RECENT CASES

ADMINISTRATIVE LAW — FAIR HOUSING ACT — EN BANC SECOND CIRCUIT IGNORES HUD REGULATION IN TENANT-ON-TENANT RACIAL HARASSMENT CASE. — *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67 (2d Cir. 2021).

> *Happiest is he . . . for whom there waits Comfort at home.*
> — Johann Wolfgang von Goethe[1]

For many in the United States, the home offers neither rest nor repose. Complaints of housing discrimination — and particularly residential harassment — are on the rise, with millions more cases estimated to be unreported.[2] Under the Obama Administration, the Department of Housing and Urban Development (HUD) set out to provide much-needed reprieve. The agency promulgated a regulation ("HUD Rule") that holds landlords liable under the Fair Housing Act[3] (FHA) for failing to intervene against racially motivated tenant-on-tenant harassment.[4] The ink had not yet dried when a distressed Black tenant sought shelter under this new safeguard. Donahue Francis had suffered months of racial torment perpetrated by a White neighbor. Their shared landlord knew, but did nothing. Indignant, Francis took to the courts to vindicate his fair housing rights. Yet in *Francis v. Kings Park Manor, Inc.*,[5] the en banc Second Circuit rejected Francis's FHA claims without so much as a mention of the HUD Rule. Moving forward, judicial opinions should contend openly with this regulation and determine its due weight (which likely equates to *Chevron* deference). By meeting the HUD Rule head-on, future courts can help clarify an area of housing law — muddled in *Francis* — that is of great consequence to vulnerable tenants.

After years of living in inner-city urban communities, Donahue Francis, a Black man, sought to better his housing situation.[6] In 2010, with the help of a Section 8 voucher, he signed a rental lease agreement with King's Park Manor (KPM) in a predominantly White and wealthy

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[1] JOHANN WOLFGANG VON GOETHE, IPHIGENIA IN TAURIS act 1, sc. 3, ll. 221–23 (Martin Swales ed., Roy Pascal trans., Angel Books 2014) (1787).

[2] NAT'L FAIR HOUS. ALL., 2021 FAIR HOUSING TRENDS REPORT 3, 5 (2021), https://nationalfairhousing.org/wp-content/uploads/2021/07/2021-Fair-Housing-Trends-Report_FINAL.pdf [https://perma.cc/8N7A-XD3A].

[3] 42 U.S.C. §§ 3601–3619.

[4] Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054, 63074 (Sept. 14, 2016) [hereinafter HUD Rule] (codified at 24 C.F.R. pt. 100); *see also* 24 C.F.R. § 100.7(a)(iii) (2018).

[5] 992 F.3d 67 (2d Cir. 2021).

[6] Complaint at 3–4, Francis v. Kings Park Manor, Inc. (*Francis I*), 91 F. Supp. 3d 420 (E.D.N.Y. 2015) (No. 14-cv-3555), *aff'd*, 992 F.3d 67 (2d Cir. 2021).

suburban area.[7] According to Francis, just months after he had moved into his new home, he became the target of a racially motivated campaign of harassment by his next-door neighbor, Raymond Endres. Endres, a White man, allegedly called Francis a "fucking lazy, god-damn fucking [n-word]" and a "[B]lack bastard."[8] Endres even threatened Francis, saying, "I oughta kill you, you fucking [n-word]."[9] Fearing for his safety, Francis notified KPM four times about the abuse, but KPM took no action — even after Endres was arrested and charged with aggravated harassment.[10] In fact, KPM specifically advised its building manager not to get involved in the dispute. The torment continued until Endres's lease expired in early 2013, whereafter he left the complex.[11]

Francis brought suit against KPM, alleging violations of the FHA.[12] He first claimed that Endres's racially charged abuse created a hostile housing environment — which Francis analogized to a hostile working environment from the Title VII context.[13] He then imputed liability for the harassment to KPM because the landlord "knew about it, had the authority to address it, yet failed to take any reasonable actions."[14]

The district court granted KPM's motion to dismiss as to the FHA claims.[15] Judge Spatt acknowledged the viability of Francis's hostile-environment theory but qualified the analogy to Title VII: he concluded that while Title VII allows employees to triumph over *negligent* employers, the FHA's plain terms require that a landlord's inaction be motivated by *discriminatory intent*, which Francis had not alleged.[16]

On appeal, Francis newly raised that a rule proposed by HUD, pending since 2000, might soon be promulgated and would support his

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[7] *See id.* at 4, 11; Mollie Krent, Note, *Remediating Racism for Rent: A Landlord's Obligation Under the FHA*, 119 MICH. L. REV. 1757, 1758 n.3 (2021) (citing 2019 Census data).

