# Addendum to The Fair Housing Act and Religious Freedom

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# Addendum to The Fair Housing Act and Religious Freedom

By
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## Introduction

Since this article was published in the Texas Journal on Civil Liberties and Civil Rights one year ago, there have been two developments in the law that are worthy of note, neither of which change appreciably the conclusions reached in the original article.

First, the United States Supreme Court has confirmed that the Religious Freedom Restoration Act of 1993[1] (RFRA) requires the federal government to demonstrate a "compelling" interest when individuals claim an exception from federal laws of general application to accommodate their religious practices. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.[2]

Second, the Court of Appeals for the Seventh Circuit's holding in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*[3] that Sections 804(a) and (b) of the Fair Housing Act[4] apply only to pre-sale or pre-rental discrimination continues to cause uncertainty, at least in that Circuit, about the illegality of discrimination that occurs after a homeowner or tenant acquires housing. Whether the Court of Appeals properly interpreted the Fair Housing Act is open to serious question. However, even if *Halprin* is correct, it should not cause courts to dismiss most of the claims described in the original article.

## RFRA

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,*[5] the United States Supreme Court affirmed that RFRA places a burden on the federal government, which under the Court's decision in *City of Boerne v. Flores,*[6] it cannot place on the states. The Court held that a religious sect could seek a preliminary injunction against the federal government from enforcing the Controlled Substances Act[7] to prevent the sect form using hallucinogens in their religious ceremonies. Chief Justice Roberts declared that the government's ban would substantially burden a sincere religious exercise and that the government

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[1] 42 U.S.C. § 2000bb-1(b).
[2] 126 S.Ct. 1211 (2006).
[3] 388 F.3d 327 (7th Cir. 2004).
[4] 42 U.S.C. § 3604 (a) and (b).
[5] 126 S.Ct. 1211 (2006).
[6] 521 U.S. 507, 530-532 (1997).
[7] 21 U.S.C. § 812 (c).

had not met its burden under RFRA of demonstrating that the health risks of using such a drug were compelling.

To the government's argument that an exception for religious practices would destroy uniformity in enforcement, Justice Roberts countered that a case-by-case consideration of religious exemptions to generally applicable rules was feasible under the Controlled Substances Act. Justice Roberts admitted that the task assigned by Congress to the courts in RFRA was not an easy one; nonetheless, he stated that:

> ". . . Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca.*"[8]

Pursuant to *Gonzales,* if a defendant is arguing that the application of the Fair Housing Act substantially burdens the free exercise of religion, there would have to be an individualized showing under RFRA that Congress had "compelling" reasons to eliminate discrimination in that case. As demonstrated in the Texas Journal article, eliminating discrimination based on race, color, national origin, sex, and religion is clearly a "compelling" governmental objective, and a good argument can be made that Congress had a "compelling" governmental objective to eliminate discrimination on the basis of handicap and familial status.[9] Therefore, a finding of discrimination should be possible in most cases where a housing provider claims an exemption for religious practice. Under *City of Boerne v. Flores,* [10] a state or local government would not be required to demonstrate a "compelling" governmental objective to ban housing discrimination under state and local human rights laws and ordinances unless the state has enacted its own equivalent of RFRA.

**Halprin**

To put it gently, the *Halprin*[11] decision is strange. While Judge Posner spoke broadly, it would seem that he was talking about the facts of that case and the case really should not be read broader than its facts. Halprin was a Chicago lawyer who was having trouble getting along with his neighbors. The neighbors exhibited anti-Semitic behavior and Halprin and his wife sued them under the Fair Housing Act.

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[8] 126 S.Ct. at 1225.
[9] 11 Tex. J. C.L.& C.R. at 27-29.
[10] 521 U.S. 507, 530-532 (1997).
[11] 388 F.3d 327 (7th Cir. 2004).

The Court of Appeals held that the Fair Housing Act should not be used to resolve disputes among neighbors.[12] We could live with that. The conflict in *Halprin* was between neighbors and not with the housing provider. Even if the conduct was based on religion or national origin, there was no allegation that the Halprins were about to vacate their premises. However, the Court went on to state that sections 804(a) and (b)[13] do not apply to post-acquisition disputes.[14] It did hold that the Halprins stated a claim under section 818[15] because HUD had adopted regulations that covered post-acquisition harassment.[16] The Court questioned whether HUD had gone beyond its congressional mandate by exercising its rule-making ability to cover this situation, but because the issue was not raised by the defendants, the Court held that the validity of the rule was not before it.

