

15-1823

IN THE
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 OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL
LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, AND 49
ADDITIONAL ORGANIZATIONS COMMITTED TO GENDER JUSTICE AS AMICI
CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT**

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STATEMENT OF INTEREST¹

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over two million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women's full equality in American society. These efforts include challenging housing discrimination experienced by women, with a focus on advancing their rights to obtain and maintain safe and secure housing. The ACLU has litigated Fair Housing Act cases in courts across the country and advocated for housing policies at the federal, state, and local levels.

The New York Civil Liberties Union (NYCLU) is the New York affiliate of the ACLU. The NYCLU is a non-partisan, non-profit membership organization with more than 200,000 supporters across New York. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Constitution. In furtherance of that mission, the NYCLU litigates, advocates, and educates on a wide range of civil liberties and rights issues impacting New Yorkers, including issues related to fair housing and gender justice.

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure and Local Rule 29.1(b), *amici* state that their counsel authored this brief in whole and no other party or party's counsel, nor any other person, contributed money intended to fund preparing or submitting the brief.

The National Women’s Law Center is a nonprofit legal advocacy organization founded in 1972 and dedicated to the advancement and protection of the legal rights and opportunities of women and girls, and all who suffer from sex discrimination, including sexual harassment. The Center focuses on issues of importance to women and their families, including economic security, employment, education, health, and reproductive rights, with particular focus on the needs of low-income women and those who face multiple and intersecting forms of discrimination.

Amici submit this brief alongside the 49 additional organizations listed in the attached Appendix that are committed to gender justice to highlight the particular harms for women² tenants that are at stake in this case. *Amici* support the principle that all tenants should be safe from sexual harassment and other forms of sex-based discrimination and urge the Second Circuit to interpret the Fair Housing Act in a manner that ensures that housing discrimination will be addressed in accordance with comparable federal civil rights protections in other contexts.

² *Amici* refer to the experiences of women throughout this brief, recognizing that sexual harassment disproportionately harms women—and particularly, women of color. See Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 Yale J.L. & Feminism 227, 254 (2016). *Amici* recognize that people of all genders experience sexual harassment and also note that these harms are particularly felt by LGBTQ individuals.

INTRODUCTION

Over half a century ago, Congress enacted Title VIII of the Civil Rights Act—otherwise known as the Fair Housing Act (FHA)—with the express purpose of creating “truly integrated and balanced living patterns.” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211–12 (1972) (quoting 114 Cong. Rec. 3422 (1968) (Statement of Senator Walter Mondale)). To achieve this goal, the FHA has provided critical protections against the widespread and invidious issue of discriminatory harassment—a major barrier to integrated communities and housing access for historically marginalized and otherwise vulnerable individuals. *See* Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 *Mo. L. Rev.* 597, 639 (2018). The FHA’s broad protection against tenant-on-tenant harassment ensures that every individual has equal access to safe housing, regardless of their sex, race, color, national origin, religion, disability, or familial status. *See* 42 U.S.C. § 3604. This access is especially important during economic crises like the one unleashed by the spread of the novel coronavirus.

This case raises the question whether a housing provider³ is obligated to address discriminatory tenant-on-tenant harassment when it knew or should have known of the conduct and had the power to correct it. In *Francis v. Kings Park*

³ In this brief, *amici* refer to “housing providers,” while recognizing that the FHA applies to the conduct of landlords, housing providers, property owners, property management companies, and other actors.

Manor, Inc., 944 F.3d 370 (2d Cir. 2019), a panel of this Court reversed the district court's partial judgment in favor of defendants and held that a Black tenant plausibly alleged that his landlord had discriminated against him under the FHA by failing to address race-based harassment by another tenant that the housing provider was aware of. *See id.* at 379.

While the case before the Court involves racial harassment, this Court's decision will shape the contours of the FHA's protections against harassment of *all* protected classes, including women facing sexual harassment—of particular concern for *amici*.⁴ Sexual harassment in housing is widespread and causes unique and devastating harms that can lead to housing instability. To address these harms, the U.S. Department of Housing and Urban Development (HUD) has pursued enforcement actions to combat sexual harassment in housing and has issued regulations stating that a housing provider may be held liable for failing to take appropriate corrective action to address tenant-on-tenant harassment, including the

⁴ In this brief, *amici* primarily discuss the FHA's protections against sexual harassment committed by another tenant, given the issues raised in this case. However, this case also implicates the FHA's protections against other forms of sex-based discrimination, including discrimination against survivors of domestic violence and sexual assault. The harmful impact of sexual harassment and other forms of sex-based discrimination are often compounded by other aspects of one's identity, including, but not limited to, race, national origin, disability, and religion. *See Elengold, Structural Subjugation, supra*, at 254. Ultimately, *amici* argue that the FHA's protections extend to all forms of tenant-on-tenant harassment based on protected characteristics, as addressed in arguments made by other *amici*, including racial justice and LGBTQ rights organizations.

creation of a hostile environment, when the provider knew or should have known about the harassment and had the power to correct it. 24 C.F.R. § 100.7(a)(iii); *id.* § 100.600(a). HUD's recognition is consistent with the protections against harassment set forward in other civil rights statutes, including Title VII (employment), 42 U.S.C. § 2000e *et seq.*, and Title IX (education), 20 U.S.C. § 1681 *et seq.* Recognizing housing providers' obligations to take reasonable steps to address tenant-on-tenant harassment will not disrupt housing providers' operations, as there are a variety of reasonable steps they may take to address and prevent such harassment. And despite any arguments to the contrary, these approaches do not burden an accused harasser's First Amendment rights.

