15-1823

United States Court of Appeals for the Second Circuit

DONAHUE FRANCIS,

Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., CORRINE DOWNING,

Defendants-Appellees,

RAYMOND ENDRES,

Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR AMICUS CURIAE THE STATE OF NEW YORK IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The State of New York has a strong interest in protecting its residents and communities from housing discrimination in all of its forms. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982). New Yorkers' entitlement to fair housing encompasses not only equal *access* to housing opportunities, but also equal *enjoyment* of their housing after renting or purchasing a residence. Landlords violate this entitlement when they are aware of tenant-on-tenant harassment based on race or another protected characteristic but do nothing to address it, despite having a policy or practice of remediating other tenant-created disturbances. The panel opinion here correctly recognized that under both the federal Fair Housing Act (FHA), 42 U.S.C. §§ 3601-3619, and New York's Human Rights Law (HRL), Executive Law §§ 290-301, landlords are potentially liable when they discriminate between race-based tenant-on-tenant harassment and other kinds of tenant-created disturbances.

The State has long been committed to using its enforcement powers to protect all New Yorkers' rights to fair, equal, and livable housing.[1] The

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[1] *See, e.g.*, *Matter of People v. Ivybrooke Equity Enters., LLC*, 175 A.D.3d 1000 (4th Dep't 2019) (enforcement action against landlord for violating local antidiscrimination law prohibiting source-of-income discrim-

legal questions at issue here directly implicate those enforcement interests. Landlords' selective inaction in the face of racial tenant-on-tenant harassment causes substantial harms not only to the victims of such harassment, but also to the State, by perpetuating the segregation and housing instability that federal and state antidiscrimination laws were designed to eradicate.

For these reasons, in addition to the reasons given by the plaintiff, this Court should conclude that both the FHA and the HRL hold landlords responsible for selectively failing to address such tenant-on-tenant harassment when they are aware of such harassment and have a policy or a practice of addressing tenant-created disturbances in other circumstances.[2]

ination); *People v. Marolda Props., Inc.*, 2017 N.Y. Slip Op. 32497(U) (Sup. Ct. N.Y. County 2017) (enforcement action to prevent owners of rent-stabilized building from harassing tenants); Petition at 2-3, *People v. Pedrez*, Index No. 452277/2017 (Sup. Ct. N.Y. County Aug. 10, 2017), NYSCEF No. 1 (investigation into landlord's potential discrimination against tenants based on national origin).

[2] The State submits this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

ARGUMENT

POINT I

THE FAIR HOUSING ACT (FHA) PROHIBITS LANDLORDS FROM IGNORING RACIALLY BASED TENANT-ON-TENANT HARASSMENT WHILE HAVING A POLICY OR PRACTICE OF RESPONDING TO OTHER TENANT-CREATED DISTURBANCES

As the panel here correctly concluded, a landlord that responds to other tenant-created disturbances but selectively declines to address racial harassment by one tenant against another violates the FHA's mandate that landlords not "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race." 42 U.S.C. § 3604(b). Consistent with that conclusion, courts around the country have recognized housing providers' responsibility to act even-handedly in resolving neighbor-on-neighbor disputes.[3]

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[3] *See Hicks v. Makaha Valley Plantation Homeowners Ass'n*, No. 14-cv-254, 2015 WL 4041531, at *11-12 (D. Haw. June 30, 2015) (denying motion to dismiss FHA claim against homeowners' association alleging failure to intervene to stop race-based harassment by neighbor); *Johns v. Stillwell*, No. 07-cv-63, 2008 WL 2795884, at *4 (W.D. Va. July 18, 2008) (denying motion to dismiss FHA claim against property owner alleging failure to prevent owner and owner's neighbors and relatives from intimidating and harassing plaintiffs based on their race); *Martinez v. California Investors XII*, No. 05-cv-7608, 2007 WL 8435675, at *1-8 (C.D. Cal. Dec. 12, 2007) (denying motion to dismiss FHA claim against property manager alleging failure to address neighbor's racial slurs, vandalism, and threats of violence); *Wilstein v. San Tropai Condo. Master Ass'n*, No.

