15-1823

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,

Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., CORINNE DOWNING,

Defendant-Appellee,

RAYMOND ENDRES,

Defendant.

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

MOTION TO FILE BRIEF AS AMICUS CURIAE
SUPPORTING PLAINTIFF-APPELLANT, DONAHUE FRANCIS

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Fair Housing Alliance, the Fair Housing Justice Center, the Connecticut Fair Housing Center, Westchester Residential Opportunities, CNY Fair Housing, and ERASE Racism (collectively the "Fair Housing Amici") respectfully move for leave to file a brief as amicus curiae in support of Plaintiff-Appellant Donahue Francis. The Fair Housing Amici propose to address significant legal issues regarding the

interpretation of the Fair Housing Act, underlying New York tort law regarding landlord liability for tenant-on-tenant harassment, and the practical implications of the District Court's ruling. The parties have been informed of the proposal to file an amicus brief. Appellant Francis consents to the Fair Housing Amici's filing of the proposed amicus brief. Appellees Kings Park and Corrine Downing do not consent to the proposed filing.

INTEREST OF THE PROPOSED AMICI

1. The National Fair Housing Alliance ("NFHA") is a non-profit corporation that represents approximately 150 private, non-profit fair housing organizations throughout the country.

2. Through education, outreach, policy initiatives, and enforcement activities, NFHA and its members are dedicated to ending housing segregation and ensuring equal housing opportunities for all people.

3. On the front line in the fight against housing discrimination, NFHA and its members regularly rely on the strength of the Fair Housing Act ("FHA" or "the Act") to undertake investigative, enforcement, and education initiatives in cities and states across the country, including on issues of housing harassment.

4. Five NFHA members located within the Second Circuit seek to join NFHA as amici curiae:

- Fair Housing Justice Center
- Connecticut Fair Housing Center
- Westchester Residential Opportunities
- CNY Fair Housing
- ERASE Racism

5. All five are non-profit, public interest organizations, operating in the states of New York or Connecticut, and dedicated to eradicating housing discrimination. Collectively, they serve Long Island, New York City, Central and Northern New York, the New York Counties of Westchester, Rockland, Orange, Dutchess, and Putman, as well as the State of Connecticut.

6. Four of these organizations are Qualified Fair Housing Enforcement Organizations within the meaning of 24 C.F.R. Subtitle B, Ch. I, Section 125–103. They are qualified to receive federal funding under the Fair Housing Initiatives Program, which is a critical component of the civil rights enforcement infrastructure in the United States. *See* Housing and Community Development Act of 1987, § 561 (42 U.S.C. § 3616a). Among other criteria, they have been certified by HUD to have at least two years of experience in complaint intake, complaint investigation, testing for fair housing violations, and enforcement of claims.

7. All five organizations assist victims of housing discrimination, including harassment, educate housing providers about their duties under the FHA, and engage in public policy initiatives that promote residential integration and further fair housing within the Second Circuit.

8. NFHA and its members have filed amicus briefs in many housing-related discrimination cases interpreting the scope of the FHA and its enforcement, including, more recently, *Bank of America v. City of Miami,* 137 S. Ct. 1296 (2017); *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2518 (2015); and *Wetzel v. Glen St. Andrew Living Community.,* 901 F.3d 856 (7th Cir. 2018).

ARGUMENTS TO BE ADVANCED BY AMICI

9. The Fair Housing Amici have a strong interest in the issue raised on this appeal—the scope of the Act and whether it imposes liability on landlords to take action to stop known tenant-on-tenant racial harassment.

10. The decision of the District Court—that landlords have no obligation to intervene to address such harassment under any circumstance—would significantly curtail the rights and protections afforded by the Act to victims of housing discrimination in ways that Congress could not have intended.

11. The Fair Housing Amici offer three arguments to further support Plaintiff's appeal for reversal of the District Court's decision, and to respond to the arguments set forth by the dissent in the original panel hearing.

12. First, the proposed brief argues that the Circuits are now unanimous that the FHA bars post-acquisition housing discrimination and that the Act's post-acquisition scope is not limited to claims of constructive eviction.

13. Second, the proposed brief argues that harassment based on a protected characteristic is exactly the type of conduct that the FHA was enacted to eradicate, and provides examples of the types of unlawful conduct that have arisen within this Circuit and that would go unchecked if the District Court's decision were affirmed.

14. Third, the proposed brief seeks to demonstrate that holding landlords liable under certain circumstances for discriminatory hostile housing environments is consistent with both traditional tort principles and the contractual protections expressly provided to Appellant Francis in this case.

15. These arguments contain analysis "relevant to the disposition of th[is] case," Fed. R. App. P. 29(b)(2), and which will aid the Court in deciding whether to reverse the District Court's judgement of dismissal.

16. Counsel for the Fair Housing Amici has reviewed the brief of Appellant and orally conferred with other amici supporting Plaintiff Francis and have sought to minimize repetition with the arguments contained in other briefs.

CONCLUSION

17. For the foregoing reasons, the Fair Housing Amici move the Court to grant their Motion for Leave to File the below Brief of Amicus Curiae in Support of Plaintiff-Appellant, Donahue Francis.