[8] Complaint, *supra* note 6, at 5, 7 (racial slur omitted). These verbal attacks took place in the complex's common areas or while Francis was in his apartment with the door open. *Id.* at 5.

[9] *Id.* at 6 (racial slur omitted).

[10] *Id.* at 6–9.

[11] *Id.* at 9–10.

[12] Francis specifically relied on section 3604(b), which prohibits race-based discrimination in the "terms, conditions, or privileges" of housing, and section 3617, which makes it unlawful to "coerce, intimidate, threaten, or interfere with" a person's exercise or enjoyment of other FHA rights. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 15–18, *Francis I*, 91 F. Supp. 3d 420 (No. 14-cv-3555) (first quoting 42 U.S.C. § 3604(b); and then quoting 42 U.S.C. § 3617). In addition, Francis asserted claims under state housing law and state tort law, as well as under 42 U.S.C. §§ 1981 and 1982. *Id.* at 14–15, 18–19.

[13] *Id.* at 5–9.

[14] *Id.* at 9.

[15] *Francis I*, 91 F. Supp. 3d at 438. The district court also dismissed Francis's claims under 42 U.S.C. §§ 1981 and 1982 — holding that Francis had failed to plead "specific facts" to support the requisite inference that KPM "intentionally discriminated" on the basis of race. *Id.* at 426.

[16] *Id.* at 428–29, 433. Francis's claim under state housing law "fail[ed] as a matter of law" and was dismissed "for the same reason [as] the FHA claims." *Id.* at 434. His claim under state tort law similarly "failed," given that KPM owed him no "common law duty of care." *Id.* at 435.

hostile-environment claim.[17] In response, the panel sent a letter to the agency requesting an amicus brief on the matter.[18] Three months later, HUD issued a regulation interpreting the FHA to hold landlords "directly liable for . . . [f]ailing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the [landlord] knew or should have known of the discriminatory conduct and had the power to correct it."[19] The Rule's preamble made clear that it had not created any new or enhanced liabilities for landlords but merely clarified obligations already owed under the FHA.[20] The agency's subsequent amicus brief called on the court to apply *Chevron* deference.[21]

The Second Circuit vacated the district court's dismissal of Francis's FHA claims and remanded for further proceedings. Writing for the majority, Judge Lohier[22] drew on FHA "text, legislative history, and a pattern of expansive readings of the [statute]."[23] But he spilled far more ink on — and gave great weight to — the HUD Rule.[24] In dissent, then-Judge Livingston criticized the majority's reliance on the regulation, agreeing with the district court that the FHA requires a tenant to show that racial animus motivated the landlord's inaction.[25]

Nine months later, the panel withdrew its original opinion and issued a new one with the same judgment but different reasoning.[26] Again writing for the majority, Judge Lohier[27] disclaimed reliance on the HUD Rule and assumed without deciding that intentional discrimination *is*

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[17] *See* Opening Brief of Plaintiff-Appellant Donahue Francis at 18–19, Francis v. Kings Park Manor, Inc. (*Francis II*), 917 F.3d 109 (2d Cir. 2019) (No. 15-1823-cv), *withdrawn*, 920 F.3d 168 (2d Cir. 2019), *superseded*, 944 F.3d 370 (2d Cir. 2019), *vacated en banc*, 992 F.3d 67 (2d Cir. 2021).

[18] *See* Letter from Catherine O'Hagan Wolfe, Clerk of Ct., to Helen R. Kanovsky, Gen. Couns., U.S. Dep't of Hous. & Urb. Dev., *Francis II*, 917 F.3d 109 (No. 15-1823-cv).

[19] HUD Rule, *supra* note 4, at 63074. HUD's Secretary has the authority and responsibility to administer the FHA, 42 U.S.C. § 3608(a), including through rulemakings, *id.* § 3535(d).

[20] HUD Rule, *supra* note 4, at 63069.

[21] *See* Brief of the United States as Amicus Curiae in Support of Neither Party at 5, *Francis II*, 917 F.3d 109 (No. 15-1823-cv).