Under Defendant-Appellee's theory, no housing provider could ever be held accountable for failing to act when confronted with harassment by tenants against tenants—a serious risk, especially for marginalized individuals. This Court should hold that the FHA requires housing providers to take reasonable steps to address a hostile housing environment caused by tenant-on-tenant harassment where the housing provider knew or should have known of the discriminatory conduct and had the power to correct it. As detailed herein, rejecting Plaintiff-Appellant's arguments in this case would represent a significant divergence from other federal civil rights schemes, conflict with decades of judicial interpretation and administrative

guidance, and significantly undermine the purposes and goals of the FHA—to create an integrated society free from discrimination.

ARGUMENT

I. SEXUAL HARASSMENT IN HOUSING IS WIDESPREAD AND JEOPARDIZES INDIVIDUALS' ACCESS TO A SAFE AND STABLE HOME.

A. Sexual Harassment in Housing, Including Tenant-on-Tenant Harassment, Is a Widespread Problem.

i. The Problem

Sexual harassment in housing remains widespread across the United States, and is often compounded for individuals with intersecting marginalized identities, such as women of color. HUD estimates that there are over two million reported instances of housing discrimination each year across the country. *Cityscape: A Journal of Policy Development and Research*, U.S. Department of Housing and Urban Development, Office of Policy Development and Research 37 (2015), https://www.huduser.gov/portal/periodicals/cityscpe/vol17num3/Cityscape_November_2015.pdf.

Harassment in the home can arise when one tenant harasses another, as the case before this Court demonstrates. For example, in *Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360 (D. Md. 2011), one tenant subjected the plaintiff tenant to unwanted touching, lewd and sexual emails and comments, and threats. *Id.* at 362. The target of the harassment stopped wearing makeup and began wearing all black

and multiple layers of clothing in hopes of deterring the harasser. Am. Compl. ¶¶ 13, 14, *Fahnbulleh*. The plaintiff complained to the landlord regarding the harassment on multiple other occasions. *See, e.g., id.* ¶¶ 22, 26, 28, 48. In response, the landlord “asked [her] what she had done to attract” her harasser. 795 F. Supp. 2d at 362.

Intersecting forms of harassment—i.e., harassment based on multiple aspects of a person’s identity, such as race, national origin, religion, and disability—pose significant concerns for women tenants. Testimony of women in sexual harassment housing cases often indicates that they may have been sexually harassed precisely *because of* their race and stereotypes about women of color. *See* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 *Yale J.L. & Feminism* 227, 240–41 (2016) (discussing cases in which tenants testified that their landlords sexually harassed and/or assaulted them and made comments including ones that mentioned Black women’s race in an offensive and sexualized manner and threatened them with eviction if they didn’t engage in sex). In *Reeves v. Carrollsburg Condominium Unit Owners Ass’n*, for example, a Black woman brought an FHA hostile-environment claim based on racial and sexual harassment after her white neighbor “repeatedly subjected Ms. Reeves to threats of rape and lynching, in addition to the racial and sexual character of his verbal abuse.” No. CIV. A. 96-2495RMU, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997). The

condominium association knew of the ongoing harassment and still failed to act, leaving Ms. Reeves with no choice but to move out of her home. *Id.* Because of the intersecting experiences of racism and sexism, women of color are especially vulnerable to sexual harassment and its lasting consequences—including financial instability and long-term housing insecurity. *See* Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. Rev. 457, 491–93 (2018).

The harmful impact of sexual harassment is also magnified for women with other marginalized identities. Women with disabilities, for example, face higher rates of sexual harassment and violence than those without disabilities. *See* Erika Harrell, *Crime Against Persons with Disabilities, 2009-2015 – Statistical Tables*, U.S. Dep’t of Justice: Bureau of Justice Statistics (July 2017), <https://www.bjs.gov/content/pub/pdf/-capd0915st.pdf>. Additionally, many women face religion-based harassment, which jeopardizes housing access for many tenants. *See, e.g.*, Consent Order, *United States v. Altmayer*, No. 05 C 1239 (N.D. Ill. Jan. 18, 2006), ECF No. 41, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/altmayer_settle.pdf (requiring man who harassed his neighbors because of their Jewish religion and Israeli and Mexican national origin to pay \$15,000 in damages, barring him from harassing his neighbors in the future, and requiring him to attend fair housing training); *see also* ACLU Women’s Rights Project, *Discrimination Against Muslim Women - Fact Sheet*, <https://www.aclu.org/other/discrimination-against-muslim->

women-fact-sheet#7 (last visited Apr. 29, 2020). The FHA's protections, therefore, are critical to ensuring housing access for women who face discrimination based on other protected characteristics.