The dissent here would have held otherwise by disputing two key principles. First, the dissent asserted that § 3604(b)'s prohibition on racially based housing discrimination should not extend to "post-acquisition conduct"—i.e., a landlord's actions after the initial sale or rental of a dwelling—unless that conduct was so severe as to constitute constructive eviction. Second, the dissent reasoned that landlords could not be held responsible under the FHA for the misconduct of their tenants, no matter how egregious, in part because the dissent believed that landlords had neither the authority nor responsibility under state law to meaningfully address *any* tenant misconduct. The dissent is mistaken on both points.

98-cv-6211, 1999 WL 262145, at *11 (N.D. Ill. Apr. 22, 1999) (denying motion to dismiss FHA claim against condominium association alleging failure to remediate known tenant-on-tenant harassment); Consent Decree, *United States v. Applewood of Cross Plains, LLC*, No. 16-cv-37 (W.D. Wis. Jan. 20, 2016), ECF No. 3 (settling claim against apartment complex for failure to take prompt action to correct disability-related harassment by other tenants); Order, *Bonds v. Turner*, No. 15-cv-192 (N.D. Ga. Nov. 10, 2015), ECF No. 16 (denying motion to dismiss FHA claim against city alleging failure to prevent plaintiffs' neighbor from using racial slurs, taunts, and threats against plaintiffs).

A. The FHA's Bar on Housing Discrimination Extends to Landlords' Post-Acquisition Conduct Even in the Absence of Constructive Eviction.

As this Court has recognized, the FHA reflects Congress's "broad legislative plan to eliminate all traces of discrimination within the housing field." *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994) (quotation marks omitted). The panel correctly concluded that § 3604(b) gives effect to this legislative objective by holding landlords liable if their actions after the initial sale or rental of a dwelling discriminate against tenants' ongoing enjoyment of their residence based on race or other protected status. (*See* En Banc Appellant's Appendix (A.) 218-222.)

The dissent acknowledges, as it must, that Congress intended this prohibition to reach at least *some* post-acquisition discrimination. (A. 239.) But the dissent errs in attempting to limit § 3604(b)'s post-acquisition scope to conduct that results in constructive eviction—that is, conduct that renders the property effectively uninhabitable and forces a tenant to leave. (*See* A. 242-244.) *See also Barash v. Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 83 (1970) (defining constructive eviction).

That restrictive reading is inconsistent with both the text and purpose of § 3604(b).[4]

The text of § 3604(b) makes clear Congress's intent to protect not only the right to acquire and remain in housing, but also the right to enjoy housing free from discriminatory treatment giving rise to a hostile housing environment. As the panel here and at least two other circuits have recognized, the term "privileges" in § 3604(b) refers to a tenant's ongoing rights in their housing—such as the right to a habitable apartment—and thus makes clear Congress's intent to reach discriminatory conduct even after the point of sale or rental. (A. 213.) *See also Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 867 (7th

[4] The dissent did not dispute that a separate provision of the FHA, 42 U.S.C. § 3617, prohibits post-acquisition discrimination by a landlord beyond constructive eviction. (*See* A. 238-239.) Section 3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised and enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" the FHA. As other courts have recognized, § 3617 "reaches a broader range of post-acquisition conduct" than § 3604(b). *E.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc). The dissent nonetheless found § 3617 inapplicable here because it believed this provision did not make landlords responsible for their tenants' misconduct. As explained below (see *infra* at 10-12), that argument fails because the liability recognized by the panel majority holds landlords responsible for their own inaction and not for the misconduct of their tenants.

Cir. 2018), *cert. dismissed*, 139 S. Ct. 1249 (2019); *Committee Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009). That interpretation is consistent with courts' recognition that the term "privileges" in the United States Constitution, *see* U.S. Const. art. IV, § 2, cl. 1, connotes ongoing rights, such as the right to practice law, *see Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985); the right to access the courts, *see Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 387 (1978); and the right to petition Congress, *see Hague v. Committee for Indus. Org.*, 307 U.S. 496, 522 (1939).

