

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BAY VIEW CHAUTAUQUA  
INCLUSIVENESS GROUP,

Plaintiff,

v.

Case No. 1:17-cv-622-PLM-RSK

THE BAY VIEW ASSOCIATION OF  
THE UNITED METHODIST CHURCH,  
et al.,

HONORABLE PAUL L. MALONEY

Defendants.

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**BRIEF OF PROPOSED *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND  
AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF  
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

**INTERESTS OF AMICI CURIAE**

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Michigan is a state affiliate of the national ACLU with more than 38,000 members. The ACLU has long fought to eliminate housing discrimination on the basis of race, religion, ethnicity, disability, sex, and other protected characteristics, both nationally and in Michigan. Moreover, for nearly a century, the ACLU has been dedicated to preserving religious liberty. Because this case involves the intersection of these two rights, the ACLU has a strong interest in its proper resolution.

## SUMMARY OF ARGUMENT

Buying a home has long been touted as the American dream, but for non-Christians seeking to join the community in Bay View, Michigan, it's nothing short of a nightmare. Situated along the shores of Lake Michigan, Bay View is a quaint and picturesque community comprising more than 400 cottages, which are individually and privately owned. Am. Compl. ¶ 66. Behind Bay View's charming exterior, however, is an ugly history of discrimination against people of color, Catholics, and non-Christians. Membership in the Bay View Association—"a body politic and corporate" under Michigan's Summer Resort Act—is required to purchase a home in the community, yet Association membership is not open to all. Pl. Br. Supp. Mot. J. Pleadings 1-2.

Around 1942, the Association adopted a resolution to limit membership, and thus the ability to own a home in the community, to those who were "of the white race" and Christian. Am. Compl. ¶ 43. By 1959, the racial covenant had been eliminated, yet the religious test remained. *Id.* ¶ 45. That religious restriction included a quota on Roman Catholic membership, effectively capping at 10% the portion of homeowners in the community who could be Catholic. *Id.* ¶ 46. Though it appears that the Association no longer enforces that cap, it continues to demand that members be "of Christian persuasion" and that applicants provide a minister's letter verifying active participation in a Christian church. *Id.* ¶¶ 47-48. In other words, Jews, Muslims, Sikhs, Buddhists, Hindus, Baha'i, atheists, humanists, and many others need not apply.

Bay View's religious restriction for homeownership harkens back to a shameful era in Michigan and U.S. history when overt discrimination and segregation in housing on the basis of race, religion, and other protected characteristics was rampant. Fifty years ago this month, President Johnson signed the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, landmark legislation aimed at curtailing these practices. Two months later, Michigan followed suit with its own fair

housing law, Public Act No. 112 of 1968 (superseded in 1977 by the Elliott-Larsen Civil Rights Act, M.C.L. § 37.2501 *et seq.*). To be sure, these protections have not been cure-alls: Housing segregation, especially with respect to race, is a particularly insidious form of discrimination that can take countless covert and subtle forms, and it is perpetuated by a number of actors, from homeowners to lenders to real estate agents to home associations to the government itself.

Nevertheless, at a time when Michigan and the United States are more religiously diverse than ever, and people of minority faiths are increasingly under attack, courts have a responsibility to rebuke those who seek to use religion as a basis for denying the fundamental right to fair housing. That is especially true where, as here, the defendant is a state actor whose discriminatory conduct violates the Establishment Clause of the First Amendment to the U.S. Constitution. *Amici* respectfully urge this Court to grant Plaintiff's Motion for Judgment on the Pleadings.