Dated: May 7, 2020
New York, New York

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 7, 2020, the foregoing Motion For Leave to File a Brief as Amicus Curiae Supporting Plaintiff-Appellant, Donahue Francis was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Second Circuit using the appellate CM/ECF system, which will send notice to all registered CM/ECF users.

Dated: May 7, 2020
New York, New York

/s/ David Berman
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Attorney for the Fair Housing Amici

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 15-1823 Caption [use short title] Francis v. Kings Park Manor, Inc., et al.

Motion for: leave to file amicus brief in support of plaintiff-appellant Francis

Set forth below precise, complete statement of relief sought:

permission to file amicus brief.

MOVING PARTY: National Fair Housing Alliance, et al. **OPPOSING PARTY:** Kings Park Manor, Inc., et al.

- [x] Plaintiff
- [ ] Defendant
- [ ] Appellant/Petitioner
- [ ] Appellee/Respondent

MOVING ATTORNEY: Diane L. Houk **OPPOSING ATTORNEY:** Stanley J. Somer

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Court-Judge/Agency appealed from: United States District Court for the Eastern District of New York/The Honorable Arthur D. Spatt, Presiding

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
[x] Yes [ ] No (explain):

Opposing counsel's position on motion:
[ ] Unopposed [x] Opposed [ ] Don't Know

Does opposing counsel intend to file a response:
[ ] Yes [ ] No [x] Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? [ ] Yes [ ] No

Has this relief been previously sought in this Court? [ ] Yes [ ] No

Requested return date and explanation of emergency:

Is oral argument on motion requested? [ ] Yes [x] No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? [x] Yes [ ] No If yes, enter date: 9/24/2020

Signature of Moving Attorney:
/s/ Diane L. Houk **Date:** 5/7/2020

Service by: [x] CM/ECF [ ] Other [Attach proof of service]

15-1823

IN THE UNITED STATES COURT OF APPEALS
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BRIEF OF NATIONAL FAIR HOUSING ALLIANCE, FAIR HOUSING JUSTICE CENTER, CONNECTICUT FAIR HOUSING CENTER, WESTCHESTER RESIDENTIAL OPPORTUNITIES, CNY FAIR HOUSING, AND ERASE RACISM, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

All proposed *Amici Curiae* are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns a portion of any of them.

INTEREST OF AMICI CURIAE[1]

The National Fair Housing Alliance, Inc. ("NFHA") is a non-profit corporation that is dedicated to ending discrimination in housing. NFHA represents approximately 150 private, non-profit fair housing organizations throughout the country. NFHA and its members engage in efforts to end segregation and to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement activities. On the front line in the fight against housing discrimination, NFHA and its members regularly rely on the weight of the Fair Housing Act ("FHA") to undertake investigative, enforcement, and education initiatives in cities and states across the country, including on issues of housing harassment.

Five NFHA members located within the Second Circuit join NFHA as *amici curiae*—the Fair Housing Justice Center, the Connecticut Fair Housing Center, Westchester Residential Opportunities, CNY Fair Housing, and ERASE Racism (collectively the "Fair Housing Amici"). Each organization works to eliminate

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the National Fair Housing Alliance, the Fair Housing Justice Center, the Connecticut Fair Housing Center, Westchester Residential Opportunities, CNY Fair Housing, and ERASE Racism certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than Amici, their members and their counsel) contributed money intended to fund the preparation or submission of the brief.

housing discrimination and to ensure equal housing opportunities for all people within their communities through education, advocacy, and public policy initiatives. Each of the Fair Housing Amici assists victims of housing discrimination, including harassment, and educates housing providers about their duties under the FHA.

Four of these organizations, in addition to NFHA, are Qualified Fair Housing Enforcement Organizations within the meaning of 24 C.F.R. Subtitle B, Ch. I, Section 125–103. They are qualified to receive federal funding under the Fair Housing Initiatives Program, which is a critical component of the civil rights enforcement infrastructure in the United States. *See* Housing and Community Development Act of 1987, § 561 (42 U.S.C. § 3616a). Among other criteria, they have been certified by the United States Department of Housing and Urban Development ("HUD") to have at least two years of experience in complaint intake, complaint investigation, testing for fair housing violations, and enforcement of claims. These organizations regularly receive complaints alleging housing discrimination, investigate and educate housing-related industries for compliance with fair housing laws, and participate in federal and state-court litigation brought under those laws.

As such, the Fair Housing Amici's interests would be adversely affected by affirmance of the District Court's holding that housing providers cannot be liable

for refusing to address discriminatory hostile housing environments. As discussed in greater detail below, affirmance of the District Court's decision, or adoption of the positions advocated by the dissent in the original panel hearing, would significantly curtail the rights and protections afforded by the FHA to victims of housing discrimination in ways that Congress could not have intended. The Fair Housing Amici thus have a strong interest in participating in this case: (1) to emphasize the necessity of sustaining the FHA's protections against post-acquisition housing harassment, and (2) to demonstrate that holding landlords liable under certain circumstances for discriminatory hostile housing environments is consistent with traditional tort principles and the contractual protections expressly provided to Appellant Donahue Francis in this case.