Other terms in § 3604(b) further confirm Congress's intent to broadly protect tenants from discrimination during the course of their occupancy. For example, the FHA defines the term "'to rent'" as the leasing of "the *right to occupy* premises not owned by the occupant." 42 U.S.C. § 3602(e) (emphasis added). And it defines "'[d]welling'" as "any building, structure, or portion thereof which *is occupied* as, or designed or *intended for occupancy* as, a residence." *Id.* § 3602(b) (emphasis added). By focusing on occupancy—a status that persists for the entire time a tenant remains in a dwelling—these terms make clear Congress's intent to reach discrimination that harms homeowners and tenants throughout

their enjoyment of their property, not merely at the point where they enter or leave their residence.

This interpretation of § 3604(b) parallels the Supreme Court's construction of nearly identical language in Title VII. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that Title VII's prohibition on sex discrimination in the "terms, conditions, or privileges of employment" was not limited to a "tangible loss of an economic character," such as hiring or firing, but rather extended to "the entire spectrum of disparate treatment of men and women in employment"; as a result, the Court held that Title VII prohibited employers' creation or tolerance of hostile working environments that harmed their employees' day-to-day jobs. 477 U.S. 57, 64, 67 (1986) (quotation marks omitted). As the Court explained, Title VII's prohibition of discrimination would ring hollow if it applied only to hiring and firing because hostile working conditions pose an equivalent "barrier" to the right of equal employment protected by Title VII. *Id.* at 67. Just as Title VII's prohibition of discrimination in the "terms, conditions, and privileges of employment" extends throughout an employee's employment, so too should the FHA's prohibition on discrimination in the "terms, conditions, or privileges of

the sale or rental of" housing extend to discrimination throughout a tenant's occupancy of their dwelling. *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affairs. v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2521 (2015) (Title VII cases "provide essential background and instruction" in interpreting the FHA).

The dissent's narrowing of § 3604(b)'s post-acquisition scope to constructive eviction would exclude from the FHA a substantial amount of discriminatory conduct that denies tenants equal housing. Establishing "constructive eviction is a tall order" that requires a tenant to establish elements having nothing to do with whether she has been subjected to discriminatory treatment. *See Bloch v. Frischolz*, 587 F.3d 771, 777 (7th Cir. 2009) (en banc). In New York, a plaintiff must demonstrate not only that she was deprived of the beneficial use and enjoyment of the premises, but also that she promptly abandoned the premises—often within just a few months. *See Barash*, 26 N.Y.2d at 83; *see also 3 E. 54th St. N.Y., LLC v. Patriarch Partners, LLC*, 2013 N.Y. Slip Op. 51329(U), at *4 (Sup. Ct. N.Y. County 2013) (collecting cases dismissing constructive eviction claims where tenant delayed abandonment by more than six months). There is simply no indication in the text or purpose of § 3604(b)

that Congress intended to limit federal protections against discrimination in housing to only those cases where individuals were in fact forced out of their homes.

B. A Landlord Is Liable Under the FHA for Its Own Action in Choosing Not to Address Tenant-on-Tenant Racial Harassment Despite a Policy or Practice of Addressing Other Tenant-Created Disturbances.

The dissent also would have denied FHA liability on the separate ground that the FHA holds landlords responsible only for their own conduct, not for the conduct of their tenants. (*See* A. 236-261.) But that objection reflects a mistaken understanding of the liability recognized here. Under analogous antidiscrimination laws, the Supreme Court has made clear that actors may be liable for their own intentional discrimination when they fail to remediate a hostile environment created by others despite knowing of the underlying discriminatory conduct and having authority to address it. *See, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (Title IX); *Meritor*, 477 U.S. at 64 (Title VII); *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665-66 (2d Cir. 2012) (Title VI).

For example, in *Davis,* the Court found a school board liable under Title IX for its failure to address known student-on-student sexual

harassment. *See* 526 U.S. at 643-44. As the Court explained, the school board was not vicariously liable for the students' misconduct; rather, it was being held responsible for *its own* "official decision . . . not to remedy the violation" in the face of known harassment, which the Court construed as an affirmative choice to allow the harassment to occur and thus a species of intentional discrimination. *Id.* at 642-43 (quotation marks omitted).