### **ARGUMENT**

“[H]omeownership is among the foremost values of the American people[.]” Ronald Reagan, *Remarks on Signing the Fair Housing Amendments Act of 1988* (Sept. 13, 1988), <http://www.presidency.ucsb.edu/ws/?pid=36361> (internal quotation marks omitted). As President Reagan recognized, “[d]iscrimination is particularly tragic when it means a family is refused housing near good schools, a good job, or simply in a better neighborhood to raise children.” *Id.* *Accord* U.S. Comm’n on Civil Rights, *Understanding Fair Housing* 1 (Feb. 1973) [hereinafter *Understanding Fair Housing*], <https://www.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf> (“Few rights are as basic as acquiring a home of one’s choice. The home and neighborhood are the environment in which families live and rear their children.”). Indeed, access to equal housing “is a major determinant of the quality of life afforded to minorities.” *See Understanding Fair*

*Housing, supra*; see also Sidney Fine, *Michigan and Housing Discrimination, 1949-1968*, 23 Mich. Hist. Rev. 2, 81, 83 (1997).

As a historical matter, even before the passage of the Fair Housing Act, housing discrimination against religious minorities was, of course, not nearly as pervasive or as severe as was discrimination against people of color. Brief of National Jewish Organizations and Representative Local Jewish Councils *Amici Curiae, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (No. 645), 1968 WL 129311, at \*13. Nevertheless, such religious discrimination did occur with frequency, especially against those of the Jewish and Catholic faiths. See *id.* at \*12-\*13; Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 Cal. L. Rev. 967, 986–87 (2008) (noting that, after World War II, “Jews and Catholics, in particular, routinely were subjected to discrimination in housing, college admissions, and membership in social and civic groups”); Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 Urb. Law. 399, 436 (2003) (reporting that New York fair housing activist Algernon Black had decried earlier housing laws because they had done “just about nothing at all for the Jewish and Catholic and other minority families who are prevented from buying homes or renting apartments in many accurately-described exclusive communities in our state”) (internal quotation marks omitted); Michael P. Seng, *The Fair Housing Act & Religious Freedom*, 11 Tex. J. on C.L. & C.R. 1, 5 (2005) (“[T]here is no question that there is a long history of religious discrimination in the private housing market. The most notable example was the prevalence of restrictive covenants in certain residential areas against Jewish people.”); cf. Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* 263-64 (Kennikat Press 1971) (1955) (noting that African-Americans, Jews, Catholics,

Puerto Ricans, Mexicans, and Indians were victims of fallacies about the effects of minorities on neighborhoods).<sup>1</sup>

For religious minorities who face housing discrimination, the effect on their lives is significant and the humiliation suffered just as pernicious. Discrimination on these grounds is an affront to a “fundamental of human dignity.” See Lyndon B. Johnson, *Letter to the Speaker of the House Urging Enactment of the Fair Housing Bill* (Apr. 5, 1968), <http://www.presidency.ucsb.edu/ws/?pid=28785S>. It sends a message of “rejection and inferiority”—an intolerable proclamation that adherents of the excluded faiths (whether Jewish, Catholic, Sikh, Muslim, etc.) are second-class citizens. See Br. of Nat’l Jewish Orgs., 1968 WL 129311, at \*9, \*13 (discussing dignitary harm that Jewish people suffer when they face housing discrimination).

Bay View’s restriction of homeownership to Christians is a repugnant throwback to that era—before the passage of civil-rights protections for fair housing—when discrimination based on race, religion, ethnicity, and other characteristics was not only permitted but often encouraged and facilitated by the government.<sup>2</sup> Today, such brazen discrimination violates the plain terms of

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<sup>1</sup> Discrimination against Jewish people, Muslims, and other religious groups has, at times, been treated as racial discrimination. In those instances, litigants may seek relief under 42 U.S.C. §§ 1981 and 1982, which bar race-based discrimination in the formation of contracts and assignment of property rights. See Seng, *supra*, at 5 n.29 (citing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) & *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987)); see also Hon. Avern Cohn, *Fair Housing Testing*, 41 Urb. Law. 273, 276 (2009) (noting that racially restrictive covenants “oftentimes included Jews”); *Shelley v. Kraemer*, 334 U.S. 1, 21 n.26 (1948) (“We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.”).

