No. 21-_____

In the Supreme Court of the United States

JULIE ELLEN WARTLUFT, f/k/a Julie Ellen Bartels; AND
FREDERICK L. BARTELS, JR., as Administrators of
the Estate of Abrielle Kira Bartels, Deceased,

Petitioners,

vs.

THE MILTION HERSHEY SCHOOL; AND
THE HERSHEY TRUST COMPANY, as Trustee of
the Milton Hershey School Trust,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To provide fair housing across the United States is the express purpose of the Fair Housing Act. *See* 42 U.S.C. § 3601 *et seq*. This Act is also known as Title VIII of the Civil Rights Act of 1968, as amended. It makes it unlawful to discriminate in the rental, or to otherwise make unavailable or deny a dwelling to any renter because of a disability of the renter. 42 U.S.C. §3604(f)(1). To rent is defined in the Act as to lease or to let or otherwise to grant *for consideration* the right to occupy premises. 42 U.S.C. §3602(e). The Milton Hershey School provides education and housing to approximately 2,100 underprivileged students in homes of 10-12 students without requiring any monetary consideration. The question presented is whether participation in a mandatory chore program at the student home as set forth in an enrollment agreement to remain in residence at the School is "consideration" under the Act sufficient for the child to qualify as a renter and thus bestowing the Act's protections from discrimination in housing.

PARTIES TO THE PROECEEDINGS

Julie Ellen Wartluft, f/k/a Julie Ellen Bartels; Frederick L. Bartels, Jr., as Administrators of the Estate of Abrielle Kira Bartels, Deceased, are petitioners and were plaintiffs-appellants below.

The Milton Hershey School; The Hershey Trust Company, as Trustee of the Milton Hersey School Trust, are respondents and were defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioners Julie Ellen Wartluft, f/k/a Julie Ellen Bartels and Frederick L. Bartels, Jr., as Administrators of the Estate of Abrielle Kira Bartels, Deceased, are not corporate entities. Thus, this rule is not applicable.

TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS

Opinions, Orders and Memorandum Entered in Conjunction with Judgment

Other Relevant Memorandum Entered in the Case

Statutes Involved in Case

Other Material Essential to Understand Petition

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Julie Ellen Wartluft, f/k/a Julie Ellen Bartels, and Frederick L. Bartels, Jr., as Administrators of the Estate of Abrielle Kira Bartels, deceased, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Administrators were also individual plaintiffs in the appellate court proceeding.

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit (App.1a-10a) is unpublished and non-precedential. *Wartluft, et al. v. The Milton Hershey School et al.*, 844 Fed. Appx. 499 (3d Cir. 2021), No. 13-1415 (the "Panel Opinion"). The Memorandum of the United States District Court for the Middle District of Pennsylvania (App. 15a-28a) is available at 2020 WL 1285332 (M.D. Pa. 2020). The Memorandum and Order of the District Court for the Middle District denying the Defendants' Motion for Judgment on the Pleadings on the issue that is the subject of this Writ is reported at 400 F. Supp. 3d 91 (M.D. Pa. 2019). There are no related proceedings.

BASIS FOR JURISDICTION

The Court of Appeals entered judgment on February 1, 2021. App. 11a-12a. Petitioners timely filed a petition for rehearing or rehearing *en banc*, which the Third Circuit denied on March 16, 2021. App.13a-14a. This Court has jurisdiction under 28 U.S.C. §1254(1). Pursuant to this Court's Order of March 19, 2020, the deadline to file this Petition for Writ of Certiorari has been extended to 150 days from the order denying a timely petition for rehearing, which is August 13, 2021.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are from Title VIII of the Civil Rights Act of 1964, as amended. Title VIII is the Fair Housing Act (the "FHA" or the "Act"). The two relevant statutes include 42 U.S.C. §3604(f)(1), which makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of – (A) that buyer or renter." The second relevant statute is 42 U.S.C. §3602(e), where "to rent" is defined in the Act as "includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant."

STATEMENT OF THE CASE

Are society's neediest, most vulnerable youth — ones in institutional care — children of a lesser god? Are their labors unworthy of the solemn protections afforded by our civil rights laws, like "tramps given a free meal" and not permitted to complain even if their mistreatment may be so abjectly cruel as to drive them to take their own lives?

The Third Circuit has answered these questions in the affirmative. This Honorable Court is called on to revisit that improvident conclusion and determine that even children in institutional care are protected by our nation's disability laws for their housing when that institution requires the children to perform work for its benefit.