The same principle should apply to landlord liability under the FHA when a landlord is aware of tenant-on-tenant harassment based on race or other protected characteristic but does nothing to address it, despite having a policy or practice of remediating other tenant-created disturbances. As other courts have recognized in the FHA context, a landlord's selective failure to act under these circumstances can be understood as an affirmative decision to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race" under § 3604(b), or to "interfere with any person in the exercise or enjoyment of" his or her right to equal housing under 42 U.S.C. § 3617. *See Wetzel*, 901 F.3d at 859; *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 365 (8th Cir. 2003) (per curiam). Knowingly adopting more lenient responses to racially based tenant-on-tenant harassment constitutes the type of race-based

differential treatment that fits squarely within the FHA's prohibition of intentional discrimination.[5]

The dissent rejected any analogy between the FHA and other antidiscrimination laws because it believed that, in contrast to the power that employers have over employees and schools have over their students, landlords do not have either the duty or the authority under state law to remediate disputes between their tenants. (A. 247-248, 252-256.) But the dissent is mistaken. As a matter of New York common law, landlords are obligated to maintain the safety and security of their premises. *See Miller v. State of New York*, 62 N.Y.2d 506, 513 (1984). This obligation includes the duty to "respond[] appropriately to reports of past tenant misconduct so as to maintain the general well-being" of all residents. *Gill v. New York City Hous. Auth.*, 130 A.D.2d 256, 266 (1st Dep't 1987). And it imposes an affirmative obligation on landlords to undertake reasonable security precautions to protect tenants from a "third party's foreseeable criminal

[5] *See also Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1383 (11th Cir. 1994) (plaintiff entitled to presumption that employer intentionally discriminated when employer enforced its facially neutral leave policy "unequally to pregnancy-related conditions); *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 313-14 (2d Cir. 1997) (selective enforcement of employer's policy supported inference of discrimination).

conduct." *See, e.g.*, *Raghu v. 24 Realty Co.*, 7 A.D.3d 455, 456 (1st Dep't 2004).[6]

New York courts have also identified a related obligation in the implied warranty of habitability, *see* Real Property Law § 235-b, which requires all landlords to ensure that (1) the "premises are fit for human habitation," (2) "the condition of the premises is in accord with the uses reasonably intended by the parties," and (3) "the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety," *Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 325 (1979). This "unqualified obligation" extends to the "acts of third parties" that may threaten the habitability of a tenant's residence. *Id.* at 327. For example, courts have required landlords to protect tenants against secondhand

[6] *See also, e.g.*, *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520 (1980) (landlord who failed to take reasonable security measures was potentially liable to tenant shot in lobby by third party); *Loeser v. Nathan Hale Gardens*, 73 A.D.2d 187, 188-89 (1st Dep't 1980) (landlord who failed to maintain adequate lighting was potentially liable for tenant's assault by third party).

smoke,[7] excessive noise and odors,[8] and water overflow,[9] among other things. As one court explained, "[w]hen neighbors fail to respect each other and the landlord does not act, the law imposes its will on landlords and tenants through the statutorily enacted implied warranty of habitability." *Poyck v. Bryant*, 13 Misc. 3d 699, 700 (Civ. Ct. N.Y. County 2006).

The dissent dismissed the warranty of habitability as irrelevant because it "sound[s] in contract . . . rather than tort" (A. 246 & n.11), but that distinction is irrelevant to the question of whether the landlord engaged in prohibited discrimination in performing its responsibilities. Like other antidiscrimination statutes, the FHA prohibits disparate treatment based on race or other protected characteristics. A landlord that selectively declines to perform a state-law duty to protect its tenants

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[7] *See, e.g.*, *Upper E. Lease Assoc., LLC v. Cannon*, 2011 N.Y. Slip Op. 50054(U), at *1 (Nassau Dist. Ct. 2011), *aff'd*, 2012 N.Y. Slip Op. 52154(U) (Sup. Ct. App. Term 9th & 10th Dists. 2012); *Poyck v. Bryant*, 13 Misc. 3d 699, 701-02 (Civ. Ct. N.Y. County 2006).