<sup>2</sup> For a discussion of government agencies’ role in promoting housing discrimination and housing segregation, see, e.g., Brief of Housing Scholars as *Amici Curiae* Supporting Respondent, *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405732, at \*8-\*38. The Fair Housing Administration, in particular, played an unsavory part in fomenting housing discrimination

both the federal Fair Housing Act and Michigan’s Civil Rights Act. It cannot be reconciled with our country’s growing religious diversity or with the Establishment Clause of the First Amendment to the U.S. Constitution, which prohibits state actors, such as the Bay View Association, from coercing people to attend church or profess certain religious beliefs and from giving preference to one faith over others.

**I. Bay View’s ‘Christians Only’ Ownership Rule Evokes a Shameful Era in U.S. and Michigan History When the Most Blatant Housing Discrimination Went Unchecked.**

Before the passage of the federal Fair Housing Act and various state protections, discrimination in housing against religious minorities, including Jews and Catholics, was all too common. For example, in Nassau County, New York, from 1920 through 1945, “Jews and Catholics, particularly Catholics from Ireland and Italy, were prevented from purchasing homes . . . by a variety of official and unofficial means.” William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 *Fordham Urb. L.J.* 197, 214 (1999). These official methods included the enactment of exclusionary zoning laws that prevented the construction of local synagogues and churches, as well as the use of restrictive covenants that kept “Jews, Catholics and Blacks out of communities[.]” *Id.* at 214 & n.94, 215. Meanwhile, during this period, the KKK in Nassau County grew in influence and played a major role in deterring Jews and

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against African-Americans, Italians, Jews, Catholics, Mexican-Americans, and Puerto Ricans by changing standard deeds to include racial covenants. Abrams, *supra*, at 235. As a result, “[b]uilders everywhere became the conduits of bigotry,” and white, Protestant Americans “learned from a government agency that it was right to fear people of this sort and to keep them out of neighborhoods.” *See id.*

Catholics from residing in that area of New York.<sup>3</sup> “Cross-burnings and rallies drawing thousands reminded Catholics and Jews alike that Nassau County was not open to them.” *Id.* at 215-17.

Elsewhere in the state, in New York City, “over a third of the 200 cooperative apartment houses were said to exclude Jews.” U.S. Comm’n on Civil Rights, *Report of the U.S. Commission on Civil Rights* 381 (1959) [hereinafter “1959 Report”], <https://www.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf>. And the suburb of Bronxville was labeled what “Hitler called ‘Judenrein’—free of Jews—as a result of a covenant that requires a prospective purchaser to get the approval of all four of the nearest neighbors to the house he would like to purchase.” *Id.* It was only after the KKK’s influence faded, New York enacted one of the nation’s earliest civil right statutes in 1945, and the state courts began to strike down restrictive covenants and exclusionary zoning laws that Jews and Catholics in Nassau County saw some relief from housing discrimination. Nelson, *supra*, at 219-223.

Nevertheless, despite some progress, as of 1959, housing discrimination against religious minorities was still widespread. *See* Kevin M. Schultz, *Tri-Faith America* 108 (2011). The U.S. Civil Rights Commission reported that, in “practically every large city in the United States and in the suburbs as well, there is discrimination against Jews in housing.” 1959 Report, *supra*. In addition to restrictive covenants, some communities barred Jewish families “by controlling the listings of real estate brokers,” while others made “community facilities dependent on membership in a ‘private’ club’ from which Jews [were] excluded.” *Id.* at 381-85 (noting that

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<sup>3</sup> Because the African-American population in Nassau County at the time was small, the KKK directed its bigotry toward the “small but growing population of Jews and Catholics.” Nelson, *supra*, at 215-16.

entire neighborhoods or suburbs were closed to Jewish people in Washington D.C., Chicago, Kansas City, St. Louis, Philadelphia, Pittsburgh, and Seattle).