SUMMARY OF THE ARGUMENT

The FHA was passed the same month as Dr. Martin Luther King, Jr.'s assassination with the express intent to create "truly integrated and balanced living patterns" throughout the United States. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (Statement of Senator Mondale)). Given this ambitious goal, it is hardly a surprise that every Circuit to reach the issue has concluded that the FHA not only bars discrimination in the sale or rental of housing in the first instance, but also bars discrimination in the use of that housing once it is acquired. The FHA's text supports its broad purpose of

preventing not only point-of-sale discrimination, but also discrimination in the subsequent "terms, conditions, or privileges … of [one's] housing," and in the "the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b).

The District Court's ruling in this case, and the positions for which the dissent advocated in the original panel hearing, would cut a gaping hole right through the heart of one of Congress's greatest achievements meant to remedy decades of segregation. Society will hardly become further "integrated" if, after moving into housing, the very people protected by the Act cannot enjoy their homes because their neighbors have free rein to prevent them from enjoying the "privileges" of that housing. Nor would granting landlords an exemption from traditional common law responsibilities to their tenants be a rational interpretation of the Act. Neither the text nor purpose of the Fair Housing Act supports such a dystopian conclusion, and this Circuit should not be the first to adopt it.

Recognizing the validity of post-acquisition claims for discriminatory interference with the enjoyment of one's home mirrors the Supreme Court's interpretation of Title VII, a statute with virtually identical operative language and a common, broad purpose of eradicating discrimination within its field. The same language within Title VII has long been held to protect against "hostile working environments"—that is, pervasive discrimination on the basis of a protected

characteristic that makes the work environment intolerable. It follows that the FHA provides the same protections for tenants that Title VII does for employees, and ensures that tenants have protection from discrimination both at the point of market entry and once situated in their homes.

Recognizing this protection for tenants is also consistent with underlying tort principles. New York common law recognizes two distinct duties for landlords to protect their tenants from interference with the enjoyment of their homes—the warranty of habitability and the duty to protect tenants from foreseeable harm. These two duties require similar analyses of whether the landlord knew of the hazard to its tenant and whether it had the authority or control to correct it. When those two prerequisites are satisfied, the common law imposes a duty on landlords to take corrective action.

While the landlord in this case and the dissent both argue that these principles are inconsistent with holding landlords liable because landlords cannot control their tenants, that is an inherently fact-based inquiry that cannot be resolved categorically as a matter of law. Although the common law does not prescribe a specific course of action a landlord must take, it does not endorse a landlord's right to do nothing in the face of a known harm. Mr. Francis is entitled to discovery to probe what remedial actions were available to his landlord to address the repeated racial harassment he was forced to endure.

Mr. Francis's lease in this case gave his landlord, not Mr. Francis, the power to address this persistent discrimination. The lease issued by his landlord both promised tenants the right to quiet enjoyment of their apartments and banned any use of the landlord's property that interfered with other tenants' use of their apartments. Landlords of course have the sole authority to enforce the terms of their own leases, further reinforcing that addressing pervasive harassment of a tenant is or, at the very least could be, within a landlord's control.

Overall, the common law recognizes liability for landlords who do nothing, while also acknowledging that what action is appropriate will depend on the circumstances of each individual case. These same principles apply to hostile housing environment claims under the FHA. Mr. Francis has stated a viable claim, and he is entitled to discovery to resolve the fact-intensive inquiries on which his case will turn.

ARGUMENT

I. The Fair Housing Act Bars Post-Acquisition Housing Discrimination

The FHA is one of the broadest civil rights statutes ever enacted, providing in no uncertain terms that it is "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This Circuit has recognized the Act's vast remedial purpose and that it embodies a '"broad legislative plan to eliminate all traces of discrimination

within the housing field.'" *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994) (quoting *Marr v. Rife,* 503 F.2d 735, 740 (6th Cir. 1974)).

Discrimination "within the housing field" unfortunately does not end at the initial point of sale or rental. The FHA recognizes that housing discrimination is not nearly so circumscribed and, in addition to banning discrimination at the point of sale or rental, expressly prohibits discrimination "in the terms, conditions, or privileges … of [one's] housing," and "the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). Circuits throughout the country are unanimous in recognizing that this language extends the FHA beyond the point of sale or rental and reaches conduct that prevents a tenant from enjoying the benefits of the housing that he acquired. The Supreme Court has reached the same conclusion when analyzing materially identical language in the context of a similar anti-discrimination statute. This Court should join with this consensus.

A. *The Second Circuit Should Join the Uniform Holdings of its Sister Circuits that the Fair Housing Act Bars Post-Acquisition Housing Discrimination*

Every Circuit to have addressed Section 3604(b)'s scope has ruled the same way—the FHA prevents not just discrimination by a landlord at the point of rental or sale, but also post-acquisition discrimination that interferes with a tenant's enjoyment of her home. *See, e.g.*, *Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 632 (11th Cir. 2019) ("To ascribe to the

statute the limited applicability the City urges, we would have to read an otherwise absent temporal limitation into the language of the statute."); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 867 (7th Cir. 2018) (recognizing claim where discrimination "diminished the privileges of [the Plaintiff's] rental" and noting that such claims cannot be limited to constructive eviction because "occupancy of the unit is not the only privilege of rental"); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 714 (9th Cir. 2009) (recognizing that FHA applies to "discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling"); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (recognizing FHA violation where "unwelcome harassment was sufficiently severe to deprive [plaintiff] of his right to enjoy his home"); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) ("Applied to housing, a claim is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises.").