[22] Judge Lohier was joined by Judge Pooler.

[23] *Francis II*, 917 F.3d at 120.

[24] *Id.* at 119–23. The panel reinstated Francis's claims under state housing law (as they are "evaluated under the same framework" as FHA claims), *id.* at 125–26, as well as 42 U.S.C. §§ 1981 and 1982 (for Francis's allegations of "deliberate indifference" on the part of KPM were sufficient to state a claim), *id.* at 125. But the panel affirmed the dismissal of Francis's state tort law claim because any injury suffered due to KPM's alleged breach was insufficiently "direct." *Id.* at 126.

[25] *Id.* at 130–37 (Livingston, J., dissenting).

[26] Francis v. Kings Park Manor, Inc. (*Francis III*), 944 F.3d 370 (2d Cir. 2019), *vacated en banc*, 992 F.3d 67 (2d Cir. 2021). This practice, while rare, is not unheard of in the Second Circuit. *See, e.g.*, Maddox v. Bank of N.Y. Mellon Tr. Co., N.A., No. 19-1774, 997 F.3d 436 (2d Cir. 2021), *withdrawn and superseded on reh'g*, 19 F.4th 58, 60 (2d Cir. 2021) (changing course in response to a Supreme Court decision that rendered the panel's initial opinion suspect). One possible (admittedly speculative) explanation for the panel's action here is that it suspected the Trump Administration would repeal the HUD Rule, so it reconfigured its opinion to withstand future challenge.

[27] Judge Lohier was again joined by Judge Pooler.

an element of an FHA violation.[28] He then held that Francis had plausibly alleged as much in claiming that KPM had failed to take reasonable steps to address Endres's harassment despite intervening against other tenants for non-race-related violations of their leases or of the law.[29] Then-Judge Livingston again dissented, criticizing the majority's new theory: just because KPM "did *something* with regard to *some* incident involving *some* tenant at *some* past point" does not mean that its failure to intervene in Francis's case stemmed from racial animus.[30]

The Second Circuit granted KPM's petition for en banc hearing.[31] Prior to oral argument, HUD (now under the Trump Administration) published a notice of proposed rulemaking to withdraw the HUD Rule.[32] The agency then asked the court not to rely on the estranged regulation in deciding the appeal.[33] Writing for the majority, Judge Cabranes[34] obliged. He made no mention of the HUD Rule in his opinion, which vacated the panel decision and affirmed the district court's judgment. Judge Cabranes instead held that Francis's factual allegations failed to carry his "modest" burden under the evidentiary framework developed by the Supreme Court in the Title VII context — which the majority found applied here.[35] While Francis plausibly alleged that he is a member of a protected class and suffered an adverse action, his complaint lacked "even 'minimal support for the proposition'" that discriminatory intent had motivated KPM.[36] Even under a deliberate indifference theory of liability,[37] Francis failed to state a claim, as the power to evict does not furnish a landlord with the requisite "substantial control" over the harasser.[38] For a similar reason, Francis's appeal to the employment context fell equally flat: an employer's manner and degree of control over its agent-employees is "typically far less" than that of a landlord over its tenants, rendering the analogy inapposite.[39]

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[28] *Francis III*, 944 F.3d at 379 & n.7.

[29] *Id.*

[30] *Id.* at 384 (Livingston, J., dissenting).

[31] Francis v. Kings Park Manor, Inc. (*Francis IV*), 992 F.3d 67, 72 (2d Cir. 2021).

[32] *See* Amicus Curiae United States' Notice Under Federal Rule of Appellate Procedure 28(j), *Francis IV*, 944 F.3d 379 (No. 15-1823-cv). Less than two months before the Second Circuit issued its en banc decision, the Biden Administration took over and withdrew the notice of proposed rulemaking to withdraw the HUD Rule, recommitting the agency to the regulation. *Id.*

[33] *See* Brief of the United States as Amicus Curiae in Support of Neither Party at 11–13, *Francis IV*, 944 F.3d 379 (No. 15-1823-cv).

[34] Judge Cabranes was joined by Chief Judge Livingston and Judges Sullivan, Bianco, Park, Nardini, and Menashi.

[35] *Francis IV*, 992 F.3d at 73 & n.17.

[36] *Id.* at 73 (quoting Littlejohn v. City of New York, 795 F.3d 297, 311 (2d Cir. 2015)).