Housing discrimination against Jewish people was particularly prominent in resort areas. *See id.* at 385; *Abrams, supra*, at 191. In Maine, for instance, more than half of hotels and resorts “routinely refused to accommodate Jews in the 1950s, the highest rate of resort discrimination in the United States.” David M. Freidenreich, *Making It in Maine: Stories of Jewish Life in Small-Town America*, 49 Me. Hist. 1, 5, 17 (Winter 2015), <http://web.colby.edu/jewsinmaine/files/2015/05/Freidenreich-Making-it-in-Maine.pdf>. Visitors to these Maine resort areas were often greeted with signs proclaiming, “No Dogs, No Niggers, No Jews Allowed.” *Id.*; *Abrams, supra*, at 195-201 (documenting discrimination by resorts in Maine, as well as Wisconsin, New York, Massachusetts, Pennsylvania, Vermont, New Hampshire, Florida, California, and Arizona).

Meanwhile, until the late 1950s, Jewish people “were effectively barred from living in La Jolla [California] by a combination of formal and informal housing restrictions.” *Trunk v. City of San Diego*, 629 F.3d 1099, 1121 (9th Cir. 2011). Like Bay View, La Jolla is situated along the water (the Pacific coast) and regarded by many as a charming and exclusive resort town. Mary Ellen Stratthaus, *Flaw in the Jewel: Housing Discrimination Against Jews in La Jolla, California*, 84 Am. Jewish Hist. 3, 189, 192-93 (1966). And, also like Bay View, prospective homebuyers for certain areas of La Jolla (known as “La Jolla Farms”) were required to obtain membership in an exclusive club—the La Jolla Beach and Bridle Club—before they would be permitted purchase a home. *Id.* at 196. Of course, the “Club could easily turn down applications from people they wished to exclude from the community.” *Id.* Jewish applicants were thus technically “not prevented from buying property but from joining a private, and therefore legally

unrestricted, club, allowing developers to bypass [any existing local] antidiscrimination laws.” *Id.* Other tactics used to exclude Jewish people from La Jolla included marking a Star of David on applications from prospective Jewish homebuyers and leaving on porch lights during the day as a signal to real estate agents that property owners did not want to sell to anyone who was Jewish. *Id.* at 198, 200.

Similar discriminatory practices could be found throughout Michigan at the time. In 1950, Michigan’s Jewish population was estimated to be 87,500, and was thus an “important minority group in the State.” *The National Conference and the Reports of the State Advisory Committees to the U.S. Commission on Civil Rights* 191 (1959), <https://www.law.umaryland.edu/marshall/usccr/documents/cr12st2959.pdf>. Nonetheless, they continued to be “subject to discrimination in housing in many communities of Michigan, particularly in suburban areas, such as those outside the city of Detroit, and in resort areas and in some new developments.” *Id.*; accord Fine, *supra*, at 84 (writing that “[b]lack were not the only victims of housing discrimination” in the state, as “Jews and members of various ethnic groups were similarly affected”).

As in other areas of the country, restrictive covenants in deeds and bills of sale were popular in Michigan and were upheld at least twice by the Michigan Supreme Court.<sup>4</sup> See *Parmalee v. Morris*, 188 N.W. 330 (Mich. 1922) (holding that deed’s restrictive covenant

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<sup>4</sup> “To those familiar with housing discrimination tactics,” codes, restrictions, covenants, and conditions “signal ways to exclude unwanted purchasers.” Stratthaus, *supra*, at 193 n.23. Accord U.S. Comm’n on Civil Rights, *Housing*, 1961 U.S. Commission on Civil Rights Report Book 4, at 2 (1961) [hereinafter *Housing*], <https://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk4.pdf> (“The most obvious aspect of the problem involves the owner of a house who, from his own prejudice or by reason of outside pressure, refuses to sell or rent to members of particular minority groups. Frequently, such prejudice finds expression in restrictive covenants.”).