While the dissent acknowledges that there is no circuit split on the issue of whether the FHA reaches post-acquisition conduct, it attacks the majority for declining to address "the deep division" among the courts on "the scope or degree of the provision's post-acquisition reach." A. 239. But the majority was correct not to wade into these waters because, even to the extent such a division exists, it has no application at this stage of this case, prior to the completion of discovery.

The apparent "division" the dissent refers to is an arguable disagreement between the Ninth Circuit, on the one hand, and the Fifth (and debatably Eleventh) Circuit on the other, as to whether a municipality's distribution of governmental services across differing neighborhoods is sufficiently "connect[ed]" to the "sale or rental of a dwelling" to create liability under § 3604(b). *Compare City of Modesto*, 583 F.3d at 714 (inadequate provision of law enforcement personnel in minority neighborhood sufficient to state claim under § 3604(b)) *with Cox v. City of Dallas* 430 F.3d 734, 740 (5th Cir. 2005) (municipality's failure to police the operation of an illegal dump in minority neighborhood not sufficiently "connected" to sale or rental of housing to implicate FHA). *See also LaGrange*, 940 F.3d at 633 (stating in dicta that municipal law enforcement services "are not provided in connection with the sale or rental of a dwelling" but holding that municipal water, gas, and electricity services are sufficiently connected to housing to state § 3604(b) claim).

This narrow dispute as to when governmental services can be deemed sufficiently "connected" to housing to come within the FHA's reach is not at issue in this case. This case pertains only to the relationship between *a landlord and its tenant*, a relationship which undoubtedly arises "in connection" with the "provisions or services" of a housing rental. 42 U.S.C. § 3604(b). Mr. Francis seeks only for this Circuit to join every other Circuit that has ruled on this issue in holding that the FHA prohibits a landlord from discriminating in both the rental of

housing and the provision of services and privileges associated with that housing once it is acquired.[2]

In support of its position, the dissent relies on only one case that rejects post-acquisition liability against a housing provider, advocating that this Court adopt similar reasoning and hold that such claims under the FHA should be limited to instances of constructive eviction. A. 240-42 (citing *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004)). But this interpretation of *Halprin*'s holding has been rejected *within its own Circuit*. *See Bloch v. Frischholz*, 587 F.3d 771, 780 (7th Cir. 2009) (limiting *Halprin*'s application in the context of § 3604(b)); *Wetzel*, 901 F.3d at 864 ("[T]he duty not to discriminate in housing conditions encompasses the duty not to permit *known* harassment on *protected* grounds."). *See also City of Modesto*, 583 F.3d at 714.[3] *Halprin* is becoming a dead letter, and this Court should not revive it beyond the narrow cabining which its own Circuit has proscribed.

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[2] Ruling in Mr. Francis's favor likewise would not have the vast implications the dissent predicts: creating a cause of action against "anyone" whose behavior "could be said to 'impact property values' or the enjoyment a leasehold[.]" A. 244. This case does not require this Court to reach beyond the landlord-tenant relationship.

[3] The Eighth and Tenth Circuit's holdings that the FHA prevents post-acquisition discrimination pre-dated *Halprin*. *See Neudecker*, 351 F.3d at 364; *Honce*, 1 F.3d at 1090. *Halprin* provided no basis for distinguishing these cases beyond summarily stating that they did not reflect "considered holdings." 388 F.3d at 329. It is *Neudecker* and *Honce*, not *Halprin*, that have withstood the test of time.

B. *The Supreme Court Has Found Near Identical Language in Title VII to Cover Post-Acquisition Discrimination*

The Supreme Court has reached the same conclusion when analyzing materially identical statutory language. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court analyzed Title VII's protection against discrimination in the "terms, conditions, or privileges" of employment. Rejecting the employer's argument that this language was limited to the "tangible, economic barriers" to employment, the Court held that this broad language "evince[d] congressional intent to strike at the entire spectrum of [discrimination]." *Id.* (internal quotation marks and citation omitted). From this premise, the Court concluded that this "spectrum" of discrimination includes not only barriers to obtaining employment but conduct which "alter[s] the conditions of . . . employment and create[s] an abusive working environment." *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

There is no reason that the same logic should not apply in interpreting the FHA. The FHA contains the identical language banning discrimination in the "terms, conditions, or privileges" of a housing rental. *Compare* 42 U.S.C. § 3604(b) (FHA) *with* 42 U.S.C. § 2000e-2(a)(1) (Title VII). To the extent there are any material differences between the provisions, the FHA goes *further* than Title VII, banning not only discrimination in the "terms conditions or privileges" of housing but also " in the provision of services or facilities in connection" with

the housing sale or rental. 42 U.S.C. § 3604(b). It would defy common sense to conclude that Title VII reaches discrimination that creates an "abusive working environment," but that the analogous provision of the FHA—a broader provision within a statute that the Supreme Court has specifically instructed is to be read with a "broad and inclusive compass" and a "generous construction," *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (internal quotation marks and citation omitted)—cannot reach the identical conduct in the context of housing. *See also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (cases interpreting Title VII provide "essential background" in interpreting FHA).