This case arises from a novel question concerning the scope of standing to sue for discrimination under the Fair Housing Act of 1968, as amended, and the proper construction of 42 U.S.C. §§3604(f)(1) and 3602(e) of the Act, which as relevant

herein, only protects "renters" from discrimination and requires those invoking the Act to have provided "consideration" for their housing.

Supreme Court Rule 10(c) provides that this Court considers in review of a writ whether a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Appellants submit that protecting our nation's most vulnerable citizens from the tragedy exhibited here presents a case of such importance. The harms done to this class of disabled children here will concomitantly undermine the federal housing rights of this country's most vulnerable citizens, in contexts as varied as residential schools, universities, residential drug treatment facilities, and homeless shelters. By focusing on what constitutes "consideration" for purposes of invoking civil rights protections when no money changes hands, this case provides an opportunity for the Court to clarify this as yet obscure issue. In addition, it is submitted that the Panel Opinion applied a narrow construction to a statutory provision of civil rights law, where a broad construction was required by this Court's precedents.

By definition, our nation's most indigent lack cash and so perforce make it up in trade whether by sweeping, cleaning, other meaningful chores, teaching, residential assistance, picking produce, or any number of methods. These citizens should not be denied protection if any construction of the statute allows it. These

citizens simply should not be denied the federal civil right to be free from discrimination in their housing merely because they do not have any money and there is a substantial element of gratuitous benefit provided beyond what the labors of their hands can generate.

So too with tenderhearted Abrielle Bartels, a 14-year old girl who fate placed in a residential care facility and who needed the protection of federal law that would have prevented the discrimination she faced; viz, to be suspended or effectively expelled merely for suffering a bout of adolescent depression, while she was being professionally treated, which would have been prohibited under the Fair Housing Act. By improperly reading the Act narrowly to exclude such children and their labors from the definition of "renters," the Panel Opinion, as did the District Court, frustrates the remedial purpose of the Act and truncates its protections for the class who need it most: those who have no resources and thus can only barter. This reading unduly demeans such consideration as chores provided by citizens in many settings and, here, all students at the facility in question, including young Abbie who, as a condition of continued residence at the facility, was required to provide chores.

The Panel Opinion essentially holds that there is no degree of services provided by a child at a tuition-free residential school that would be sufficient to claim a civil rights protection to be free from housing discrimination. The Panel Opinion says that our poorest kids are not protected by our nation's housing civil rights laws because their labors can never be consideration under the Act. This is

an irrational inversion of what should be the case: our courts should resolve every doubt in favor of protecting such disabled children, not throwing them to the wolves.

A. Procedural Background.

This case comes on appeal from a District Court order granting summary judgment to the Defendants on all counts, and affirmed by the Third Circuit Panel Opinion. Final judgment was entered in the District Court on March 18, 2020, and a timely notice of appeal was filed on April 7, 2020. The District Court exercised its subject matter jurisdiction pursuant to 28 U.S.C. §1331 over the FHA claim. The Court of Appeals had subject matter jurisdiction pursuant to 28 U.S.C. §1291. In the Amended Complaint at issue, Plaintiffs claimed, in part, that the School violated the FHA. It is only the FHA claim that is the subject of this Petition.

B. Factual Background.

At the tender age of 5, with parents whose tragic circumstances left them unable to adequately care for her, Abrielle Kira Bartels ("Abbie") landed at the Milton Hershey School (the "School" or "MHS"), a residential K through 12 school for underprivileged children founded as an orphanage in 1909. The uncontroverted facts highlight the travesty of what followed: the School made a premature decision on or before June 12, 2013 to bar Abbie's continued enrollment, at the age of fourteen, merely because Abbie needed a short-term admission to a mental health treatment facility for suicide ideation a second time.

This setback from Abbie's first treatment was eminently treatable. Nonetheless, eager to rid itself of a child it viewed as a problem, the School made a decision to immediately bar Abbie from stepping foot on campus for at least 14

months; *i.e.*, a *de facto* expulsion dressed up as a "leave of absence." Notably, Abbie's admission to the second mental health facility that treated her, the Pennsylvania Psychiatric Institute ("PPI"), occurred on June 11, 2013 (Panel Opinion at 4); *i.e.*, a mere one day before the School decided to send her away. In fact, Abbie's mother was told *before* the second admission that Abbie would not be allowed to return to the School for at least the entire next school year.