barring blacks from occupying lots for sale was not contrary to public policy and was enforceable); *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947) (affirming *Parmalee* rule), *rev'd*, *Shelley v. Kraemer*, 334 U.S. 1 (1948). As discussed above, across the country, these covenants targeted not only African Americans, but also homebuyers of the Jewish and Catholic faiths, along with those of foreign descent. *See supra* pp. 4-7 & n.1. The U.S. Supreme Court reversed *Sipes* in 1948, ruling that the judiciary could not enforce such restrictive covenants without violating the Equal Protection Clause of the Fourteenth Amendment. *Shelley*, 334 U.S. at 20-23. However, voluntary discriminatory agreements were still allowed, and despite the growing condemnation of these practices, housing segregation remained “pervasive in Detroit and its suburbs . . . and in the rest of Michigan as well” in the years preceding passage of the federal and Michigan fair housing laws. *Fine, supra*, at 83.

In a 1958 survey of Detroit real-estate agents, 56% of agents reported that they had discriminated against Jews in “varying degrees.” *Id.* at 84. And, it was revealed in 1960 that, for 15 years, a suburban Detroit realtors’ association, the Grosse Pointe Brokers Association, had employed a screening “points” system to disadvantage prospective buyers of various national origins, as well as Jewish applicants. *Id.* at 87-88. Under the points system, a private investigator would examine the prospective buyer’s country of origin, occupation, friends, appearance, and accent to determine whether the applicant’s “way of living” was “American.” *Id.* Additional points could be earned based on the buyer’s dress, education, religion, military service, and use of grammar, among other factors. *Id.* at 88. While the minimum required points for most applicants was 50, prospective buyers of Polish descent needed 55 points, southern Europeans 75 points, and Jews 85 points—a requirement that was eventually raised to 90 when too many Jewish applicants were meeting the threshold score. *Id.*; *Schultz, supra*. “Because Jews were

viewed as ‘different from those in other categories,’ they received fewer points than other prospects for the same answers. Fine, *supra*, at 88. Blacks, Mexicans, and Asians were fully prohibited from applying. *Id.* See Schultz, *supra* (discussing Grosse Pointe scheme); *Housing, supra*, at 3 (noting that Grosse Pointe discrimination “covered the full ambit of ‘race, color, religion, and national origin,’ and it was practiced with mathematical exactitude.”).

It was against this historical backdrop that the federal and Michigan fair housing laws were enacted. While they were primarily aimed at alleviating racial discrimination in housing, the laws also forbade discrimination based on religion and other grounds, and for good reason: “[N]othing could be more calculated to create or deepen divisions between existing religious and ethnic groups . . . than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas.” *To Secure These Rights*, The Report of the President’s Committee on Civil Rights 69 (1947), <https://trumanlibrary.org/civilrights/srights2.htm> (quoting *Re Drummond Wren*, [1945] 4 D.L.R. 674 (Can. Ont. Sup. Ct.)).

In practice, Bay View’s requirement that prospective homebuyers join the Bay View Association, which accepts only Christians as members, is nothing more than a backdoor restrictive covenant—one that excludes all religious minorities and non-theists from homeownership in the community. Although the federal and state statutory protections are not a panacea for all housing discrimination,<sup>5</sup> this is the very sort of overt discrimination they are designed to meet head-on and bring to a halt.<sup>6</sup>

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<sup>5</sup> According to Sidney Fine, the Michigan Fair Housing Act was stronger than the federal law and more robust “than just about all of the existing state fair housing acts” across the country. Fine, *supra*, at 111.

