U.S. CONST. amend. I.

[131] *See* Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).

[132] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 530 (1993).

[133] *Id.*

[134] *Id.* at 532 (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990)).

[135] *See id.* at 533-38.

[136] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 573 (7th Cir. 2008) (Wood, J., dissenting) *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

hallway rule prohibits more conduct than is necessary to achieve the Association's stated goal of maintaining an attractive hallway appearance.[137] This objective could be achieved by less restrictive means. Moreover, it could be achieved even if there was a religious exception to the rule permitting Jews or any other religious group that requires such an accommodation to display *mezuzot* or the like in their doorways.

In sum, the condominium association rule violates the Free Exercise Clause under the factors enumerated by the Supreme Court. On the other hand, a religious accommodation requirement in the housing context would be constitutionally permissible. In fact, religious accommodation would be in line with the legislative approach to religion in the employment context, a world where religious accommodation is not merely permissible, but is required.[138] Even if religious accommodation in the housing context is out of line with the congressional intent of the Fair Housing Act, the subsequent sections assert that religious accommodation is necessary, at least in certain situations. These situations exist where, like in the case at bar, the rule in question has a disparate impact on one specific religious group, observant Jews, and is therefore in violation of both the First Amendment and the Fair Housing Act. In such an instance, religious accommodation is necessary regardless of whether the drafters of the Fair Housing Act envisioned the law to operate in this way.

C. Religious Accommodation and Title VII Employment Claims

Title VII of the Civil Rights Act prohibits employment discrimination on the "basis of race, color, religion, sex, and national origin."[139] The Supreme Court has held that it is constitutionally permissible for the government to order employers, under this Act, to accommodate employees' religious

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[137] *See* Brief of Defendants-Appellees at 9, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376).

[138] *See* 42 U.S.C. § 2000e(j) (2006); *see also* EEOC, RELIGIOUS DISCRIMINATION (2009), http://www.eeoc.gov/types/religion.html [hereinafter RELIGIOUS DISCRIMINATION]. This assertion builds off the previous section's argument that religious accommodation is in line with the congressional intent of the Fair Housing Act. *See supra* Part III.C.

[139] 42 U.S.C. § 2000e-2(a)(1).

needs.[140] This section seeks to explain how religious accommodation is handled under the Title VII mandate, and argues that creating a similar requirement under Title VIII, the Fair Housing Act, would function similarly and be constitutionally permissible.

The Supreme Court has held that the Title VII religious accommodation requirement does not violate the Establishment Clause, because it does not promote or advance religion, but rather merely permits religious exercise.[141] The United States Equal Employment Opportunity Commission ("EEOC"), the agency responsible for enforcing Title VII and investigating alleged violations of the statute, created the religious accommodation requirement, which now requires that "[e]mployers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer."[142] The EEOC has defined a religious accommodation to be "any adjustment to the work environment that will allow the employee to practice his religion."[143] Such adjustments include flexible scheduling, task reassignments, and modification of grooming requirements and agency policies, practices, and procedures, including permitting religious expression.[144] The only exception to this requirement is if such an accommodation would "legitimately" harm the interests of the business.[145]

The adoption of religious accommodation practices in the housing context would be no more violative of the First Amendment than would the parallel requirement in the employment context, which the Supreme Court has long upheld as constitutional.[146] A religious accommodation requirement is necessary to provide homeowners with the same protections that the EEOC requirement of religious accommodation provides to employees. Such an accommodation, as long as it is tailored in a manner similar to Title VII, should not violate the

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[140] *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (internal quotation marks omitted) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987))).

[141] *See id.*

[142] RELIGIOUS DISCRIMINATION, *supra* note 138.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See Amos*, 483 U.S. at 335.

Establishment Clause. To the contrary, it would further the goal of the Free Exercise Clause of preventing the burdening of religious exercise,[147] because such an accommodation would enable homeowners to be free from the fear that they may be constructively evicted from their homes due to rules that inhibit their ability to practice their religion in their homes.

The Title VII religious accommodation requirement has interpreted the word "religion" to include "all aspects of religious observance and practice, as well as belief."[148] In order to establish a religious accommodation claim under Title VII, the claim must be assessed under a two-step framework.[149] First, the claimant must establish a prima facie case by proving that: (1) he has a "bona fide religious belief" that conflicts with one or more of his employment duties; (2) he informed the employer of the belief and conflict; and (3) as a result of the conflict, he was subject to adverse employment consequences.[150] If all of these requirements are met, the burden shifts to the defendant to show that accommodation would create an undue burden for the company.[151]

Employers are required to make religious accommodations for both employees and prospective employees, so long as such an accommodation does not result in "undue hardship."[152] However, the level of undue hardship necessary to overcome the religious accommodation requirement is not clear. The Ninth Circuit found in *Garbers v. Postmaster General* that forcing an employer to pay extra overtime wages was an undue hardship justifying the employer's refusal to provide a Baptist employee additional time off to attend ministerial meetings twice a month.[153] That court defined undue hardship as "result[ing] in more than a de minimis cost to the employer."[154] Furthermore, the Supreme Court has held that when an employer takes reasonable steps to accommodate an

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[147] U.S. CONST. amend. I.

[148] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 (1977).

[149] Garbers v. Postmaster Gen., No. 94-15557, 1995 WL 241474, at *1 (9th Cir. Apr. 24, 1995).