This Circuit should follow the clear path set by the Supreme Court and hold that the materially identical language in these two anti-discrimination statutes prohibits the same conduct within their respective spheres. To hold otherwise would not only create an illogical chasm between the coverage of two statutes serving the same purpose with the same language, but would leave a gaping hole in Congress's "broad legislative plan" to eliminate "all traces" of discrimination throughout "the housing field." *Cabrera*, 24 F. 3d at 390.

II. Harassment Based on a Protected Characteristic is Exactly the Kind of Conduct that the FHA Was Enacted to Eradicate

The Supreme Court has not only recognized, but emphasized the FHA's broad scope and "continuing role in moving the [n]ation toward a more integrated society." *Inclusive Cmtys.,* 135 S. Ct. at 2525-26. Despite the FHA's passage almost fifty years ago and the dogged determination of housing advocates like the Fair Housing Amici to achieve its ideals, the Court has also recognized that "vestiges [of residential segregation] remain today, intertwined with the country's economic and social life." *Id.* at 2515.[4]

For thousands of people across the nation, including the Fair Housing Amici's own clients and constituents, equal housing opportunity has been thwarted by pervasive harassment within their apartment complex or neighborhood of choice. In fact, this form of discrimination is on the rise. In 2018, private fair housing organizations alone reported receiving 897 complaints of harassment on the basis of a protected characteristic (most prominently on the basis of disability,

[4] Long Island is the country's tenth most racially segregated area when compared to the 50 most populated metropolitan areas in the United States with half of Long Island's black population living in only 11 of the Island's 291 communities. *See* Olivia Winslow, *Dividing Lines, Visible and Invisible, Long Island Divided, Part 10*, Newsday, November 17, 2019, available at projects.newsday.com/long-island/segregation-rea-estate-history. Kings Park Manor is located in the majority white Town of Smithtown on Long Island's Suffolk County and has an African American population of less than 15%. ACS Demographic and Housing Estimates, American Community Survey 2018, available at, https://data.census.gov/cedsci/table?q=population%20in%20smithtown,%20new%20york&tid=ACSDP1Y2018.DP05.

race, gender, and national origin), up from 747 such complaints in 2017 and 640 in 2016. *See* National Fair Housing Alliance, *Defending Against Unprecedented Attacks on Fair Housing: 2019 Fair Housing Trends Report* at 18 (2019), available at https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf. This harassment often goes unreported out of fear of losing one's housing or of further harassment, *id.* at 1, 8, and these reported cases to non-profit organizations are likely only the tip of the iceberg. *Id.* at 56 (reflecting that reports of housing-related hate crimes rose by approximately 15% from 2016 to 2017).

Some recent examples of harassment reported to fair housing organizations within the Second Circuit include:

- A single mother of a boy on the autism spectrum who has been subjected to pervasive harassment by her neighbors, including degrading comments about her son, damage to her car, and having household items thrown at her apartment door;
- A single Latina woman who has been harassed by her neighbor with unwanted text messages, unwanted items left at her door (some of which pertained to her national origin) and her neighbor's opening his door every time she leaves her unit and watching her leave. After she installed a doorbell camera at the advice of the police, her neighbor

was seen lingering outside her unit in the shared hallway, sometimes in a towel, and screaming sexually explicit terms directly into the doorbell camera;

- An elderly woman and her adult daughter who have been subjected to pervasive harassing comments by neighbors on the basis of their national origin (both are of Italian/Israeli descent), their religion (both are Jewish) and the daughter's sexual orientation (she identifies as a lesbian). In addition to repeated harassing comments, their neighbors would repeatedly linger outside their open windows to intimidate them and have sprayed a hose into their apartment.

Constant harassment of any kind serves as an attack on one's sense of security, safety, and belonging in one's own home. These feelings are exacerbated when the harassment goes unchecked despite pleas for help. The victim is no longer simply the unlucky target of a single bad actor, but must confront the reality that her own landlord has decided that threats to her safety and security do not warrant intervention.

When a landlord makes the affirmative decision to let harassment go unchecked, that abuse also perpetuates the segregated and discriminatory housing patterns that the FHA is meant to overcome. Threats of violence and harassing conduct by fellow residents continue to be among the primary mechanisms by

which segregation has become entrenched. *See generally* Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 Ohio St. J. Crim. L. 47 (2007). To hold that the FHA plays no role in preventing this devastating—and unfortunately still prevalent—practice would deal a devastating blow to one of the FHA's central promises.

III. Housing Providers Have the Authority and Duty Under State Law to Remedy Discriminatory Harassment

Contrary to the dissent's and Kings Park's[5] assertions, interpreting the FHA to require a landlord to take action to stop known racial harassment is consistent with a landlord's existing obligations under conventional tort principles. Ruling in Mr. Francis's favor would not "alter" traditional tort law, A. 248, but would reinforce the long-established principle that a landlord may be held liable for a third-party's interference with a tenant's enjoyment of his home. The only requirements for imposing such liability are that the harm was foreseeable and that the landlord had the authority to address the harassing behavior. While the dissent and Kings Park advocate that landlords have no authority to redress tenant-on-tenant racial discrimination, that is a question of fact that cannot be decided as a matter of law without further factual development.