It is thus facially obvious that the termination decision was premature because it was made at the outset of treatment, not after treatment, nor even during treatment. The decision was also taken with no individualized assessment to be made after treatment, whether in June 2013, or in August 2013 before the start of a new school year, or anytime thereafter during the entire next school year, which would have been 9th grade for Abbie. Instead, the School made its determination based entirely on Abbie's need for a second admission in a robotic manner that flouts both medical standards and civil rights laws.

Abbie's School psychologist even admitted under oath that the School never made any determination as to whether it could meet her needs before or after this second treatment. This action was discriminatory on its face because mental health was the sole reason for barring Abbie from the School after nine years in residence there, the only real home she had known. Then, one day after Abbie was cleared by PPI to return to the School, the School compounded its error by harshly disinviting her from her own 8th grade graduation and after-party at her student home, where

her possessions remained in her room. That denial was itself a discriminatory act independent of barring Abbie from returning for 9th grade.

The brutally abrupt rescission of the invitations came the very day before the events, again without any assessment of Abbie's condition by the School, or whether any accommodation could have been offered to allow her to attend these events. Contrary to the Panel Opinion and what any fair understanding of the psyche of a 14-year old girl would lead one to conclude, there was patent evidence that Abbie was devastated: this poor child killed herself, which was certainly sufficient evidence for the Plaintiffs in this case to have prevailed on defending summary judgment, where every inference is to be given the non-moving party and all doubts resolved in its favor. Indeed, just before the suicide, the School had further compounded Abbie's distress, consigning her to wonder what her fate was, by not telling her its conclusions in a timely manner. The School told Abbie and her mother in unambiguous terms that the only options on the table were a total termination from the School or possibly a long-term leave of absence and possible return afterwards on certain conditions not imposed on other students. All of that caused Abbie to lose hope for her future, crying on the morning of her suicide that she did not want to live away from the School.

None of these facts are controverted and the only real question is whether this child was protected by the civil rights law of this country or, instead, was thrown under a legal bus after the School threw her under an emotional one.

The FHA Count of the Amended Complaintwas dismissed solely on the grounds that Abbie's residence at the School was completely gratuitous, without any consideration provided by Abbie to the degree necessary to invoke the FHA. Both the District Court and the Court of Appeals rejected the position that the School's highly-touted mandatory chore program, with a history dating back to 1908, was consideration for her residence at the School. Those determinations precluded Abbie from renter status under the FHA, with no standing to bring a claim. The result is incongruous, veers sharply from the liberal construction afforded such remedial laws as the FHA, and produces a manifestly unjust outcome.

The uncontroverted record is replete with evidence demonstrating that the mandatory chore program is more than sufficient to provide "a consideration" for purposes of invoking the Act. The Panel Opinion minimized such evidence, which created triable issues of fact as to the supply of consideration. Among the evidence that made Abbie a renter within the Act were, *inter alia*, the following:

(1) the mandatory chore program was birthed simultaneous with the School and dates back to the original Deed of Trust, wherein students were expressly required to work on the School's farms of that era, which were owned by the School Trust;

(2) as a strict condition of enrollment for every child at the School, the child or the child's parent/sponsor, must sign an enrollment agreement requiring the student to comply with the rules, including specific mention of doing *chores* at

the student home — a fact that standing alone calls into question the Panel Opinion;

(3) the School does not contest that the chore program exists or that there is a discipline policy at the School that would include points for insubordination at the student home, that could ultimately lead to the loss of college aid or expulsion; and

(4) the chores included items otherwise deemed FHA consideration such as cleaning, grounds maintenance, cooking, and the like.

All this notwithstanding, the Panel Opinion narrowly construed the FHA's "for a consideration" requirement of renter status necessary to invoke FHA protection despite a record that could support a conclusion in favor of the non-moving party. This is plain error thay disproportionately affects a highly vulnerable class of children and invites mistreatment of other disenfranchised constituencies who, rather than paying cash, earn what keep they can with what humble labor they can provide. Indeed, in reaching its conclusion deeming Abbie unworthy of FHA protection, the District Court applied an analogy likening Abbie to a "tramp" given a free sweater and who may not then be heard to complain later if that free sweater is not given even if that child must work to keep that sweater. Something has gone tragically wrong with our nation's system of federal disability protection if that is in fact how such children are viewed.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I. THE THIRD CIRCUIT'S DECISION APPLIED A NARROW INTERPRETATION TO THE DEFINITION OF "CONSIDERATION" UNDER THE FAIR HOUSING ACT THAT IS CONTRARY TO THE HOLDINGS OF THIS COURT AND OTHER CIRCUITS TO THE DETRIMENT OF THIS COUNTRY'S MOST VULNERABLE CITIZENS

The Panel Opinion conflicts with decisions of this Supreme Court and the Third Circuit requiring that the terms of the Fair Housing Act be recognized as providing a "broad and inclusive" compass and therefore accorded a "generous construction." The Supreme Court has emphasized that the language of the FHA is "broad and inclusive" and must be given a "generous construction," in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972); as summarized in *U.S. v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990). This Court has stated that the FHA "broadly prohibits discrimination in housing throughout the Nation." *Gladstone v. Village of Bellwood*, 441 U.S. 91, 93 (1979).