[150] *See id.* at *1; *see also* Johnson v. K-Mart Corp., No. 96-2408, 1997 WL 741368, at *2-3 (4th Cir. Dec. 2, 1997).

[151] *Johnson*, 1997 WL 741368, at *1; *see also Garbers*, 1995 WL 241474, at *1.

[152] *Trans World Airlines*, 432 U.S. at 74.

[153] *Garbers*, 1995 WL 241474, at *1 (holding that having to pay 12% in overtime constituted an undue burden to employer overcoming his duty to accommodate employee's religious beliefs).

[154] *Id.* (citing Heller v. EBB Auto Co., 8 F.3d 1433, 1440 (9th Cir. 1993)); *see also Trans World Airlines*, 432 U.S. at 84.

employee's religious beliefs, the requirement may be met even though no solution was ultimately found.[155]

In addition, employees may bring Title VII claims alleging "constructive discharge."[156] Such a situation occurs when "a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions."[157] This type of claim requires a plaintiff to establish that the employer deliberately created intolerable working conditions to compel the employee to quit.[158] Intent is demonstrated through evidence that the employee's resignation was a "reasonably foreseeable consequence" of the employer's failure to act when he becomes aware of the condition.[159]

Under Title VII's framework for religious accommodation, it appears that the Blochs' claim of discrimination would be strong enough to establish a violation. Under the two-step framework, the Blochs have established a prima facie case of discrimination, and there is no proof that providing religious accommodation would cause any hardship for the Shoreline Towers Condominium Association. First, the Blochs have proven that they have a "bona fide religious belief" that conflicts with the rule in question.[160] The Jewish religion requires that individuals display *mezuzot* in the doorways of their homes at all times.[161] The hallway rule that Shoreline adopted in the spring of 2004 may be interpreted as including a prohibition on the display of *mezuzot* on the exterior doors of the condominiums.[162] This rule necessarily interfered with the Blochs' practice of their religion, and the Blochs appropriately

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[155] *See Trans World Airlines*, 432 U.S. at 78-79 (holding that no violation of Title VII occurred where an airline provided a religious employee with multiple alternatives to working on Saturdays, despite the fact that none were ultimately found to be suitable; the Court found that the accommodation that the employee wanted would have posed an undue burden, and because employee had been given accommodating options, Title VII was not violated).

[156] *Garbers*, 1995 WL 241474, at *1.

[157] *Id.* at *2 (quoting Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987)); *see also* Johnson v. K-Mart Corp., No. 96-2408, 1997 WL 741368, at *3 (4th Cir. Dec. 2, 1997) (defining constructive discharge as the situation where "an employer deliberately makes the working conditions of the employee intolerable in an effort to induce the employee to quit" (internal citations omitted)).

[158] *See Johnson*, 1997 WL 741368, at *1.

[159] *Id.*

[160] *See Garbers*, 1995 WL 241474, at *1.

[161] *See supra* note 13 and accompanying text.

[162] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 567 (7th Cir. 2008) (Wood, J., dissenting) *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

contacted Shoreline about the problem, providing them with information explaining the religious significance of a *mezuzah*.[163] Finally, the Blochs suffered adverse consequences as a result of the conflict between the hallway rule and their religious practices.[164] The Blochs suffered emotional distress as a direct result of both this conflict and their internal struggle between wanting to live in their home and adhering to the tenets of their religion.[165] Furthermore, there was no showing that the condominium association would have suffered any hardship at all,[166] let alone an "undue hardship," by accommodating the religious beliefs of the Blochs and other Jewish unit owners.[167] The alleged goal of the hallway rule was to "protect the appearance of the hallways,"[168] and there was neither a showing that this goal would be undermined by a religious-accommodation exception to the rule, nor that the condominium association would suffer any hardship as a result.

The Shoreline Towers Condominium Association did not even offer accommodation alternatives with which the Blochs may have been satisfied.[169] Instead, they entirely refused to accommodate their religious beliefs.[170] One tenant described the

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[163] *Id.* As the amicus brief submitted in support of Plaintiff-Appellants notes, many Jews believe they are biblically required to place a *mezuzah* in the doorway of their home because it is "a sacred piece of iconography meticulously presented in their doorway in accordance with [G-d's] law." Brief of Amicus Curiae the Decalogue Society of Lawyers in Support of Plaintiffs-Appellants at 4, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376) ("Because an observant Jew cannot live in a home without a mezuzah, forcibly removing one from an adherent's doorway is tantamount to eviction.").

[164] *Bloch I*, 533 F.3d at 567 (Wood, J., dissenting); *see also Garbers*, 1995 WL 241474, at *2-3.

[165] *See Bloch I*, 533 F.3d at 567 (Wood, J., dissenting); Amended Complaint at ¶ 41-42, Bloch v. Frischholz (N.D. Ill. 2006) (No. 06 C 4472).

[166] While arguably Shoreline Towers Condominium Association could assert that *mezuzot* are not aesthetically pleasing, and thus cause the Association hardship, it seems unlikely that a court could legitimately characterize aesthetic concerns as excessive enough to warrant being deemed "undue hardship." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). This seems especially true in light of seriousness that the Supreme Court has required in order to show that an accommodation poses "undue hardship," that is, proof that the accommodation would pose "more than a de minimis cost" to the accommodator. *See id.*

[167] *Id.*

[168] Response Brief of the Defendants-Appellees at 9, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376).