Despite the Court of Appeals broad language concerning sections 804(a) and (b), *Halprin* involved an action against neighbors and not against a housing provider.[17] If someone moves into a unit and then is denied the full right to enjoy that unit by the housing provider and especially if the result of that discrimination is that the owner or renter cannot remain there, there would seem to be a clear violation of Sections 804(a) and (b).[18] This is confirmed by existing case law both in the Seventh Circuit and elsewhere. The Court of Appeals itself acknowledged this.[19]

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[12] 388 F.3d at 330.
[13] 42 U.S.C. § 3604 (a) and (b).
[14] Congress rejected a similarly constrained interpretation of 42 U.S.C. § 1981 by the United States Supreme Court. In Patterson v. McLean Credit Union, 491 U.S. 164, 105 L.Ed.2d 132, 109 S.Ct. 2363 (1989), the United States Supreme Court held that discriminatory conduct that occurs after the formation of a contract or that does not interfere with the right to enforce established contract obligations does not violate § 1981. However, Congress responded to the Patterson decision by amending § 1981 to include a provision that the term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. §§ 1981(b). There is every reason to believe that Congress intended the same broad coverage to apply under the Fair Housing Act.
[15] 42 U.S.C. § 3617.
[16] 24 C.F.R. § 100.400(c)(2).
[17] 388 F.3d at 330.
[18] Section 3604(a) covers not only refusals to rent or sell, but also to "otherwise make unavailable or deny, a dwelling to any person." 3604(b) covers not only discrimination in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."
[19] The Court of Appeals stated:

> "Acts of post-sale discrimination have been litigated successfully under the Act in two reported cases, *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972); *Kruger v. Cuomo,* 115 F.3d 487 (7th Cir. 1997), but in neither was the Act's applicability to such discrimination discussed – apparently the issue hadn't been raised. In several other cases the Act has been held to forbid harassment amounting to

Furthermore, section 804(b) makes it illegal for a housing provider to discriminate in the services or facilities related to occupancy.[20] Particularly if a housing provider is intentionally failing to prove services necessary to a tenant because of the tenant's religion, there should be a violation of this section even after the owner or tenant has moved into the unit.

Harassment or retaliation for exercising one's Fair Housing rights is clearly prohibited by Section 818. Neighbors should be liable for these illegal acts and a landlord or property manager should equally be liable if it knows of the actions by third persons, is in a position to stop or prevent those actions, and does not do so.[21]

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constructive eviction by analogy to "constructive discharge," a form of discrimination recognized in Title VII cases. *DiCenso v. Cisneros,* 96 F.3d 1004, 1008 (7th Cir. 1996); *Neudecker v. Boisclair Corp.,* 351 F.3d 361, 364-65, (8th Cir. 2003 (per curium); *Honce v. Vigil,* 1 F.3d 1085, 1090 (10th Cir. 1993). But in none of these cases did the court consider the difference in language between the two statutes. None of the five cases contains a *considered* holding on the scope of the Fair Housing Act in general or its application to a case like the present one in particular." 388 F.3d at 329.

The Court of Appeals summary conclusion that the language of § 804(a) and (b) does not support post-acquisition discrimination is itself not "considered" and its summary dismissal of existing precedent is extraordinary. The cases cited by Judge Posner that conflict with his decision barely represent the myriad of precedents that point in the other direction from his extraordinary holding. For instance, the Fair Housing Act has been extended to retaliation against tenants because they entertained African-American guests, which obviously occurred after the tenancy commenced. Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982).

[20] In Concerned Tenants Association of Indian Trails Apartments v. Indian Trails Apartments, 496 F.Supp. 522, 525 (N.D. Ill. 1980), it was held that the failure to provide the same service to black tenants that was formerly provided to white tenants may violate the Fair Housing Act. Judge Roszkowski stated that the defendant's argument that their activities did not bear upon the availability of housing was "ludicrous and runs counter to the *plain and unequivocal* language of the statute."

[21] *See, e.g.,* Reeves v. Carrollsburg Condominium Unit Owners Ass'n, 1997 WL 1877201 (D.D.C. 1997) (harassment by neighbors due to race and sex and failure of condominium association to stop this conduct when it had notice is actionable); Sofarelli v. Pinellas County, 931 F.2d 718, 721-22 (11th Cir 1991) (fair housing claim upheld against neighbors who harassed a housing provider because he provided housing to African-Americans); Cambell v. City of Berwyn, 815 F.Supp. 1138 (N.D. Ill. 1993) (claim was stated against municipality because it did not protect new black residents from harassment by neighbors.)