[8] *See, e.g.*, *Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 105 (1st Dep't 1996); *Matter of Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 638 (2d Dep't 1995); *Cohen v. Werner*, 82 Misc. 2d 295, 296 (Civ. Ct. Queens County), *aff'd*, 85 Misc. 2d 341 (Sup. Ct. App. Term 9th & 10th Dists. 1975).

[9] *See, e.g.*, *Benitez v. Restifo*, 167 Misc. 2d 967, 969 (Yonkers City Ct. 1996).

when it comes to racially based harms engages in precisely the type of race-based, differential treatment that the FHA prohibits. The underlying source of the duty is immaterial to the dispositive question of whether the landlord acted differentially in exercising whatever duties it had based on racial (or other) concerns. For similar reasons, under analogous civil rights statutes, courts have looked at sources of duty beyond just tort law—and, indeed, beyond state law altogether—to determine whether the defendant engaged in disparate decision-making that would render it liable for a failure to act. *See, e.g.*, *Davis*, 526 U.S. at 643-44 (federal regulations put school district on notice of its obligation to address third-party harassment); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 276 (2d Cir. 2009) (hospital could be liable for failing to provide interpretation services, in part, because its own policy required the provision of such services).

The dissent was also mistaken in stating (A. 252-256) that landlords in New York lack the tools necessary to address tenant-on-tenant harassment. Under the FHA, as under analogous antidiscrimination statutes, it is not necessary that landlords have a means of definitively resolving tenant-on-tenant harassment; it is enough that the landlord

have tools available, and selectively decline to use them to respond to racial harassment alone. Thus, for example, in *Davis*, the Court did not find that the school board could have definitively halted the sexual harassment at issue; the board was nonetheless potentially liable under Title IX because it had numerous tools to respond to the harassment, including the authority to discipline a student harasser, and declined to leverage those tools. *See* 526 U.S. at 644-47 (reversing a dismissal under Federal Rule of Civil Procedure 12(b)(6)). Similarly, in the Title VII context, courts have repeatedly held employers liable for failing to address the conduct of non-employees, even though courts recognize that employers have comparatively less direct control over such non-employees.[10]

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[10] *See, e.g.*, *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-24 (4th Cir. 2014) (employer may be liable for failing to address discriminatory harassment by a customer); *Freitag v. Ayers*, 468 F.3d 528, 532 (9th Cir. 2006) (corrections department may be liable for prison officials' failure to correct a hostile work environment created by male prisoners' sexual harassment of female correction officers); *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 677-78 (6th Cir. 2000) (same); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244-45 (10th Cir. 2001) (state hospital may be liable for failing to take adequate remedial action to prevent sexual harassment of employees by patients); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998) ("employers can be liable for a customer's unwanted sexual advances if the employer ratifies or acquiesces in the customer's demands"); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1112 (8th Cir. 1997) (residential home for individuals with

Under New York law, landlords possess ample tools to respond to tenant-on-tenant discrimination—namely, the same basic tools on which they rely to respond to other kinds of tenant-created disturbances. Neither the allegations in this case nor common experience supports the notion that New York landlords are incapable of responding when, for instance, they receive a complaint from a tenant about a neighbor's smoking, noise, or pets. At minimum, landlords have the power to investigate a complaint and issue warnings against disruptive tenants; they may also have the power to issue fines or pursue more aggressive options depending on the severity of the underlying violation and the terms of the housing contract. *See, e.g.*, *555-565 Assoc., LLC v. Kearsley*, 2015 N.Y. Slip Op. 51093(U), at *4 (Civ. Ct. N.Y. County 2015) (noting that the landlord "conducted its own investigation" into allegations of secondhand smoke, including "interviewing other residents to see if there were any other complaints," and inspecting the premises).