[169] *See supra* notes 142-145 and accompanying text.

[170] *Bloch I*, 533 F.3d at 568 (Wood, J., dissenting). In September 2004, Lynne Bloch approached the condominium board with a proposed amendment to the hallway rule that would allow the display of religiously-mandated objects, including *mezuzot*, on the doorframes, but her proposal was rejected. *Id.*

effect of the rule on her life by stating that she had "essentially been evicted from her home."[171] This allegation of constructive eviction is analogous to claims of constructive discharge, which are actionable under Title VII.[172] Here, observant Jewish condominium owners were placed in a situation where they felt forced to move out of their homes because of intolerable discriminatory housing practices.[173] Just as such a claim would be actionable under Title VII, a similar remedy should be available for individuals who are placed in an analogous situation by discriminatory housing practices.

The constitutionality of the religious accommodation requirement of Title VII has been established.[174] Creating a similar requirement for Title VIII, the Fair Housing Act, would similarly pass the First Amendment's requirements of neither promoting nor advancing religion, and would foster the free exercise of religion. As discussed, if an analogous framework were in place for assessing violations of the Fair Housing Act as is in place for determining whether violations of Title VII have occurred, the Blochs could potentially have two causes of action. First, it seems that the Blochs would easily be able to make out a prima facie case of discrimination that the defendants would be unable to overcome by proof of undue hardship. In addition, the hallway rule resulted in constructive eviction of Jewish condominium owners because they can no longer display their *mezuzot*, in accordance with the tenets of their religion.[175] As a result, constructive eviction could potentially be an independent cause of action as well.[176] Creating a religious accommodation requirement for the Fair Housing Act would properly allow discrimination in the housing market to be overcome by the most fair and efficient means possible. The religious accommodation requirement has fostered non-discrimination in the employment context as

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[171] *Id.*

[172] *See* Johnson v. K-Mart Corp., No. 96-2408, 1997 WL 741368, at *1 (4th Cir. Dec. 2, 1997).

[173] *Bloch I*, 533 F.3d at 568 (Wood, J., dissenting); s*ee also Garbers*, 1995 WL 241474, at *7-8.

[174] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

[175] *See supra* note 13 and accompanying text.

[176] The Blochs' potential constructive eviction claim referenced here would be distinct from claims of constructive eviction under § 3604(a) and § 3604(b) of the Fair Housing Act, discussed in Part III.A, as the claim here would stem from the Religious Accommodation Clause for which this section advocates.

efficiently as possible, and so too could such a requirement in the housing market.

D. The Seventh Circuit's Failure to Reach Disparate Impact Analysis

The Seventh Circuit further erred in analyzing the situation presented in *Bloch* by failing to assess the disparate impact that the hallway rule had on observant Jews. While the court in *Bloch I* completely ignored the potential for a disparate impact claim, in *Bloch II* the court explained that it believed that the Blochs waived their ability to argue disparate impact, because they did not raise it during the summary judgment phase of the proceedings.[177] The court acknowledged that the Blochs used the term "disparate impact" in their pleadings and cited the seminal case on disparate impact in their sur-reply, but concluded that it was not enough to entitle them to disparate impact analysis on their claims.[178] However, if the court had reached the Blochs disparate impact claim and looked at Fair Housing Act and First Amendment jurisprudence, it would have become clear that the Blochs had a legitimate disparate impact claim since the hallway rule had a disparate impact on Jewish residents, substantially burdening their ability to freely practice their religion, without any legitimate reason for doing so. In deciding that the Blochs waived their disparate impact claims, both Seventh Circuit decisions never engaged in enough analysis to recognize that clear issues of material fact existed as to the disparate impact of the hallway rule on observant Jews.[179]

A Fair Housing Act violation can be established by a showing of disparate impact or disparate treatment.[180]

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[177] Bloch v. Frischholz (*Bloch II*), 587 F.3d 771, 784 (7th Cir. 2009).

[178] *Id.* at 784-85 ("Accordingly, we conclude that the Blochs waived any *Arlington Heights* disparate impact argument. So the Blochs must proceed on a showing on intentional discrimination.").

[179] By limiting the remanded case to the issue of intentional discrimination and not allowing the Blochs to proceed on the additional claim of disparate impact, one of their potential avenues of relief was made unavailable to them.

[180] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988); *see also* Hack v. President of Yale Coll., 237 F.3d 81, 96-97 (2d Cir. 2000) (Moran, J. dissenting) (noting that "the existence of disparate impact claim under Title VIII was implicitly confirmed when the Supreme Court announced its decision in *Village of Arlington Heights v. Metro. Housing Development Corporation*.") (citing 429 U.S. 252 (1977)). The circuits, however, are not in agreement as to whether mere proof of disparate impact alone is enough to establish a Fair Housing Act violation. While some circuits have found violations of the Act in

Similarly, a violation of the First Amendment may also be established by showing that a rule is facially discriminatory or has a disparate impact on one or more religious groups.[181] Proof of disparate impact requires a totality of circumstances analysis, for example, an investigation into the background of the decision, the sequence of events leading up to the decision, and the factors the decision-maker considered.[182] In order to prove discriminatory impact under the Fair Housing Act, there must be a showing that the ultimate effect of the law or rule is disproportionately placed on one group.[183] If discriminatory impact is present but discriminatory intent cannot be readily proven, the analysis of whether the rule is discriminatory under the Fair Housing Act becomes more complicated. Although Fair Housing Act claims are dramatically easier to prove when both discriminatory intent and effect can be shown, violations of Title VII, as discussed, are often established based on evidence of discriminatory impact, even without a showing of discriminatory intent.[184] Thus, whether the additional requirement of proving discriminatory intent is necessary for establishing a violation of the Fair Housing Act, or for establishing whether the conduct is in violation of the First Amendment, must be assessed.