## **II. Robust Judicial Enforcement of Fair Housing Protections for Religious Minorities Remains Necessary Today.**

Though not nearly as common as racial discrimination, as illustrated by this case, religious discrimination in housing has not been relegated to a bygone era. For example, after September 11, 2001, “reports of individual instances of housing discrimination involving Muslims soared[.]” Michael Allen & Jamie Crook, *More Than Just Race, in The Fight for Fair Housing* 100 (Gregory D. Squires ed., 2018). And the current social and political climates faced by religious minorities highlight the continuing relevance and importance of maintaining strong safeguards against religious discrimination in the housing context.

The United States is “more religiously diverse than ever before.” U.S. Dep’t of Justice, *Combating Religious Discrimination Today: Final Report* 6 (July 2016), <https://www.justice.gov/crs/file/899771/download>. Among the faiths represented in our country’s rich religious tapestry are Christianity, Islam, Buddhism, Hinduism, Judaism, Sikhism, and many other faiths and belief systems. *Id.* at 7, 11. Moreover, nearly a quarter of Americans are unaffiliated with any religion. *Id.* at 7.

A recent study, for instance, concluded that the Muslim population in Michigan had already grown to 274,000, or 2.75 percent as of 2015. Rebecca Karam, Inst. for Soc. Policy and Understanding, *An Impact Report of Muslim Contributions to Michigan* 35 (May 2017), <http://www.ispu.org/wp-content/uploads/2017/05/An-Impact-Report-of-Muslim-Contributions->

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<sup>6</sup> For the reasons set forth in the Plaintiff’s motion, the religious exemption in Section 3607(a) of the federal Fair Housing Act does not apply to Bay View. Pl. Br. Supp. Mot. J. Pleadings 14-20; *see Seng, supra*, at 10-11, 14-15 (pointing out that “Congress intended that the exemption be read narrowly in light of the overreaching purpose of the Act to prohibit discrimination against protected classes” and concluding that, “once a religious organization decides to sell or rent homes to lay persons, it must not restrict the sales or leases only to members of the religion of the organization”). On the contrary, as discussed below in Part III, Bay View is a state actor, subject not only to fair housing laws but also to the U.S. Constitution.

to-Michigan.pdf. The report also revealed that, at the time of the study, 35 Muslims held public office in Michigan; 35,835 businesses in the state were Muslim-owned; and Muslims comprised more than 15% of Michigan's licensed medical doctors. *Id.* at 2, 4. This trend toward increasing religious diversity will likely continue in the coming years. U.S. Dep't of Justice, *supra*, at 7. Across the United States, there were approximately 3.45 million Muslims as of 2017. Basheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, Pew Research Center (Jan. 3, 2018), <http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/>. According to the Pew Research Center, “[b]y 2040, Muslims will replace Jews as the nation’s second-largest religious group after Christians.” *Id.* And by 2050, the U.S. Muslim population is “projected to reach 8.1 million, or 2.1% of the nation’s total population — nearly twice the share of today.” *Id.*

Unfortunately, at the same time that religious diversity is expanding across the country, so too is animosity toward religious minorities. In recent years, attacks on Muslims in the political and social arenas have skyrocketed, and “there is some evidence that [these attacks have] had an effect on housing availability for Muslim home seekers.” Allen & Crook, *supra*, at 101. See Samantha Friedman et al., *Religion, Housing Discrimination, and Residential Attainment in Philadelphia: Are Muslims Disadvantaged?* 6 (Sept. 25, 2015), <https://paa.confex.com/paa/2016/mediafile/ExtendedAbstract/Paper8129/friedman.gibbons.wynn.PAA16.pdf> (reporting preliminary findings that “Muslims are significantly [1.69 times] more likely to experience housing discrimination than their non-Muslim counterparts, even after controlling for respondents’ race/ethnicity, nativity status, and other relevant factors”). The discriminatory climate faced by Muslims is reminiscent of the hostility directed toward Catholics last century. See *supra* pp. 4, 6-7.