Standing that mandate upside down, the Panel Opinion has instead eviscerated the reach of the FHA and provided the School with a full exemption from it, despite an express admonition from the Supreme Court that FHA exemptions are to be "read narrowly in order to preserve the primary operation" of the national policy of fair housing. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995). That approach is troubling especially because the Third Circuit, laudably, has addressed another FHA question within this Court's remedial framework and noted: "In answering this question, we are mindful of the Act's

stated policy 'to provide, within constitutional limitations, for fair housing throughout the United States.' *§ 3601.* We also note precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision." *Id.* at 732.

The Third Circuit, citing to the House Judiciary Committee, has recognized that "the Fair Housing Amendments Act . . . is a clear pronouncement of a national commitment to *end the unnecessary exclusion of persons with handicaps* from the American mainstream." *Helen L. v. DiDario*, 46 F.3d 325, 333 n.14 (3d Cir. 1995) (emphasis in original) (citation omitted). The Panel Opinion ignored this case law on generous construction.

Further, in *Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 110 (3d Cir. 2017), the Third Circuit concluded that "[t]he Fair Housing Act was intended by Congress to have 'broad remedial intent.' *Alexander v. Riga*, 208 F.3d 419, 425 (3d Cir. 2000) (quoting *Havens Realty v. Coleman*, 455 U.S. 363, 380, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)); *see also Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011) ('The FHA is a broadly remedial statute . . . ."), *cert. dismissed*, 134 S.Ct. 636 (2013)." Clearly, the Third Circuit in other circumstances hews to the Supreme Court's FHA guidance.

The appeal under the FHA claim is limited to 42 U.S.C. §3604(f)(1), which requires Abbie to qualify as a renter. The definition of "to rent" in the FHA is, in part, "to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. §3602(e). When interpreting a statutory term, we first give

effect to statutory definitions and then to the term's "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37 (1979). "[F]or a consideration" is not further defined, but of the multiple definitions of consideration in Merriam-Webster's Dictionary (2021), the most generous and applicable should be its simple common usage of a "recompense, payment." It is submitted that any contemporary context should surely include as consideration mandated chores at a residential school for children, as we are far past the point of disregarding child labor under Federal law.

Based upon Supreme Court precedent, the Panel Opinion should merely have examined whether Abbie agreed to provide meaningful chores for her residence at the School. The Panel Opinion (at 5) unduly narrowed Abbie's rights under the FHA by suggesting that all that mattered was the complex Black's Law definition of consideration as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promise; that which motivates a person to do something." While the School Enrollment Agreement would satisfy this definition by mandating compliance with the chore program, the more generous construction is that "a consideration" means merely that Abbie provided something of value (recompense) in exchange for her residence.

Veering sharply from the Supreme Court directive to construe the FHA broadly, the Panel Opinion instead chose the most restrictive possible definition of "a consideration," as if it wanted to see an arm's length negotiation between the School and the child resulting in specified contract terms. This was even though

the Panel Opinion acknowledged that consideration need not be provided in cash. Abbie of course gave consideration in the form of chores, required by an actual contract (the Enrollment Agreement), and mandated in a School Handbook (at 3, 30 and 37) in order to remain in the student home.

Rejecting the plain fact of chores as consideration (as supported by the Enrollment Agreement), the Panel Opinion instead analogized chores to homework. But homework, of course, is not in any way "a consideration" given to the School. Unlike homework, chores are performed for the benefit of the student home or for maintenance of School facilities. The School would have to hire staff to keep the group homes clean, cook, and maintain the grounds if students did not do chores. However, no one would be hired to do a student's homework.

To deny Abbie the status of a renter, one must conclude that Abbie provided nothing of value to the School in order to continue her residence there, a factually unsupportable conclusion as a matter of fact and law. Said another way, the Panel Opinion would conclude that no amount of chores imposed on a child as a condition of residence could ever be sufficient to qualify as consideration to allow standing under the FHA.