Under the Fair Housing Act, when discriminatory effect can be established but discriminatory intent cannot, a claim that a violation has occurred is not necessarily void. Instead, it just becomes much more difficult to prove.[185] The Act requires that in order for a violation to be found in such a case, the

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the absence of proof that the defendant intended to discriminate, others have found effect alone to be insufficient. *Compare Huntington Branch, NAACP*, 844 F.2d at 934-35, *with* Dirden v. Dep't. of Hous. and Urban Dev., 86 F.3d 112, 114 (8th Cir. 1996) ("To prevail on a claim under . . . . the Fair Housing Act . . . a plaintiff must prove discriminatory intent.") *and* Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1534 (7th Cir. 1990) ("But discriminatory effect is not . . . the violation; it is merely evidence of violation.").

[181] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-38 (1993).

[182] *See Vill. of Arlington Heights*, 429 U.S. at 267-68.

[183] United States v. City of Black Jack, Mo., 508 F.2d 1179, 1186 (8th Cir. 1974) (holding that discriminatory effect was established where an ordinance led to foreclosure for 85 percent of the African Americans living in the area).

[184] United States v. City of Chi., 549 F.2d 415, 435 (7th Cir. 1977) (citing Wash. v. Davis, 426 U.S. 229, 238-39 (1976)).

[185] *See City of Black Jack, Mo.*, 508 F.2d at 1186; *see also supra* note 180. *But see Hack*, 237 F.3d at 96-97 (Moran, J. dissenting) (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 128 (3d Cir. 1977) and noting that the Third Circuit has held that proof of discriminatory effect alone is sufficient to establish a prima facie case of disparate impact under the Fair Housing Act).

claimant must establish that the action was taken "because of religion."[186] The broad view of this requirement is that an action can be shown to have been taken on the basis of religion wherever claimant can prove that the "natural and foreseeable consequence" of the action is discrimination, regardless of intent.[187] The narrow view, however, is that in order to meet this requirement, intent needs to actually be proved.[188] Even after this requirement is met, some courts proceed to consider four factors to fully determine whether a violation of § 3604(a), the section prohibiting discrimination in the sale and rental of dwellings, has occurred.[189] The factors to be assessed are: (1) the strength of the showing of the discriminatory effect; (2) whether there is any showing of discriminatory intent at all; (3) the defendant's interest in taking the action; and (4) whether the plaintiff is looking to get the court to make an affirmative holding that the defendant must provide housing for minorities or whether he seeks merely to prevent the defendant from interfering with the right of individual property owners.[190]

First Amendment analysis of whether facially neutral laws are discriminatory on the basis of religion is approached differently. Facially neutral laws are assessed under a rationality standard: does the rule infringe on the free exercise of religion?[191] Even if a facially neutral law of general applicability does infringe on religious practice, the Supreme Court has only applied strict scrutiny where other constitutional protections were at issue as well,[192] or where it could be shown that the rule was not actually "neutral," because its object was "to infringe upon or restrict practices."[193]

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[186] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (finding discriminatory effect in the absence of discriminatory intent in the case of zoning ordinances prohibiting the construction of federally financed low-income housing); 42 U.S.C. § 3604(a) (2006).

[187] *See id.* at 1288.

[188] *See id.*

[189] *See id.* at 1290.

[190] *Id.*

[191] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990).

[192] *See id.* at 881-82 (citing numerous cases including *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (deeming a statute compelling students to salute the flag to be unconstitutional when challenged by religious objectors); Wisconsin v. Yoder, 406 U.S. 205, 206 (1972) (invalidating compulsory schooling laws as applied to Amish Parents who objected on religious grounds after the Court upheld the right of parents to direct the education of their children in *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925))).

[193] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

Congress, however, did not approve of the rational basis test, and voiced its disapproval by passing the Religious Freedom Restoration Act ("RFRA").[194]

RFRA prevented the government from "substantially burdening" religious practice even where the burden resulted from a generally applicable rule.[195] The exception to this was that if the government could demonstrate that the burden was in furtherance of a "compelling government interest," and that the restriction was the least restrictive means of achieving the interest, then the rule could be upheld.[196] One of the stated goals of RFRA was to provide a cause of action for people whose religious exercise was unnecessarily burdened by the government.[197] The Supreme Court, however, struck down RFRA in *City of Boerne v. Flores*,[198] holding that the law created a separation of powers issue because it exceeded Congress' remedial powers.[199]

In a second attempt to remedy what Congress saw as an injustice in denying individuals the rights guaranteed to them by the First Amendment, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[200] This Act was also constitutionally challenged, but the Supreme Court upheld the statute,[201] exemplifying the fact that religious accommodation statutes do not automatically violate the Establishment Clause. RLUIPA is a narrower version of RFRA that prohibits the government from imposing "substantial" burdens on the religious exercise of any institutionalized individual unless there is a compelling government interest and the restriction is the least restrictive means of achieving the interest.[202] In the face of allegations that RLUIPA

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[194] 42 U.S.C. §§ 2000bb-1 to -4 (1993) (this statute's application to local and state governments was later declared unconstitutional in City of Boerne v. Flores, 521 U.S. 507 (1997)).