Moreover, just over a week ago, neo-Nazis met in Georgia, where they held a white supremacist rally and burned a giant swastika. Madeline McGee, *Rural Georgia Bar Hosts Neo-Nazis for Swastika-burning After Rally*, Atlanta J.-Const., Apr. 26, 2018, <https://www.ajc.com/news/local/rural-georgia-bar-hosts-neo-nazis-for-swastika-burning-after-rally/RN4nfTteOVI3rxZqG9ufeO/>. And, in August of last year, neo-Nazis marched through the University of Virginia campus with torches, chanting, “Jew[s] will not replace us.” Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. Times, Aug. 11, 2017, <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>. These are not isolated incidents. According to the Anti-Defamation League’s (ADL) annual *Audit of Anti-Semitic Incidents*, released in February of this year, “the number of anti-Semitic incidents in the U.S. rose 57 percent in 2017 – the largest single-year increase on record and the second highest number reported since ADL started tracking such data in 1979.” Introduction, *2017 Audit of Anti-Semitic Incidents*, ADL (Feb. 2018), <https://www.adl.org/resources/reports/2017-audit-of-anti-semitic-incidents#introduction>. Further, the most recent figures released by the FBI showed a rise in the number of hate crimes targeting people of the Jewish and Muslim faiths in 2016. Mark Berman, *Hate Crimes in the United States Increased Last Year, the FBI Says*, Wash. Post, Nov. 13, 2017, [https://www.washingtonpost.com/news/post-nation/wp/2017/11/13/hate-crimes-in-the-united-states-increased-last-year-the-fbi-says/?utm\\_term=.a33d6ef210d3](https://www.washingtonpost.com/news/post-nation/wp/2017/11/13/hate-crimes-in-the-united-states-increased-last-year-the-fbi-says/?utm_term=.a33d6ef210d3). As incidents of overt hostility and discrimination toward religious minorities increase, “after several decades of relative dormancy, the Fair Housing Act’s prohibitions on religion-based discrimination will likely emerge as a significant issue in the next decade.” See Allen & Crook, *supra*, at 101-02.

**III. Because the Bay View Association Is a State Actor, Its Discrimination Against Religious Minorities Also Violates the Establishment Clause.**

Bay View has the power to appoint a marshal, form a board of assessors, levy and collect taxes, control its lands, and exercise many police powers usually reserved to townships and cities, including enforcement of laws via arrest and conviction, and fine and imprisonment. Pl. Br. Supp. Mot. J. Pleadings 1-2, 6-7. For the reasons discussed in Plaintiff’s brief, these factors render Bay View a state actor. *Id.* at 5-9. It must, therefore, comply with the Establishment Clause of the First Amendment to the U.S. Constitution. *See, e.g., Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 492–93 (2d Cir. 2009).

Bay View’s requirements that homeowners be “of Christian persuasion” and submit a letter from a pastor documenting membership or active participation in a church run afoul of the most fundamental Establishment Clause principles. First, under the Establishment Clause, the government can neither “force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). Nor can a person “be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.” *Id.* at 15-16. Yet, that is precisely what Bay View has done and continues to do. Prospective homebuyers who are not Christian are punished for their refusal to profess Christian beliefs; they are summarily denied the right to purchase a home. Indeed, even those who are “of Christian persuasion” are punished if they do not attend church and actively participate in a religious community, for they will be unable to produce the required letter from a pastor.

The Establishment Clause also forbids the government from “pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another.” *Everson*, 330 U.S. at 15. As the Supreme Court has ruled, “[t]he clearest command of the Establishment Clause is that one

religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Again, Bay View’s restriction of homeownership to Christians patently violates this basic First Amendment tenet. As a state actor, Bay View must remain neutral when it comes to religion and open up homeownership in the community to all people, regardless of faith.

### **CONCLUSION**

For the foregoing reasons, *Amici Curiae* respectfully request that Plaintiff’s Motion for Judgment on the Pleadings be granted and that Defendant be enjoined from future enforcement of its discriminatory homeownership rule.

Respectfully submitted,

s/Michael J. Steinberg

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