The Ninth Circuit Court of Appeals recently had cause to discuss the concept of FHA consideration in *Salisbury v. City of Santa Monica*, No. 20-55039, 2021 BLK 210276, 2021 US App. Lexis 16848 (9th Cir. June 7, 2021) (Amended Opinion of that at 994 F.3d 1056 (9th Cir. 2021). Salisbury brought a claim under the FHA as a holdover tenant of his father's lease, but had no rental agreement and paid no

rent. The Court denied him standing, finding that there was no evidence he performed "any act" other than the payment of rent that could satisfy the consideration requirement. The Ninth Circuit, however, made every effort to broadly define "consideration" with multiple meanings, including a broad Black's Law Dictionary (2d ed. 1910) definition of consideration as "*Any benefit* conferred, or agreed to be confirmed, upon the promisor . . . to which the promisor [i]s not lawfully entitled." (Emphasis added.) 994 F.3d at 1064.

In the course of the Panel's decision, its sharpest departure from applicable standards and controlling law came in its reliance on a statement by the School's counsel made during oral argument for the first time, having never before been introduced anywhere in the proceedings. Panel Opinion at 6. "[A]s the School's counsel explained at oral argument, if a student could not physically perform chores, the School would not deny her education or housing. The School housed Abbie out of charity. That free student housing falls outside the Act."

First, counsel's statement, as then interpreted by the Panel, should not have been afforded any weight at all, let alone used to reach a final conclusion. This is because it asserted (1) facts not in evidence; (2) an argument raised for the first time at the oral argument after submission of the briefs; and (3) it puts the rabbit in the hat by concluding that charity precludes any analysis of labor as consideration. The Panel Opinion's reliance on this statement to conclude that chores were not truly required as a condition of residence for the vast majority of students who can

perform physical chores clearly violates Supreme Court precedent. It is also contrary to the School Handbook and other material given to students.

As the Third Circuit itself explained: "Our Circuit adheres to a well-established principle that it is inappropriate for an appellate court to consider a contention raised on appeal that was not initially presented to the district court." *Lloyd v. HOVENSA*, 369 F.3d 263, 272–73 (3d Cir. 2004) (quoting *In re City of Phila. Litig.*, 158 F.3d 723, 727 (3d Cir. 1998)). Thus, the Panel Opinion's reliance on this statement constitutes a further indication of the Panel's error on standing. While the Panel Opinion accepted counsel's statement as evidence and entertained and credited the related argument, its truth was never established or probed, as would have been the case had the argument been properly raised.

Secondly, assuming *arguendo* that it was true that a physically disabled child would not forfeit enrollment, this would only be assured because the FHA would require that housing accommodations be made for a disability that may have prevented a child from performing the physical chores. But that accommodation would not swallow the general rule nor prove the lack of a chore requirement. Rather, it would prove only that there may be accommodations necessary for disabilities under Federal law. The exception for a disability proves the rule exists for all the able-bodied students, including Abbie.

The accommodation could be to provide the disabled child with other chores to perform, like paperwork for the student home. But here as well, using a statement of counsel that appeared from nowhere and with no factual support to

convert the chore requirement solely into an educational experience, also violates the summary judgment standard of drawing all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). To put it another way, the Panel Opinion used an FHA civil rights accommodation to deny FHA civil rights to the very student it used in its example. How is that student supposed to enforce his or her civil right to an accommodation scenario and not be discriminated against in housing if he or she has no right to that accommodation in the first instance?

The effect of the Panel Opinion is to use a legal obligation to make accommodations under the FHA to negate the applicability of the FHA. Clearly, if the consideration for otherwise free residential housing were chores, the fact that accommodations were made for a blind child under the FHA does not change the status of other children who do provide consideration as "renters," and who should be entitled to enforce discriminatory conduct under the FHA.

The same would apply to a homeless shelter, where a resident must perform chores to remain in residence, and therefore qualify as a renter, and which status cannot be denied merely because a blind resident is given an accommodation. While the Americans with Disabilities Act (the "ADA") could also be implicated in this example, for teenage students the ADA equitable remedies are of limited value because the student will age out before the case winds through the court system.

In *Tolan v. Cotton*, 572 U.S. 650, 656-657 (2014) (*per curiam)*, the Supreme

Court articulated the summary judgment standard:

> [C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157 (1970).

The Panel Opinion not only failed to articulate this standard but it viewed the evidence in the light most favorable *to the movant*, despite evidence to the contrary, including on Abbie's reaction to the news from the School, the finding on counsel's statement of the excuse from chores and the very issue of whether the facts support consideration given by Abbie.