[195] *Id.* § 2000bb.

[196] *See City of Boerne*, 521 U.S. at 515-16 (discussing the intent of RFRA before deeming it unconstitutional).

[197] 42 U.S.C. § 2000bb.

[198] 521 U.S. 507 (1997).

[199] *City of Boerne*, 521 U.S. at 536 (noting that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance"); *see also* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (explaining that "this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment").

[200] 42 U.S.C. §§ 2000cc-1 to -5.

[201] *See Cutter*, 544 U.S. at 719-26 (holding that the protections granted by RLUIPA did not violate the Establishment Clause).

[202] *See* 42 U.S.C. § 2000cc-1(a)(1)-(2); *see also Cutter*, 544 U.S. at 712.

effectively advanced religion, in conflict with the Establishment Clause, the Supreme Court upheld the statute. In *Cutter v. Wilkinson*,[203] the Supreme Court found RLUIPA to be constitutional because there was "no cause to believe RLUIPA would not be applied in an appropriately balanced way"[204] given the "compelling governmental interest" exception, and the fact that it "does not differentiate among bona fide faiths."[205] The Court recognized RLUIPA to be a continuation of "congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents."[206] Thus, the Supreme Court adeptly observed Congress' discontent with the limited protections that the rationality standard advanced in *Employment Division v. Smith*[207] provided to religious individuals in the face of governmental action stymieing individuals' ability to practice freely.[208]

In *Bloch I*, the Seventh Circuit found the hallway rule to be neutral and generally applicable with respect to religion.[209] Viewing the rule as facially neutral and seeing no requirement for religious accommodation under the Fair Housing Act, the court took their analysis no further.[210] By stopping their analysis at this early stage, the opinion failed to determine whether the hallway rule had a disparate impact on individuals of particular religious groups. The *Bloch II* court recognized that while the hallway rule may have been neutral when first adopted, the crux of the Blochs' claim was that the reinterpretation of the rule in 2004 was not neutral.[211] Yet the court never engaged in disparate impact analysis to address this, and remanded the case only for determination of intentional discrimination. But, violations of both the Fair Housing Act and the First Amendment can be made by proving that a disparate impact results from application of a facially

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[203] 544 U.S. 709 (2005).

[204] *Cutter*, 544 U.S. at 722.

[205] *Id.* at 723.

[206] *Id.* at 714.

[207] 494 U.S. 872 (1990).

[208] *See Cutter*, 544 U.S. at 714-15; Employment Div. v. Smith, 494 U.S. at 881.

[209] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 564 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc).

[210] *Id.* at 564-65.

[211] Bloch v. Frischholz (*Bloch II*), 587 F.3d 771, 783 (7th Cir. 2009).

neutral rule.[212] Advanced analysis of the implications of the hallway rule sheds light on the fact that perhaps disparate impact analysis would have led to a different outcome.

Under Fair Housing disparate impact analysis, even if we begin with the assumption that discriminatory intent is not outwardly evident, when we look to the factors for determining whether a violation has occurred, the answer appears to be overwhelming.[213] First, there is a strong showing of discriminatory effect here as the hallway rule results in the constructive eviction of Jewish residents since they can no longer display their *mezuzot*.[214] This effect is significant as it inhibits observant Jews from living in the condominiums they have purchased, and effectively creates a situation where the Shoreline Towers Condominiums are able to exclude Jewish residents. Second, discriminatory intent is not absent here.[215] Rather, the record is replete with evidence of discriminatory intent. The fact that the hallway rule was in place for three years before the association decided to change its applicability to include the display of *mezuzot* was clearly a targeted action.[216] The Association began to remove and confiscate *mezuzot* without giving notice to the residents of the new interpretation of the hallway rule, and continued this practice, eventually culminating in a threat to the Blochs that affixation of a *mezuzah* would result in a monetary penalty.[217] In addition, the fact that the display of *mezuzot* does nothing to inhibit the stated goal of the hallway rule, to protect the hallways' appearance,[218] is further evidence of the rule's discriminatory intent.

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[212] *See* Church of Lukumi Babalu Aye, Inc.v. City of Hialeah, 508 U.S. 520, 534 (1993); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir. 1998), *aff'd*, 488 U.S. 15 (1988).

[213] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[214] *See id.*; *see also supra* note 13 and accompanying text.

[215] *See Metro. Hous. Dev. Corp.*, 558 F.2d at 1290.

[216] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 567 (Wood, J., dissenting), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc); *Bloch II*, 587 F.3d at 773 ("Though Frischholz knew as early as 2001 that removing mezuzot would be a problem for Lynne Bloch, he made no effort to stop the staff from repeatedly tearing them down. Instead, he accused Lynne of being a racist, called her a liar, encouraged other tenants to vote against her reelection to the Association's Board of Managers, and told her that if she didn't like the way the rules were enforced, she should 'get out.'").