[37] "Deliberate indifference" requires actual knowledge of the harassment as well as substantial control over the harasser and the context in which the known harassment occurs. *Id.* at 74–75.

[38] *Id.* at 75, 77.

[39] *Id.* at 76. Judge Cabranes affirmed the dismissal of Francis's remaining claims. Because "Francis . . . failed to state a claim under the FHA, . . . he also fail[ed] to state a claim" under New

Judge Lohier dissented in relevant part,[40] likewise without mention of the HUD Rule. He took aim at the majority's attack on Francis's pleading, accusing his colleagues of demanding more than the minimal inference of discriminatory motivation required by the court's precedents.[41] Judge Lohier also contested the majority's deliberate indifference analysis.[42] New York law, he argued, envisions a flexible, fact-dependent inquiry for the "substantial control" element.[43] Here, the lease between KPM and both Endres and Francis supplied the landlord with an "arsenal of incentives and sanctions" with which to control the harassment.[44] KPM thus had the means and duty to intervene.

The en banc panel erred by not addressing the HUD Rule, which merits *Chevron* consideration — and likely deference. How a rule is classified under the Administrative Procedure Act[45] (APA) defines the weight it is owed by courts. Although the HUD Rule is procedurally and substantively unique, it is best understood as "legislative," thus invoking the *Chevron* framework. As a doctrinal matter, then, the Second Circuit was obliged to address the regulation head-on and decide its interpretive weight. Policy considerations, too, counseled for this result.

An understanding of the HUD Rule first requires a detour into the APA. The APA divides agency rulemaking into three buckets: legislative rules, interpretive rules, and general statements of policy.[46] Relevant here are the first two. Legislative rules change the law, such as by imposing a new duty; interpretive rules clarify, but do not alter, legal requirements under an existing statute.[47] Much rides on the classification: legislative rules require notice and comment — and generally receive *Chevron* deference — whereas interpretive rules do not.[48] The HUD Rule presents as an interpretive-legislative hybrid. In promulgating it, the agency conducted notice-and-comment procedures,[49] which

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York housing law and 42 U.S.C. §§ 1981 and 1982. *Id.* at 80–81. And because Francis "failed to plead" that KPM "breached a duty owed to him," his state tort law claim also fell flat. *Id.* at 81.

[40] Judge Lohier was joined by Judges Pooler, Katzmann, Chin, and Carney. Judge Chin, joined by Judges Pooler, Katzmann, Lohier, and Carney, wrote separately to challenge what he perceived to be a trend in the court's jurisprudence raising the pleading burden for civil rights plaintiffs. *Id.* at 83–85 (Chin, J., dissenting in part and concurring in part).

[41] *Id.* at 90–91 (Lohier, J., dissenting in part and concurring in part).

[42] *Id.* at 93–97.

[43] *Id.* at 94.

[44] *Id.* (quoting Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 865 (7th Cir. 2018)).

[45] 5 U.S.C. §§ 551, 553–559, 701–706.

[46] *See id.* § 553(b)(A).

[47] *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 535, 549 (8th ed. 2017).

[48] *See* 5 U.S.C. § 553(b)(A); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014). Interpretive rules are entitled to respect, insofar as they have the "power to persuade" the court. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). So, even if the HUD Rule is merely interpretive — which seems unlikely — the Second Circuit still had a duty to decide on its persuasive value.

[49] *See* HUD Rule, *supra* note 4, at 63057.

are the bread and butter of legislative rulemaking.[50] And yet the regulation's preamble repeatedly describes it as merely interpretive, nothing more.[51] In effect, the agency tells the court: "Do as I say, not as I do."

Despite the HUD Rule's mixed messaging, it should be treated as legislative and given *Chevron* consideration. Agencies increasingly face cost-related temptations to skirt the APA's notice-and-comment requirement; as a result, courts carefully inspect interpretive rules to ensure they are truly exempt.[52] But when an agency *voluntarily* uses notice and comment, the resulting regulation (nominally interpretive or not) merits de jure legislative status. This standard comports with Supreme Court precedents, which remain highly attentive to a rule's procedural provenance in the weighing process.[53] It also makes for good policy. Interpretive rules adopted by agency fiat lack the public accountability of legislative rules. The cost of convenience is heightened scrutiny (and a risk of less deference) by the courts. The HUD Rule's prize for transparency, won through notice and comment, is *Chevron* consideration.[54]

Indeed, the HUD Rule likely merits full-fledged *Chevron* deference.[55] To start, Congress has not directly spoken to the precise question at issue — whether the FHA imposes liability on landlords for failing to intervene against racially motivated tenant-on-tenant harassment and, if so, under what notice standard. At least two circuit courts disagree

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50 *See* Jacob E. Gersen, Essay, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1710 (2007).