More broadly, landlords can also adopt and enforce anti-discrimination policies; offer fair housing education to difficult tenants;

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developmental disabilities may be liable for resident's repeated assault on employees).

distribute fair housing materials to all tenants; report tenant misconduct to public authorities or law enforcement; offer to move a harasser to a different unit; or terminate or decline to renew a lease.[11] These and other tools are routinely used by landlords in New York to remediate tenant-created disturbances comparable to tenant-on-tenant racial harassment.[12] And lease and other rental agreements may give landlords additional powers to resolve disputes between tenants. Given the many tools landlords have and regularly use to address tenant misconduct, there is no basis to exempt their choice of which tools to use, and under what circumstances, from the FHA's prohibition on discrimination.

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[11] *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 80 Fed. Reg. 63,720, 63,727 (proposed Oct. 21, 2015) (describing remedial tools available to landlords); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,071 (Sept. 14, 2016) (same).

[12] *See e.g.*, *Armstrong v. Archives, L.L.C.*, 46 A.D.3d 465, 466 (1st Dep't 2007) (describing landlord's response to noise complaint, including visiting apartment of perpetrator, offering complainant the opportunity to relocate, and sending the perpetrator a letter and a notice of cure); *555-565 Assoc., LLC*, 2015 N.Y. Slip Op. 51093(U), at *4 (observing that the landlord "took a number of steps to investigate and address" a secondhand-smoke complaint, including issuing "letters to all residents setting forth obligations regarding smoking," and conducting "its own investigation," including interviews with other tenants).

C. The Panel's Interpretation of the FHA Furthers the Statute's Important Remedial Purposes.

Interpreting the FHA to apply to post-acquisition discrimination generally, and landlords' failure to remediate tenant-on-tenant racial harassment specifically, furthers the statute's remedial purposes. Congress enacted the FHA to eliminate segregation and promote "'truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)); *see also Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522. Categorically excluding housing discrimination claims like the one brought here would undermine that objective.

Racial harassment by tenants is a widespread problem. See *supra* at 3 n.3.[13] Indeed, some research suggests that such post-acquisition

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[13] *See also, e.g.*, Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing* 1-2, 61-68 (2013) (describing anti-integrationist harassment and violence).

Harassment of tenants based on other protected characteristics is also widespread. *See, e.g.*, *Report of the Commission to Study Ways to Prevent Bullying of Tenants in Public and Subsidized Multi-Family Housing* 14-16 (2017) (internet) (describing a survey of 600 residents and employees of public and subsidized housing for the elderly and disabled individuals in Massachusetts, which found that nearly half of all respondents suffered some form of bullying in their housing—often by other tenants); Rigel C. Oliveri, *Sexual Harassment of Low-Income*

harms may be even more prevalent than discriminatory practices in the initial sale or rental of a dwelling.[14]

It makes sense for the FHA to cover landlords' failure to remediate such harassment because unrestricted tenant-on-tenant racial harassment imposes the types of barriers to fair housing that the FHA was intended to eradicate. Like restrictive covenants and exclusionary sales practices, the harassment of individuals based on their protected characteristics has long been one of the causes of segregation and the isolation of minorities and individuals with disabilities.[15]

Women in Housing: Pilot Study Results, 83 Mo. L. Rev. 597, 615 (2018) (describing a pilot study, which found that sixteen percent of surveyed, low-income women in Columbia, Missouri reported some form of sexual harassment in the housing setting).

[14] *See* Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Probs. 49, 55 (2009) (reviewing housing discrimination data and observing that exclusionary practices "represent[ed] the greatest portion of verified cases in the first half of the decade," but that "nonexclusionary" practices have "increase[d] over time" and "become the more common form" of housing discrimination); *see also* Aric Short, *Not My Problem. Landlord Liability for Tenant-on-Tenant Harassment* 5 (Texas A&M Univ. School of Law Working Paper 2020) (internet). ("Although there is very little hard data, available information indicates that this problem is getting worse.").