[217] *Bloch I*, 533 F.3d at 567.

[218] Response Brief of Defendants-Appellees at 9, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376).

To add insult to injury, the condominium association removed the Blochs' *mezuzah* after they requested special permission to display one only for a limited time to conform to the Jewish mourning rituals after the death of Marvin Bloch. The condominium association's action demonstrates that another motivation, other than the hallway's appearance, was at issue.[219] Finally, the fact that the condominium board rejected a proposal to create a religious accommodation amendment to the hallway rule, when such an amendment would have no impact on the achievement of the rule's purpose, seems to indicate that they may have had an ulterior motive. This rejection is additional evidence of the association's discriminatory intent in interpreting the hallway rule to prohibit even the display of religiously-mandated objects.[220]

Looking to the final two factors,[221] it seems clear that not only did Shoreline lack an interest in taking this action, but also that all the Blochs were seeking to achieve with their lawsuit was to prevent interference with their individual property rights. Shoreline cannot legitimately say that the amendment proposed by the Blochs was objectionable on any sound basis. If the hallway rule's purpose really is simply to protect the appearance of the hallways, then the display of small religious objects such as a *mezuzah* does not contradict or undermine this purpose in any way. This is a question of fact that remained to be brought before a jury.[222] Thus, the defendants had no interest in taking this action.[223] Finally, the Blochs did not request that the Court require Shoreline to take an affirmative action to provide housing for religious minorities. Rather, they merely sought to protect their own individual property rights, which they were prevented from

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[219] *Bloch I*, 533 F.3d at 567 (Wood, J., dissenting) ("Perhaps the worst episode, and one that gives rise to a strong inference of anti-Semitic animus occurred while the Blochs were mourning the death of Dr. Marvin Bloch, Lynne's husband and Helen and Nathan's father.").

[220] *Id.* at 568.

[221] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[222] Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims at 37, Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008) (No. 06-3376) (explaining that "were the jury to find that the Association's actions were motivated in part by plaintiffs' race or religion, it does not matter that the Association acted under the aegis of neutral Hallway Rule 1").

[223] *See id.*

exercising.[224] Given the analysis of these factors, a violation of the Fair Housing Act has likely occurred, even without a reading of the statute that requires religious accommodation, because of the disparate impact of the hallway rule on observant Jewish residents and the fact that HUD has interpreted the Act to apply to post-acquisition discrimination.[225]

Under the First Amendment, while the seemingly facially neutral and generally applicable hallway rule at issue in *Bloch* might initially be seen as a situation warranting only rational-basis review,[226] this superficial analysis oversimplifies the complexity of the issues raised in the case. As the Supreme Court's decision in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[227] makes clear, strict scrutiny must be applied where the purpose of a law is to impede the practice of religion.[228] In his concurring opinion, Justice Scalia expounds on this, noting that strict scrutiny is required where "laws which, though neutral in their terms, through their design, construction, or enforcement, target the practices of a particular religion for discriminatory treatment."[229] That is precisely the type of rule at issue here.[230] The hallway rule, while neutral on its face, has been enforced only to the detriment of observant Jews, who are no longer free to display their *mezuzot*. Where the application of a facially neutral law reveals religious animus and results in disparate impact on only one religious group, the law can no longer be deemed "neutral."[231] Thus, the Condominium Association's interpretation of the hallway rule to include a prohibition on the display of *mezuzot*, combined with their

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[224] *See id.*

[225] *See supra* note 50 and accompanying text.

[226] *See* Employment Div., v. Smith, 494 U.S. 872, 882 (1990).

[227] 508 U.S. 520 (1993).

[228] *Church of Lukumi Babalu*, 508 U.S. at 533 ("Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (internal citations omitted)).

[229] *Id.* at 557 (Scalia, J., concurring).

[230] In fact, the *Bloch II* court recognized this as they cited to this case in their discussion of intentional discrimination noting, "The First Amendment 'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'" Bloch v. Frischholz (*Bloch II*), 587 F.3d 771, 785 (7th Cir. 2009) (en banc) (citing *Church of Lukumi Babalu*, 508 U.S. at 534). This statement, however, has heavy implications for assessing just how "neutral and generally applicable" the hallway rule actually is.

[231] *Church of Lukumi*, 508 U.S. at 533 (majority opinion).

continual removal of the Blochs' *mezuzah* despite specific requests to display it, demonstrate a potential religious motivation behind the rule.[232] The situation, therefore, warrants strict scrutiny. When subject to that exacting standard, the hallway rule would certainly fail to overcome the requirement that the rule be justified by a compelling interest and narrowly tailored to meet that interest.[233] If the Association's goal was truly to rid the hallways of clutter, there are certainly less restrictive ways of obtaining this result, including allowing for a religious exception to the rule. It is likely then, that had the Seventh Circuit looked beyond the face of the rule, it would have realized that the situation at bar was analogous to that at issue in *Church of Lukumi Babalu Aye, Inc*. and therefore warranted a greater level of scrutiny and deeper analysis than it was given.