51 *See, e.g.*, HUD Rule, *supra* note 4, at 63068 ("[T]he rule does not add any new forms of liability under the [FHA] or create obligations that do not otherwise exist."); *id.* at 63069.

52 Thomas J. Fraser, Note, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. REV. 1303, 1310–18 (2010).

53 In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court seemingly made notice and comment dispositive; it distinguished interpretive rules contained in opinion letters from those contained in regulations, noting that only the latter warrant *Chevron* deference. *Id.* at 587. The Court has since backed off that bright-line test, though never from the position that using notice and comment purchases, ipso facto, the right to *Chevron* consideration. *See* United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (emphasizing importance of notice and comment to invoking *Chevron* while conceding that deference may be owed *even in the absence* of that procedure); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 847 (2001) ("*Christensen* leaves the door open to the possibility that *Chevron* would apply to interpretative rules if the agency voluntarily affords notice-and-comment before such rules are promulgated.").

54 Professor David Franklin worries that designating notice and comment as the touchstone for *Chevron* consideration will discourage agencies from using that procedure to make "well-informed yet tentative decision[s]" from which they wish to freely depart in individual cases. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 308 (2010). But this fear is mitigated by the fact that agencies can (and often prefer to) solicit public input through informal channels. *See* E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) ("No administrator . . . turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties." *Id.* at 1492.).

55 Under *Chevron*, a court must determine (1) whether the statutory language is ambiguous, and, if so, (2) whether the agency's interpretation is a permissible construction of the act. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Because Congress has authorized HUD's Secretary to administer the FHA through rulemakings, *see supra* note 19, the regulation presumptively passes *Chevron* step zero. *See Mead*, 533 U.S. at 226–27.

on this point. The Seventh Circuit held a landlord liable for its inaction under an actual notice, rather than a constructive notice, standard; in so doing, the court rejected HUD's Title VII analogy and applied Title IX's deliberate indifference test instead.[56] The Second Circuit, meanwhile, denied that a landlord can be held liable at all in the absence of discriminatory intent.[57] Even though both courts declined (implicitly or explicitly) to defer to the HUD Rule, their differing interpretations of the FHA suggest that the statute is ambiguous.[58] Beyond that, several commentators have determined that the statute's text, legislative history, and purpose are all consonant with HUD's interpretation.[59] These analyses bolster the agency's own reasoned defense of the regulation,[60] which likely qualifies as a permissible construction of the FHA.[61]

Doctrinally, then, the en banc panel was duty bound to confront the HUD Rule head-on and decide its weight.[62] It is no surprise that the judges declined to do so, given how often the agency flip-flopped on its willingness to commit to the regulation.[63] Ultimately, however, the

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[56] *See* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 863–64 (7th Cir. 2018).

[57] *Francis IV*, 992 F.3d at 73.

[58] Whether a circuit split on an issue of statutory interpretation can (or should) be per se evidence of ambiguity under *Chevron* remains a live debate. Some scholars insist that disagreement among judges *of the same court* supplies reason to conclude that a statute has no clear meaning. *See* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 162–66 (2016). It is difficult to see why the same should not hold *across* courts. *See* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1538–40 (2019). In any event, the various scholarly takes on the HUD Rule, combined with the agency's rationale for it, provide independent evidence of FHA ambiguity.

[59] *See* Aric Short, *Not My Problem? Landlord Liability for Tenant-on-Tenant Harassment*, 72 HASTINGS L.J. 1227, 1273 (2021); Krent, *supra* note 7, at 1777. *But see* Cameron Roeback, Note, *No Love Leased: Determining a Landlord's Liability for Tenant-on-Tenant Harassment Under the Fair Housing Act*, 82 U. PITT. L. REV. 945, 949–56 (2021) (arguing for a deliberate indifference standard).

[60] *See* HUD Rule, *supra* note 4, at 63066–70.