[15] *See, e.g.*, Bell, *supra*, at 11-52 (describing the prevalence of neighbor-on-neighbor violence against African Americans in the decades preceding the FHA's enactment); Aric Short, *Post-Acquisition Harassment*

Indeed, the threat of tenant-on-tenant harassment has a particularly strong deterrent effect on individuals' access to housing because victims may be reluctant to acquire homes where they feel they will be attacked. The home, after all, is a place that carries heightened expectations of privacy, security, and refuge.[16] *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010). When victims are unable to rectify a situation of persistent racial harassment, many choose to leave their homes or communities to avoid the uniquely debilitating effect of such harassment. Such flight from racial harassment—or deterrence of individuals from

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and the Scope of the Fair Housing Act, 58 Ala. L. Rev. 203, 250-53 (2006) (same); Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans With Disabilities Act*, 63 Md. L. Rev. 162, 166-73 (2004) (describing the historic housing isolation of individuals with disabilities); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part) (same).

[16] The Supreme Court has long recognized that the unique status of the home entitles residents to heightened expectations of privacy and security. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980). Scholars have likewise commented on the unique status and rights associated with the home. *See, e.g.*, Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 Ariz. L. Rev. 17, 22-23 (1998); Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. Rev. 861, 886-88 (1997).

entering into certain communities in the first place—directly undermines the FHA's purpose of promoting integrated communities.[17]

A landlord's failure to respond to tenant-on-tenant racial harassment contributes to these harms. The inaction itself can worsen the victims' feelings of helplessness and isolation.[18] And the racially differential nature of a landlord's response to tenant complaints—for example, responding vigorously to complaints about a dog's barking but not about a neighbor's racist invective—heightens the sense of racial exclusion, including by suggesting that the landlord implicitly condones such behavior. Given the FHA's clear purpose of eliminating segregation and "*all traces* of discrimination within the housing field," *Cabrera*, 24 F.3d at 390 (quotation marks omitted) (emphasis added), there is no principled

[17] *See, e.g.*, Bell, *supra*, at 78, 197-99 (describing deterrent and flight effects); Roscigno, et al., *supra*, at 64 (describing flight effect); Solomon Greene, Margery Austin Turner & Ruth Gourevitch, *Racial Residential Segregation and Neighborhood Disparities* 3, U.S. Partnership on Mobility from Poverty (2017) (internet) (describing deterrent effect); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 Soc. Forces 937, 952-53, 968-70 (2002) (same).

[18] *See, e.g.*, Lu-in Wang, *Transforming Power of 'Hate': Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. Cal. L. Rev. 47, 97-119 (1997); *see also* Roscigno et al., *supra*, at 64.

basis to exclude this kind of discrimination from the statute's prohibitions. *See United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (recognizing liability under FHA for discriminatory advertisements because statute was intended to "protect[] against the psychic injury caused by discriminatory statements made in connection with the housing market" (quotation and alteration marks removed)).

POINT II

IF THIS COURT DISMISSES THE FHA CLAIM, IT SHOULD NOT RESOLVE THE NEW YORK HUMAN RIGHTS LAW CLAIM WITHOUT A DEFINITIVE INTERPRETATION OF STATE LAW BY THE NEW YORK COURT OF APPEALS

After concluding that the FHA extended to plaintiff's claims here, the panel correctly construed the HRL to also protect tenants from similar misconduct by landlords. (A. 224-225.) That holding was a faithful application of New York law providing that the HRL is at least as protective as the FHA (and similar antidiscrimination laws). *See, e.g.*, *Stalker v. Stewart Tenants Corp.*, 93 A.D.3d 550, 551-52 (1st Dep't 2012); *accord Phillips v. City of New York*, 66 A.D.3d 170, 187 (1st Dep't 2009) (federal enactments like the FHA "serve as a floor of rights below which

states and localities may not fall"), *abrogated on other grounds*, *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 838 (2014).

But if this Court were to interpret the FHA as requiring dismissal here, it cannot assume the HRL would be similarly interpreted, especially in light of recent amendments to the HRL that the New York Court of Appeals has not had an opportunity to interpret. In August 2019, the New York Legislature amended the HRL to make clear that the statute must be "construed liberally for the accomplishment of the *remedial* purposes thereof, *regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed*." *See* Ch. 160, § 6, 2019 N.Y. Laws (LRS), at 5 (new language italicized). This amendment plainly expresses the Legislature's intent to preserve the protective scope of the HRL even if similarly worded federal statutes are construed more narrowly. In the absence of a definitive interpretation of the scope of the HRL in light of these amendments, this Court should not attempt to construe the state law on this point.