[5] Except where otherwise noted, Defendants Kings Park Manor and Corrine Downing are referred to collectively as "Kings Park."

In addition to traditional common law authority, Kings Park's own lease reflects that it had the authority to intervene to prevent further racial harassment. Landlords undoubtedly have the authority to enforce the terms of their own leases and Mr. Francis is, at a minimum, entitled to discovery into what actions his landlord could have taken to remedy this ongoing interference with his contractual rights.

A. *Requiring Landlords to Take Action to Investigate and Remedy Known Tenant-on-Tenant Racial Harassment is Consistent with a Landlord's Duties under New York Common Law*

New York law already imposes two common-law duties that are consistent with requiring a landlord to take action to stop known tenant-on-tenant racial harassment. First is the warranty of habitability, which requires a landlord to take action when one tenant's behavior is depriving another tenant of "the quiet enjoyment of their apartment." *Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 638 (2d. Dep't. 1995). *See also Sutton Fifty-Six Co. v. Garrison*, 93 A.D.2d 720, 722 (1st Dep't. 1983) (warranty of habitability "can apply to conditions resulting from events beyond a landlord's control"). This duty is violated when the landlord "despite having ample notice, failed to take any effective steps to abate the nuisance." *Nostrand Gardens*, 221 A.D. 2D at 638. These questions as to whether the landlord was given ample notice and whether it took adequate remedial steps in light of that notice are not legal determinations, but questions that

inherently "turn on [their] own peculiar facts." *Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (1979). *See also Nostrand Gardens*, 221 A.D.2d at 638 (question of fact whether landlord liable for neighbor's loud music); *Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 105 (1st Dep't 1996) (denying summary judgment on claim based on landlord's failure to remedy noxious odor from neighboring retail store).

Second, New York Courts have imposed a common law duty on landlords to take "minimal precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct." *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548 (1998) (internal quotation marks and citation omitted).[6] This duty has also formed the basis for potential liability for landlords when they have failed to take action to remedy known risks of harm. *See Jacqueline S. by Ludovina S. v. City of New York*, 81 N.Y.2d 288, 295 (1993) (plaintiff assaulted after landlord's "conceded failure to supply even the most rudimentary security" despite numerous prior crimes in building); *Luisa R. v. City of New York*, 253 A.D.2d 196, 200 (1st Dep't 1999) (plaintiff assaulted in building's lobby after numerous complaints of criminal activity in building common areas and vacant apartments with no action by landlord); *Garrett v. Twin Parks Northeast Site 2 Houses, Inc.*, 256 A.D.2d 224,

[6] While third-party conduct does not need to rise to the level of criminality for this duty to protect to be implicated, the harassment Mr. Francis was forced to endure was, in fact, criminal. *See* A. 025 ¶ 50.

225 (1st Dep't 1998) (building security guard assaulted by intruders after landlord had been "well aware of criminal activity at the premises and had been apprised of the inadequacy of security measures").

In this context, too, the relevant question is whether the landlord had the "ability or a reasonable opportunity" to take action that could have prevented the harm and whether "the harm complained of was foreseeable." *Firpi v. N.Y.C. Hous. Auth.*, 175 A.D.2d 858, 859 (2d Dep't 1991). "[W]hether particular precautions are adequate to fulfill the landlord's obligation is almost always a question of fact for the jury based upon the nature of risk presented and the availability of security measures." *Garrett*, 256 A.D.2d at 226.

These duties and the cases interpreting them refute the centerpiece of the dissent's argument—that a landlord cannot be held liable for tenant-on-tenant harassment because, under the common law, "it cannot be said that a landlord has the ability or a reasonable opportunity to control the offending tenant." A. 247 (quoting *Blatt v. N.Y.C. Hous. Auth.*, 506 N.Y.S.2d 877, 879 (2d Dep't 1986)). While there may be cases where the landlord lacked such control as a factual matter, the common law is clear that a landlord's "reasonable ability to control" those whose actions affect its tenants' ability to enjoy their housing is a fact-based inquiry that depends on the circumstances of each individual case.

The common law does not prescribe a specific course of action that a landlord must take or at what point it has fulfilled its duty to take action. In some circumstances, verbal and written warnings may be appropriate. In others, transferring the offender to a different apartment (or, if the complainant so wishes, allowing him or her to move to a different apartment) may be sufficient. But these are questions of fact that will vary from case to case. No case stands for the shocking proposition that Kings Park and the dissent advocate—that a landlord who is fully aware that a tenant's right to enjoyment of his home free of discrimination is being threatened by another tenant has no duty to *take any action* as a matter of law.[7]

Blatt, on which the dissent relies heavily, reinforces the fact-based nature of this inquiry. In *Blatt*, the Second Department affirmed the trial court's grant of *summary judgment*, concluding that "*[u]nder the circumstances of this case*," the plaintiff had not made an adequate factual showing that his landlord had the ability to control the offending tenant. 506 N.Y.S.2d at 879 (emphasis added). The court