[61] The jury is still out on whether the HUD Rule, if applied in this case, would have run afoul of the antiretroactivity presumption given its post hoc promulgation. All roads lead back to APA classification. Interpretive rules moot the issue, for they operate no more retroactively than "a judicial determination construing and applying a statute to a case in hand." Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (quoting Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993)). Legislative rules are *potentially* retroactive but will be read as such only if their language so requires. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). This was a crucial question for the court to tackle. Whatever the answer, the HUD Rule should apply with full force in future cases.

[62] One might argue that the en banc panel *implicitly* addressed the HUD Rule by deciding under *Chevron* step one that the statute is unambiguous. Were that true, the opinion's "hide the ball" reasoning would be insufficient to guide future courts, threatening to shroud the law in uncertainty.

[63] The *Francis IV* court's failure to raise the HUD Rule might also be explained by Francis's abandonment of the theory on rehearing en banc. *See* Oral Argument at 37:05, *Francis IV*, 944 F.3d 379 (No. 15-1823-cv), https://www.courtlistener.com/audio/71872/francis-v-kings-park-manor-in [https://perma.cc/2GLY-D65K]. But the party presentation principle, by which judges rely on litigants to frame and argue the issues for decision, is "supple, not ironclad." United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020). The en banc panel needed only play a "modest initiating role" here, *id.*, especially given that the parties had briefed the issue below. As a policy matter, allowing litigants to circumvent a directly applicable agency regulation by not presenting it to the court can serve only to foster confusion and tension in the law.

Trump Administration withdrew support for the HUD Rule without going through the proper channels of rescission.[64] If an agency wishes to modify its stance on a rule promulgated through notice and comment, it must use the same process.[65] The en banc court could presumably have taken the same tack as the three-judge panel below and waited for the Trump Administration to complete its proposed rulemaking (which never actually happened). But by choosing to forge ahead, the Second Circuit, much like the agency, tied its own hands: the judges were left with — and indeed compelled to address — the regulation on the books.

Policy considerations, too, called for the court to consider the HUD Rule. It is well established that notice-and-comment rulemaking has grown "increasingly burdensome, expensive, and time consuming."[66] While some see it as a hindrance to effective agency operation — discouraging deviations from the status quo[67] — the ponderous process serves an important objective: preventing frequent alterations to the meaning of the law. This is especially relevant here, where outgoing agency officials sought to affect a case's outcome at the last minute by informally withdrawing support for an on-point, legally binding rule. In so doing, HUD effectively repealed the regulation without suffering the public scrutiny under which it was enacted. This "tail wagging the dog" routine sets a dangerous precedent for political accountability.[68]

Although the HUD Rule can no longer vindicate Francis, whose fair housing rights died in the Second Circuit, it still holds promise for those similarly imperiled. Given the scourge of housing discrimination in the United States, that ray of hope is well worth pursuing. The HUD Rule weathered public input, commentary, and criticism — even though it was not required to do so — in an effort to protect vulnerable tenants. It thereby purchased for itself the right to *Chevron* consideration (and likely deference). In *Francis*, the en banc Second Circuit deprived the HUD Rule of its due. Future courts must quickly correct course and chart a path toward clarifying this vital area of housing law.

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[64] While there is no direct evidence that the court credited these position statements, the fact that it solicited an amicus brief and oral argument from the government may imply as much.

[65] *See* 5 U.S.C. § 551(5) (defining rulemaking to include agency process for "amending" or "repealing" a rule); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995) ("APA rulemaking would . . . be required if [the regulation] adopted a new position inconsistent with any . . . existing regulations."). While *interpretive* rules can be revised without notice and comment, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015), the Supreme Court has never so held for *legislative* ones.

[66] Melissa Mortazavi, *Rulemaking Ex Machina*, 117 COLUM. L. REV. ONLINE 202, 206 (2017).

[67] *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–66 (1995).

[68] Hence also why agencies cannot be permitted to waive *Chevron* deference. The D.C. Circuit so held in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 23 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020). Even setting aside the accountability concerns, *Chevron* is a "doctrine about statutory meaning" — not a "'right' or 'privilege' belonging to a litigant." *Id.* at 22. Justice Gorsuch thinks otherwise. *Guedes*, 140 S. Ct. at 790 (2020) (Gorsuch, J., statement respecting the denial of certiorari). But there are good reasons to reject his position. *See* Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1961–70 (2018).