Rather, if the Court rejects the panel's interpretation of the FHA and adopts a narrow reading, it can certify to the New York Court of

Appeals the question of the scope of the HRL as relevant to the facts alleged here.[19] *See Chauca v. Abraham*, 841 F.3d 86, 94 (2d Cir. 2016) (certifying question regarding the scope of New York City's Human Rights Law after a similar amendment).

Certification would be appropriate because no state court has had an opportunity to construe the recent HRL amendment, much less apply it after a ruling from this Court on the meaning of the FHA. *See, e.g.*, *Carney v. Philippone*, 332 F.3d 163, 172 (2d Cir. 2003) (certification warranted in the absence of a definitive state-court ruling). Moreover, if this Court were to adopt a narrower interpretation of the FHA, there is good reason to believe that New York courts will interpret the HRL differently. Even before the 2019 amendment, New York courts have construed the HRL's fair housing provision (Executive Law § 296(5)) broadly to encompass claims similar to plaintiff's here. For example, several Appellate Division decisions have recognized the viability of post-

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[19] In the alternative, if the Court dismisses all of the federal claims, the Court may avoid construing state law or certifying the HRL question by dismissing the state law claims without prejudice and vacating the decision below with respect to those claims on jurisdictional grounds. *See Oneida Indian Nation of N.Y. v. Madison Cty.*, 665 F.3d 408, 437-40 (2d Cir. 2011).

acquisition claims under the HRL where the landlord's conduct created a hostile housing environment.[20] And at least one court has suggested that a landlord is potentially liable under the HRL for a hostile housing environment where the landlord "knew or should have known about the harassment and failed to remedy the situation promptly." *Matter of State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 265 (2d Dep't 2006).

Certification would also be warranted because the scope of the HRL's fair housing provision implicates important "value judgments and public policy choices" that affect landlords and tenants across New York. *See Schoenefeld v. New York*, 748 F.3d 464, 470 (2d Cir. 2014) (quotation marks omitted). The HRL embodies the State's "strong antidiscrimination policy." *National Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416, 419 n.2 (1974). In similar cases involving the HRL, this Court

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[20] *See, e.g.*, *Curley v. Bon Aire Props., Inc.*, 124 A.D.3d 820 (2d Dep't 2015) (landlord is potentially liable for his selective enforcement of housing rules and offensive comments relating to plaintiff's disability); *Ewers v. Columbia Hgts. Realty, LLC*, 44 A.D.3d 608 (2d Dep't 2007) (landlord is potentially liable for a hostile housing environment based on landlord's sexual harassment of a tenant, but claim dismissed based on the facts of the case); *Matter of State Div. of Human Rights v. Stoute*, 36 A.D.3d 257 (2d Dep't 2006) (landlord was liable for harassing tenant with sexually offensive comments and gestures, spying on tenant, and making physical threats).

has found the policy judgments underlying the "question of who may be held liable" sufficiently substantial to warrant certification. *See Griffin v. Sirva Inc.*, 835 F.3d 283, 294 (2d Cir. 2016).

Finally, certification would also be appropriate because resolution of the certified question could be "determinative of" the disposition of plaintiff's HRL claim in this appeal. *Schoenefeld*, 748 F.3d at 470 (quotation marks omitted). The district court dismissed the plaintiff's HRL claim on the assumption that it would fail for the same reason as the plaintiff's FHA claims. (A. 112.) But there is good reason to believe that the scope of the HRL may be broader than that of the FHA, and that the state law claim would survive even if the FHA claim did not. The New York Court of Appeals should determine that question before this Court rules on the state law claim here.

CONCLUSION

For the reasons above, this Court should hold that a landlord that responds to other tenant-created disturbances but selectively declines to address racial harassment by one tenant against another is potentially liable under both the FHA and the HRL.

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May 7, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,979 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ *Megan Chu*