In acting on its concern for the leniency with which the constitutionality of laws that infringe on religion are assessed, Congress passed legislation that limited the ability of the government to infringe on individuals' exercise of religion, which was scrutinized by the Supreme Court and upheld.[234] In *Cutter*, the Supreme Court observed that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety . . . accommodation must be measured so that it does not override other significant interests."[235] It seems logical, therefore, that there could be and should be a statutory requirement for religious accommodation in housing as long as it does not undermine a significant interest, for example, with a compelling interest exception and without giving enhanced privileges to one religion over another.[236] Such a requirement would not violate the Establishment Clause and would achieve the objective of the Free Exercise Clause, allowing individuals to freely practice their religions.[237]

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[232] *See supra* notes 214-219 and accompanying text.

[233] *Church of Lukumi Babalu*, 508 U.S. at 533.

[234] *See* discussion of RLUIPA *supra* notes 198-206 and accompanying text.

[235] Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

[236] *See id.* at 723-33.

[237] U.S. CONST. amend. I.

IV. THE ROAD FORWARD: THE NEED FOR IMMEDIATE LEGISLATIVE ACTION

The Seventh Circuit's cursory ruling in *Bloch I* essentially opened the door for private housing associations to arbitrarily create neutral and generally applicable[238] rules that only affect one group of people and, in doing so, effectively keep protected classes out of their units. This result is in direct conflict to the stated objectives of the Fair Housing Act, and if taken to the extreme, could cause the nation to revert to segregated housing systems like those that were predominant at the time the statute was enacted.[239] While the circuit partially remedied these potentially devastating effects by remanding the case for a determination on the issue of intentional discrimination, the initial ruling is one that courts in other circuits could easily follow and the courts' denial of the Blochs' § 3604(a) claims still allows great leeway for housing owners to subvert the spirit of the Fair Housing Act. The decision, however, is not without remedy. In light of the harsh consequences that this decision could have on the future of fair housing in the United States, the state and federal legislatures are in the best position to prevent religious discrimination in housing of the type that plagued the Blochs. In fact, some states have already begun to take action, which should encourage other states to become involved in remedying the potentially damaging consequences. In the face of judicial decisions that have negative policy implications, the other branches of government are the only bodies in a position to curtail the effects of such decisions on the general welfare of society.

In the past, when Congress has disapproved of judicial interpretations of the Fair Housing Act and the First Amendment, it has taken steps to overcome these decisions and promote the ideals they originally sought to achieve.[240] The

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[238] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562, 564 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc) (citing Employment Div. v. Smith, 494 U.S. 872, 872 (1990)).

[239] *See supra* note 69 and accompanying text.

[240] *See, e.g.*, 10 U.S.C. § 774 (2006) (providing that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force" with only two exceptions—(1) item would interfere with performance of military duty; or (2) if the item is determined not to be "neat and conservative"), which Congress passed in response to *Goldman v. Weinberger*, 475 U.S. 503 (1986) *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. 100-180, 101 Stat. 1086 (1987) (codified at 10 U.S.C. § 774)

Seventh Circuit's holdings in *Bloch I* and *Bloch II* have extreme policy implications for the future of private housing associations and their ability to discriminate against particular classes, namely religious groups. Since statutory law can effectively prevent these harsh effects from becoming reality, the legislature is in the best position to prevent the discrimination in the housing market that could result from this decision.[241] Although the decision may be merely persuasive in jurisdictions outside of the Seventh Circuit, there is no reason why other jurisdictions will not follow the Seventh Circuit's lead in creating an incredibly low burden for determining whether a Fair Housing Act or First Amendment violation has occurred.[242]

The legislatures in some jurisdictions have already taken action to prevent the effects of this decision from creating a situation contrary to that envisioned by the drafters of the Fair Housing Act. While the *Bloch* case was pending in the district court, Chicago enacted an ordinance that prohibits residential building owners from restricting the placement of religious objects in the doorways of homes unless the individual creating the restriction can prove that such a restriction is necessary to avoid property damage or undue hardship to other unit owners.[243] Similarly, two years later, Illinois adopted a law requiring condominium associations to reasonably accommodate "religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit."[244] Additionally, despite the fact that the *Bloch I* decision was not binding precedent in New York, legislators in the state have proposed a bill that would effectively overturn the *Bloch I* decision and affirmatively

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(holding that a prohibition on the wearing of headgear, including religiously-mandated headgear, while on Air Force duty was constitutional; in response, Congress passed a statute allowing religiously-mandated headgear to be worn while on duty which was also deemed constitutional).

[241] *See* 42 U.S.C. § 3601; *see also* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

[242] In fact, just months after the Seventh Circuit rendered its decision, *Bloch* was cited by a district court in the Southern District of New York for the proposition that, "creating a rule that equates failure to accommodate with discrimination would be particularly inappropriate in the context of the FHA, which explicitly provides for accommodation of handicap, but not race, sex or religion." Ungar v. N.Y. City Hous. Auth., No. 06-Civ.-1968, 2009 WL 125236, at *17 (S.D.N.Y. Jan. 14, 2009).

[243] *See Bloch I*, 533 F.3d at 564; CHICAGO, ILL., MUN. CODE 05-8-030(H) (2005).