Abbie was a renter under Section 3604(f)(1) because mandatory chores that benefit the School are consideration. The simplest, universally understood example making plain the Panel Opinion's grossly flawed "lack of consideration" error is the proposal of "Will work for food." This is the most elementary exchange of mutual consideration between the haves and have-nots, the affluent and the poor. As the case law has suggested — *see, e.g.*, *Defiore v. City Rescue Mission*, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013) (issue is whether homeless "shelter residents provide some form of consideration for their stay") — and contrary to the Panel Opinion, the poor, the homeless, and, yes, even orphan children, have a right to be free from housing discrimination when that housing has been provided pursuant to a bargain in which

they are "required" to perform their humble labor, even if meager, in consideration for continued housing.

A District of Columbia District Court simplified the analysis of "consideration" under the FHA as follows: "To satisfy this definition, a plaintiff need do no more than allege that the owner 'received some consideration for permitting them to reside in [a] dwelling[ ].'" *Hunter ex rel. A.H. v. District of Columbia*, 64 F. Supp. 3d 158, 178 (D.D.C. 2014).

Here, Abbie and other MHS children — like the residents of homeless shelters where chores must be performed — did provide *some* consideration, certainly enough to invoke our nation's civil rights laws and not cancel them on the basis of the disturbing "tramp" analogy employed in the opinion below. That analogy was likening Abbie to a tramp who receives the charity of a benevolent man, who offered her a piece of clothing if she walked around the corner to buy it for herself. The "tramp" in the analogy provides no consideration for the clothing, but the analysis would be the opposite if the "tramp" had to perform chores (*e.g.*, wash his car, clean his house, cook his food) for the benefit of the benevolent man to receive the clothing.

If we were talking about an adult homeless shelter where residents perform chores necessary to maintain the shelter, the Panel Opinion may have found valid consideration for invoking protection from housing discrimination on account of disability. Vulnerable disabled children are no less entitled to federal housing law protections, even where they benefit from "the charity of strangers" but

nevertheless must earn their keep. This case could determine whether the most vulnerable children in our society, forced to strike a bargain with a wealthy institution in exchange for a better chance at a productive life, can be discriminated against in housing provided by that institution when a condition of the housing is the sweat of their brow.

The lower court's ruling is contrary to the law of consideration, the precepts of the Hershey charity's founder chore program, and the most basic responsibility of society to stand by its neediest and most alone children. This Court should find, as the Panel Opinion ignored, that Abbie's chores were certainly sufficient to bring her within the protections of the FHA.

The School's so called "leave of absence policy," as described to Abbie's mother, facially discriminates by requiring a student with mental health challenges to complete a full year in public school before being considered for readmission, solely on account of those challenges. "The protected trait by definition plays a role in the decision-making process," making it "*per se* or explicit discrimination." *Community Services, Inc. v. Wind Gap Mu. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005).

Any explanation offered by the School to rationalize its discriminatory action in denying Abbie attendance at her hard-earned eighth grade graduation, or excluding her from the grounds of her student home picnic, is clearly a pretext for the discrimination. *See McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 802-804 (1973). We know this because when discussing internally what the School should do if Abbie and her mother appeared at graduation as threatened, the decision was

made (but not communicated) to let Abbie attend without any accommodation even necessary.

The most preposterous of the School's claims that Abbie's chore requirement was not consideration for continued residence is its argument that there are no consequences for children refusing to do chores, ostensibly because the MHS Handbook's Uniform Discipline Policy fails to expressly include "not doing chores" — the most obvious of all rule infractions — as subject to discipline. This Hail Mary argument demonstrates the weakness of the lower court's opinion that there is no *quid pro quo*, as shown below.

As MHS is fully aware, the Enrollment Agreement for each child requires in Section 4 obedience to all rules and policies, including as concerns chores ("You agree to enroll your child in the School and to accept and follow the terms of this agreement. These rules address behavior, program requirements, visiting privileges, vacations, studies, chores, substance abuse, and all other matters relating to your child's conduct at the School."). At the end of the agreement, the student and/or sponsor must acknowledge their "obligations" under the agreement. The School wants this to be a contract when it suits its purposes, but not when the consequence is to grant children civil rights. Chores are required seven days a week. Any reasonable reading of the School's Uniform Discipline Policy is that the discipline imposed for the misbehaviors set forth in that Policy are consequences that would flow from repeated defiance and refusal to do assigned chores.