[7] The factual nature of this inquiry also resolves the dissent's concern that discrimination allegations are not always cut and dried, and that landlords should not be forced to choose between being sued for discrimination and commencing evictions based on unsubstantiated allegations alone. A. 255. Eviction is not the only action available to a landlord and rarely will be the first step a landlord takes to address a tenant's harassment. A landlord is also of course entitled to conduct an investigation before taking any punitive action against an alleged discriminator. Besides, landlords are faced with similar "choices" every day, as a normal risk endemic to the nature of the business. For example, a landlord must "choose" between approving an applicant in a protected group or risk being sued for discrimination if the landlord denies the application.

went on to explain that summary judgement was appropriate because "sufficient discovery has already been completed so as to enable the plaintiff to bring forth any facts relevant to his causes of action." *Id.* at 880. *Blatt* does not stand for a blanket proposition that a landlord never has the authority to control the behavior of a tenant, but reflects a single case where the plaintiff did not meet his factual burden.

The dissent's reliance on *Blatt* for the proposition that the "mere power to evict does not evince such control" for landlords, A. 247, suffers from the same deficiency. *Blatt* does not hold, as a legal matter, that the power to evict is *never* sufficient control to impose liability on a landlord. It stands only for the uncontroversial proposition that eviction power is not sufficient control per se when there is not a factual foundation to support that eviction would have been an appropriate action for the landlord to take. *Blatt*, 123 A.D.2d at 593 (citing relevant facts and concluding that landlord's power to evict was not implicated in a "purely personal dispute" about plaintiff's romantic relationship with his neighbor's daughter). *See also Simmons v. City of New York*, 168 A.D.2d 230, 230 (1st Dep't 1990) (holding that it was a "question for the jury whether a landlord's failure to evict an alleged drug dealer may serve as a predicate for liability for tortious acts connected with the illegal activity"). What actions are available to a landlord and whether those actions are warranted given a landlord's knowledge of

the problem at issue are questions of fact that cannot be resolved on a motion to dismiss.

Finally, it is worth emphasizing that while these tort doctrines apply to any claim that interferes with a tenant's right to enjoy her home, such claims under the FHA are limited to those where the harassment constitutes *discrimination on a basis prohibited by the FHA*. Ruling in Mr. Francis's favor would not create the parade of horribles invoked by Kings Park and the dissent, where every personal dispute among neighbors becomes the subject of federal litigation. To the extent harassment by a neighbor has nothing to do with a tenant's membership in a protected class, the FHA has no application.[8] Here, there is no question, at least at the motion to dismiss stage, that Mr. Francis was harassed *because of his race* and that Kings Park was aware that he was being harassed on that basis. A. 019-24 ¶¶ 16-48. The FHA is implicated only because of the racially discriminatory nature of the harassment Mr. Francis was subjected to.

[8] For the same reason, the FHA would continue to have no application to various cases reflecting non-discriminatory personal disputes cited by Kings Park in its briefing before the initial panel. *See, e.g. Siino v. Reices*, 216 A.D.2d 552, 553 (2d dep't 1995) (personal disagreement unrelated to protected characteristic); *Blatt*, 123 A.D.2d at 592 (dispute regarding plaintiff's romantic relationship with neighbor's daughter).

B. *Mr. Francis's Lease Also Gave Kings Park the Authority to Take Action to Stop Racial Harassment*

Kings Park also had the authority to take action to address this racial harassment under the terms of *its own lease*. Mr. Francis's lease, which can be inferred to be the standard lease provided to all tenants, bars the "noisy or offensive use of the premises" or "any nuisance or use that might interfere with the enjoyment of other tenants." A. 58 ¶ 6. The lease further expressly provides all tenants with the right to "peacefully and quietly…. Enjoy the [rented] premises" during the term of the lease. *Id.* ¶ 12. New York also incorporates the implied warranty of habitability into every lease. N.Y. Real Prop. Law § 235-b; *Park W. Mgmt. Corp,* 47 N.Y.2d at 319.

These contractual terms further vitiate any contention that Kings Park had no authority as a matter of law to address the harassment that Mr. Francis endured. A landlord undoubtedly has the authority to enforce the conditions of its own lease. *See, e.g.*, *Leasehold, L.P. v. 43rd St. Deli, Inc.,* 136 A.D.3d 563, 568 (1st Dep't 2016). The Fair Housing Amici acknowledge that the tools that a landlord has available to it and whether those tools would be effective in remedying the particular violation at issue are questions of fact that will vary from case to case. It cannot be however, that a landlord *categorically* lacks the control necessary to remedy conduct prohibited by the plain terms of its own standard lease.