[244] *See Bloch I*, 533 F.3d at 564; 765 ILL. COMP. STAT. 605/18.4(h) (2007).

guarantee condominium owners the right to have religious displays, including *mezuzot*, outside of their homes.[245]

Representative Jerrold Nadler, the voice behind the proposed New York legislation, also brought the Freedom of Religious Expression in the Home Act of 2008 (FREHA) before the House of Representatives in September 2008,[246] continuing his crusade to voice disapproval with the Seventh Circuit's precedent-setting decision in *Bloch I*. The bill went before the House, with twenty-four co-sponsors, but was never enacted into law.[247] If enacted, FREHA would have effectively addressed the Blochs' problem by "amend[ing] the Fair Housing Act to prevent discrimination relating to the display of religious symbols."[248] This proposed amendment to the Fair Housing Act would allow individuals to display religious symbols in their homes, unless prohibition on such displays was "reasonable and necessary to prevent significant damage to property, physical harm to persons, a public nuisance or similar undue hardship."[249] On September 17, 2008, FREHA was referred to the House Judiciary Committee, and currently remains a potential source of relief for the near future.[250]

CONCLUSION

Bloch v. Frischholz brought to light the immense impact that hasty decisions can have by setting important precedents

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[245] Josh Gerstein, *A Nadler Bill Would Legalize Mezuzahs*, N.Y. SUN, Sept. 19, 2008, *available at* http://www.nysun.com/national/a-nadler-bill-would-legalize-mezuzot/86223/ (last visited July 12, 2009).

[246] Freedom of Religious Expression in the Home Act of 2009. H.R. 6932, 110th Cong. (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h6932ih.txt.pdf. The proposed Act was supported by Representatives Jerrold Nadler (D-NY), Lamar Smith (R-TX), Robert Wexler (D-FL), and Trent Franks (R-AZ). Inst. for Pub. Affairs, *OU Applauds Introduction of Legislation to Protect Homeowners' Religious Rights*, http://www.ou.org/public_affairs/article/ou_applauds_introduction_of_legislation_to_protect_homeowners_religious_rig (last visited Jan. 25, 2009) [hereinafter *OU Applauds Introduction of Legislation*]; *see also* Am. Jewish Congress, *AJCongress Urges Congress to Overturn Court Ruling Banning Right to Display Religious Symbols on Personal Property*, http://www.ajcongress.org/site/News2? page= News Article&id=6875 (last visited July 12, 2009).

[247] Freedom of Religious Expression in the Home Act of 2009. H.R. 6932, 110th Cong. (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h6932ih.txt.pdf.

[248] *Id.*

[249] *OU Applauds Introduction of Legislation*, *supra* note 246.

[250] Freedom of Religious Expression in the Home Act of 2009. H.R. 6932, 110th Cong. (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h6932ih.txt.pdf.

with harsh realities. Although the Seventh Circuit attempted to ameliorate the potentially devastating consequences that the *Bloch I* decision could have had, the possibility of adverse implications has not been dispelled. If the Blochs' intentional discrimination claim does not prevail on remand, then the initial threat of condoning discriminatory housing practices, which the *Bloch I* decision presented, still exists. Additionally, regardless of the outcome on remand, the potential for this result remains because the *Bloch* decision will be precedent in just one circuit. Such a reality comes in spite of the existence of the Fair Housing Act, which has promoted non-discriminatory housing practices throughout the United States since its enactment forty years ago. In the past, congressional action has been, and continues to be, the best means of overcoming judicial decisions that are contrary to the ideals of the nation. Congress should explicitly create a narrowly tailored religious accommodation clause in the Fair Housing Act. The legislative intent of the Fair Housing Act seems to speak to the fact that religious accommodation is necessary to achieve the ideals of the Act. Further reference to the treatment of religious accommodation under the First Amendment in parallel contexts gives an indication of how such a requirement could be developed in a way that would be both constitutionally permissible and potentially further the goals of the Fair Housing Act.

A narrowly tailored religious accommodation requirement in the Fair Housing Act would not violate the First Amendment. Rather, such a requirement would walk the fine line between noninterference with religion, as required by the Free Exercise Clause, and a separation of church and state, as required by the Establishment Clause.[251] The Supreme Court itself has recognized that there is space for legislative action that is not "compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[252]

This Note has argued that legislative action creating an accommodation requirement under the Fair Housing Act falls into this "space" and would be the most effective means of overcoming and preventing the potential consequences of the

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[251] *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

[252] *Id*.

Seventh Circuit's decisions in *Bloch v. Frischholz*.[253] The complementary goals of the Fair Housing Act and the First Amendment have the ability to "ensure that all persons live comfortably together in our pluralistic society and that all persons have access to safe, decent, sanitary housing where they can exercise their right to worship or not worship as they choose."[254] With this exceptional ability right at our fingertips, failing to achieve this ideal would wreak havoc on the progress made since the enactment of the Fair Housing Act. The law affords all citizens the ability to create change and live in a nation where they are free from religious persecution and discrimination. Upholding a decision that effectively subverts this notion is unjust and divergent from the ideals upon which this nation was founded.

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[253] Bloch v. Frischholz (*Bloch I*), 533 F.3d 562 (7th Cir. 2008), *aff'd in part, rev'd in part*, 587 F.3d 771 (7th Cir. 2009) (en banc); Bloch v. Frischholz (*Bloch II*), 587 F.3d 771 (7th Cir. 2009); *see also Cutter*, 544 U.S. at 719.

[254] Seng, *supra* note 1, at 38.

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