For example, a Level I violation includes "Disobeying authority" and "failure to follow student home . . . rules," a consequence of which is "Extra chores." One of those rules concerns the chore program. A Level II violation includes "Unmodified Level I behaviors, Disrespect to adults (defiance, insubordination)," the additional consequences of which include "Loss of privileges." Level III violations include "misbehavior that has not responded to Level I or II interventions," including "serious acts of defiance, insubordination" and where the add-on consequences include "Campus work assignments." Finally, a Level IV violation includes "misbehavior of a repeated nature," where the consequences rise to "Loss of C.E.S. scholarship" and "Review of enrollment."

Thus, a child's continued and repeated defiance in failing to obey chore assignments in and around the student home that are categorically required in the Enrollment Agreement, Student Handbook, and other sources in the record would be grounds for loss of college assistance and termination. The original Deed of Trust required students to "do such work upon the farms as may suit his capacity." Thus, School students have been required to perform meaningful chores for over a century. Indeed, a child's insubordination can cause extra chores and campus work assignments to be imposed resulting in more benefits for the School, unlike more homework, where there is no benefit to the School.

The punishments noted in the Discipline Policy on misbehaving children that require *more* work for the School provide additional consideration for the housing received. This should not even be close: the chores are plainly consideration

required by and provided to the School, in exchange for the privileges and benefits of residing free of monetary charge in School housing. If there is any remaining question, Section 4 of the Enrollment Agreement completes the circle by providing that failure to obey School staff and follow rules and policies will result in discipline and could lead to a child's dismissal.

Defendants now will say literally anything to avoid accountability for the singular act of cruelty at the heart of this case. Constantly refusing to do chores most certainly will get a child expelled from a facility where simply needing counseling and comfort for depression will get a child removed.

The School's allegations that it could not provide the services Abbie needed after her discharge from PPI on June 19, 2013 is belied by substantial evidence in the record. Evidence in the record described the vast psychological services provided at the School. Dr. Herr of the School recorded in a Psychotherapy Note that he met on May 29, 2013 with Abbie, her mother, her father and her father's partner at Philhaven "for a family session." Dr. Herr then met with the same family members and Abbie's brother at Philhaven two days later. Dr. Herr recorded participating in a "final family session" five days later. Finally, Dr. Herr meets with Abbie and her mother on June 13, 2013 at PPI. The School ignores the Plaintiffs' principal argument that the School failed to do an assessment of Abbie's needs after her treatment, and, in fact, never even did it before her treatment, by the very words of Abbie's treating School psychologist.

Contrary to the School's position, there is extensive evidence that students were terminated or placed on leave of absence after a second admission to a mental health facility. However, Plaintiffs' discrimination does not rise or fall on a pattern, as the individual discrimination against Abbie is well-established by the record. Moreover, Defendants contradict themselves by claiming there is no policy to banish students after two admissions at the same time they justify banishment by the defense in one of their briefs that "being hospitalized twice in such a short period has medical and clinical significance." So their position is we do not have a policy but in fact we defend that policy.

Hovering over this case is an unpleasant truth: a mind-bogglingly wealthy charity has elevated image above all, seeking to rid itself of children like Abbie rather than help them face adolescent depression. To continue this practice, MHS has manufactured an FHA escape clause, based on the preposterous claim that chores are suddenly "voluntary." This Court should not lend itself to this ruse: our nation's disability protections extend even to the needy and vulnerable children served by MHS.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS THIS COURT'S REVIEW

This appeal thus involves a question of exceptional importance, *i.e.*, whether an underprivileged child in the care of a residential school for children who cannot pay tuition, and who instead performs what chores they can for their keep, should be denied a right to be free from housing discrimination under the FHA. The fact is that from their initial mandatory enrollment agreement until graduation the child

is required to perform chores at their group homes to maintain residence. The Panel Opinion gives the School the unchecked freedom from the FHA to discriminate in its provision of housing to minor children, including against those with a mental health disability. It devalues and thereby contravenes the remedial purpose of the FHA and diminishes the services that the child gives back to the School.

Are children in need to be denied a civil right for fair housing because our courts refuse to value their labor? Should a decision that stands for a proposition that no amount of services required of a child by an institution providing monetarily free room, board, and education can constitute consideration be the law of the land? The answer to both those questions should be a resounding no. What happened below to Abbie and her family is not merely an affront to their rights but to the rights of all indigent children suffering from a disability protected by the FHA. Exempting the Milton Hershey School's student homes from the FHA would create an exception at odds with the Act's purposes and objectives: to eliminate discrimination in housing.