The specific allegations in the complaint here further reflect that the Defendant property manager—Ms. Downing—believed that Kings Park had the ability to address these ongoing lease violations. The Complaint alleges Ms. Downing contacted Kings Park specifically about Mr. Francis's allegations of racial harassment, but was told not to get involved. A. 024 ¶ 47. This reaction by Ms. Downing—to contact her managers about Mr. Francis's complaints—at the very least furthers the logical inference that she believed that there was an action that Kings Park could take to vindicate Mr. Francis's rights under his lease.[9]

In an effort to dismiss Kings Park's contractual authority to act, the dissent draws an illusory distinction between a landlord's ability to take action against its tenants under tort law and under contract law. A. 247-50. But this distinction as to the source of a landlord's authority is irrelevant. While acknowledging that fair housing claims are most analogous to tort claims, *Meyer v. Holley*, 537 U.S. 280, 290–91 (2003), there is no reason why the authority to act, which the common law

[9] Ms. Downing's actions of conferring with Kings Park about what she should do to address the harassment also undercuts Kings Park's assertion made before the original panel that even to the extent they had the authority to act, it construed Mr. Francis's multiple letters detailing his harassment as only an attempt to "give notice" rather than a request for intervention. In any event, untested representations as to how Kings Park subjectively interpreted Mr. Francis's multiple letters should not be considered on a motion to dismiss. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) (holding Court must limit its consideration to "facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference").

requires, cannot be derived from a contract. The underlying question in tort is whether "the landlord had the ability or a reasonable opportunity to control the aggressor" and whether "the harm complained of was foreseeable." *Firpi*, 175 A.D.2d at 859. Whether the "reasonable opportunity to control" derives from a common law power or from the tenant's lease plays no role in the analysis—the inquiry is simply whether the landlord had the knowledge and ability to take action, yet affirmatively chose not to do so. How the landlord obtained its ability to "control" its tenants in no way limits the landlord's duty to use that authority.

In sum, the underlying tort law supports landlord liability for tenant-on-tenant racial harassment when the landlord has both knowledge of wrongdoing and the ability to take action to stop the harassment. Here, Kings Park's knowledge is undisputed, *see* A. 041-56, or, at the very least, cannot be decided on a motion to dismiss. Whether Kings Park had the ability to control Mr. Francis's harasser is a question of fact that cannot be addressed without discovery. At a minimum, Mr. Francis's lease creates the inference that Kings Parks had vested itself with the authority to prevent tenants from interfering with other tenants' enjoyment of their apartments, and Mr. Francis is entitled to explore the scope of that authority.

While the dissent laments that there is not an immediate answer to what Kings Park should have done differently, the common law does not prescribe a one-size-fits-all answer to this question, and it would be premature for the Court to

address it at this stage of the case. The only question the Court must answer at this stage is whether it was appropriate, as a matter of law, for Kings Park to do *nothing* when it learned in no uncertain terms that one of its tenants was repeatedly racially harassing another.

C. *Defendants' Policy Arguments Regarding Public Housing Are a Red Herring*

In their briefing before the original panel, Defendants made numerous policy arguments regarding the effect that this ruling could theoretically have in the context of a municipal landlord taking action against a tenant in a public housing complex. But public housing is not at issue in this case and these speculative arguments (assuming they are re-raised) play no role in this case.

Kings Park is a privately owned, market-rate, rental housing complex.[10] The complaint does not allege that Kings Park is public or low-income, subsidized housing. Plaintiff Francis happened to use a government subsidy—a Section 8 voucher—to pay a portion of his rent, A. 071-82, but the total amount of rent for the apartment was set by market conditions and was not subject to any government housing programs or public housing regulations.[11]

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[10] *See* https://kingsparkmanor.com/

[11] *See HUD Housing Choice Voucher Fact Sheet, available at* https://www.hud.gov/topics/housing_choice_voucher_program_section_8 ("The housing choice voucher program is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary *housing in the private market*." (emphasis added)).

While the Fair Housing Amici do not agree with Kings Park's various policy arguments regarding public housing and believe that it misrepresents the obligations of federally regulated public housing authorities, Kings Park's hypothetical concerns simply are not implicated by this case. Here, the Court is only being asked to decide the scope of a private landlord's liability when renting market-rate apartments subject to a written lease.

For the same reasons, the dissent's claim that this decision would "risk[] the loss of housing to some of the most vulnerable among us," A. 261, is based on sheer speculation. Kings Park is a private landlord that owns and operates market-rate apartments for which it, not the government, sets the rents. While the Plaintiff in this case happened to have a Section 8 voucher, the current record does not reflect that Kings Park is a subsidized housing provider using rent levels set by the government and maximum income requirements for tenants. The complaint does not allege that tenants at Kings Park are low-income or that any other tenant uses a Section 8 voucher, including Defendant Endres. To the extent the Court believes there are other considerations relevant to public housing authorities and their tenants, they are not applicable to the parties in this case, and certainly not at the motion to dismiss stage.

CONCLUSION

For the reasons set forth above, this Court should join the consensus of Circuits across the country that have held that the FHA reaches post-acquisition claims when a tenant interferes with another tenant's use of his home for discriminatory reasons. This Court should also reject Kings Park's and the dissent's misapprehension of the tort principles underlying a landlord's duty to address known tenant-on-tenant racial harassment and allow Mr. Francis's claims to proceed to discovery where this fact-based analysis can be resolved. The Fair Housing Amici respectfully request that this Court reverse the judgment of the District Court and remand the case for further proceedings.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B). It contains 6,391 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(f).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Dated: May 7, 2020

CERTIFICATE OF SERVICE AND FILING

I hereby certify under penalty of perjury that on May 7, 2020 I served a copy of this proposed Brief of Amicus Curiae in Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 7, 2020
New York, New York

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