III. THIS CASE PRESENTS A NEEDED AND IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED AND ISSUING VITAL FHA GUIDANCE

The chore program at the Milton Hershey School is well-documented. It may not be so well-documented at other private schools, making this an ideal vehicle to address the issue. Moreover, if children providing chores for the benefit of the School can be given standing as renters under the FHA, and their work valued, then the ruling should easily apply to adult facilities such as half-way houses,

residential drug treatment facilities or homeless shelters to the extent there are required chores as a condition of residence in those places. Further, the School has already publicly maintained that it is an important decision for residential schools for at-risk children, inviting similar mischief elsewhere. *See* https://www.law.com/thelegalintelligencer/2021/02/11/milton-hershey-school-lawyer-finds-take-home-lessons-in-ruling-on-students-suicide/. Appendix 56a-58a. (the School's lawyer "said it's an important decision for the Milton Hershey School and possibly other institutions that provide residential programs for at-risk students.")

This case would have implications for thousands of children at the School alone. We know this from a written "Statement on the Milton Hershey School" provided by Lisa Scullin, Vice President of Communications at the School, to *The [Philadelphia] Inquirer,* and published therein on November 2, 2016. This Statement included the following: "60 to 70% of [the School's] student body has one or more physical or psychological impairments that may meet the ADA's definition of a disability," and that "[m]any of these are attributable to backgrounds of poverty and need." See Appendix 59a-61a.

The fact that the School boasts of now having avoided any prohibition against discriminatory practices in its housing, while at the same time maintaining that it serves primarily a class of children with disabilities is by itself an important reason why this standing issue is deserving of this Court's attention. It is an unseemly legal position and supports the principle that the FHA deserves a liberal construction so that discrimination in housing can be eradicated, not allowed to

flourish at a school with so many children in protected classes and bountiful resources.

The FHA should apply liberally where it can to protect indigent children from discrimination in housing based on a mental or physical disability, which the FHA refers to as a "handicap." While not an issue in this case, the definition of handicap in the Act (42 U.S.C. §3602(h)), is "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." Society's disabled children that fall into one of these broad categories should have standing under the FHA where they provide labor, even if there is disagreement about whether a course of conduct constitutes a violation of the FHA.

If there is one further justification for this Court's review, it is the very two opinions in the lower court in this case of Middle District Chief Judge John E. Jones III. These two opinions diverge because of the lack of guidance in this important issue. In denying Defendants' Motion for Judgment on the Pleadings on the issue of whether required chores could constitute "consideration" provided by Abbie, so as to give her estate standing as a renter, Chief Judge Jones stated:

> In their amended complaint, the Estate pleads that Abrielle performed chores and other tasks in exchange for residency in the student home. Taking the Estate's averments as true, and for the reasons that follow, it has sufficiently pleaded that Abrielle was a "renter" for purposes of the FHA.
>
> We first note that Defendants' position that Abrielle's chores were insufficient to bestow upon her the title of "renter" is unpersuasive. . . As aforementioned, both the statute and the common law are clear that, a person is a

> "renter" for purposes of the FHA if that person provides consideration in exchange for some interest in property. Because the Estate has pleaded that Abrielle supplied consideration in exchange for her housing, the Estate has demonstrated that Abrielle was a renter under the FHA.

Wartluft v. Milton Hershey Sch. & Sch. Tr., 400 F. Supp. 3d 91, 108 (M.D. Pa. 2019).

As chores were the only consideration ever alleged by the Estate, a conclusion could be drawn that Chief Judge Jones had a later change of heart when he granted summary judgment on the FHA claim on the grounds that chores were not consideration. The other possibility is that Chief Judge Jones found the chores were not in exchange for housing, but the entire record from the Enrollment Agreement to the School Handbook establish otherwise. This change of heart is likely because of the lack of clear guidance on non-monetary consideration provided by a resident that would otherwise have standing under the FHA, the same as if that resident had paid cash rent.

While there may exist, arguendo, grounds for claiming that the School's suspension or expulsion of Abbie merely because she faced treatable depression is defensible within the FHA, there should be no disagreement that Abbie and other indigent children like her are certainly within the protective umbrella of the FHA. This Court is called on to vindicate the latter proposition alone, leaving for the District Court and a jury the ultimate factual disposition. This Court's review is thus needed.

CONCLUSION

For the reasons set forth above, the Court should grant this Petition for Writ of Certiorari. This will let justice be done for disabled children who will otherwise

be cast outside the protections of our nation's civil rights laws, merely because they are too poor in the eyes of some to qualify for that protection. Surely, the FHA and our nation's promise to its vulnerable youth mean more than that.

Respectfully submitted,

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