ii. Underreporting

In 2018, individuals made nearly 2,000 complaints⁵ of sex-based discrimination—including sexual harassment—in housing. *See Defending Against Unprecedented Attacks on Housing: 2019 Fair Housing Trends Report*, National Fair Housing Alliance, at 16 (2019), <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf>. But because sexual harassment often goes unreported and, thus, undetected, the nearly 2,000 complaints of sex-based discrimination in 2018 represents an extreme undercount of the true number of instances of sexual harassment in housing. Individuals who experience sexual harassment are often discouraged from reporting due to “fear of retaliation, silence as the chosen form of coping, aversion to the stigma attached to victims of sexual harassment, anticipation of ridicule, and a desire not to prolong suffering.” Regina Cahan, Comment, *Home Is No Haven: An Analysis Of Sexual Harassment In*

⁵ The number is based on complaints made to HUD, state and local government agencies that receive HUD's Fair Housing Assistance Program (FHAP) funding, the Department of Justice (DOJ), and the National Fair Housing Alliance (NFHA) collectively and is necessarily lower than actual instances of sex discrimination as detailed below. *See Defending Against Unprecedented Attacks on Housing: 2019 Fair Housing Trends Report*, National Fair Housing Alliance, at 16 (2019), <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf>.

Housing, 1987 Wis. L. Rev. 1061, 1067. In many cases, victims who *do* come forward are not believed or are even blamed for their own harassment. *See id.* at 1068, 1074; *see also* Deborah A. Widiss & Emily J. Martin, *Using Federal and State Laws to Promote Secure Housing for Survivors of Domestic Violence* 4 (2007) (discussing *Bouley v. Young-Saborouin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005), in which landlord concluded that tenant was at least partially responsible for the assault by her husband because landlord expected true domestic violence victims to be meek and submissive).

Race, too, can play a role in the underreporting of sexual harassment. As noted, Black women, for example, may be especially vulnerable to sexual harassment in housing and less likely to be believed when they do report it. *See* Elengold, *Structural Subjugation*, *supra*, at 244 (“[T]he national cultural myth of the sexually insatiable Black woman makes African American women more vulnerable to residential sexual harassment and then silences their resistance by providing ‘justification’ for the abuse.”). Thus, barriers to reporting sexual harassment are compounded for Black women and other women of color.

Given this vast underreporting and the fact that many FHA challenges are resolved through voluntary resolutions, it is clear that the problem is much larger than apparent upon a review of federal cases and written opinions. *See* Erica Franklin, *When Domestic Violence and Sex-Based Discrimination Collide: Civil*

Rights Approaches to Combating Domestic Violence and its Aftermath, 4 DePaul J. for Soc. Just. 335, 373 (2011). This widespread and serious problem of sexual harassment in housing, and its particular impact on women and their families, as detailed below, must be part of this Court’s calculus when considering this matter.

B. Sexual Harassment in the Home Is Uniquely Devastating and Has Lasting Consequences.

Sexual harassment that takes place at home is uniquely devastating for the target of the harassment. *See* Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 Wis. L. Rev. 771, 772–73. As HUD has recognized, “[o]ne’s home is a place of privacy, security, and refuge (or should be)” and therefore “harassment that occurs in or around one’s home can be” uniquely “intrusive, violative, and threatening.” *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054, 63,055 (Sept. 14, 2016). Harassment and threats of violence are especially threatening and invasive when they occur at home. As Judge Cahan (King County Superior Court, Washington) has recognized:

[W]hen the harassment occurs in [one’s] home, it is a complete invasion in [their] life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, [an individual] may feel distressed and, often, immobile.

Cahan, *supra*, at 1073. Moreover, a tenant experiencing such harassment has no place to escape. *See id.* Thus, it is no surprise that HUD has recognized that sexual harassment can interfere with a person's right to access and enjoy their housing. 24 C.F.R. § 100.600(a)(2).

Harassment in the home often inflicts devastating and lasting harm, as individuals may be forced to leave their homes to end the harassment. Such involuntary displacement can have far-reaching consequences for tenants, including job loss, physical or mental health issues, material hardship, and long-term housing insecurity. *See* Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, Social Forces Advance Access, at 4–7 (Feb. 24, 2015), https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015_2.pdf. Thus, robust enforcement of the FHA is necessary to keep victims of sexual harassment in their homes.

In short, the FHA's protections against discriminatory tenant-on-tenant harassment are crucial to combatting the widespread problem of sexual harassment in housing, and to ensuring equal access to safe and stable housing for all individuals, especially for those women facing compounding discrimination and barriers tied to their marginalized identities.

C. The Federal Government Has Recognized the Importance of Protecting Tenants from Sexual Harassment in Housing, Including from Harassment By Other Tenants.

Recognizing the harmful impact of sexual harassment, HUD and DOJ⁶ have taken action to combat its discriminatory effects. Importantly, HUD has recognized the importance of the FHA's protections against sexual harassment in housing for decades and has pursued such charges since the 1990s. *See, e.g., HUD v. Krueger*, HUDALJ 05-93-0196-1, 1996 WL 418886 (H.U.D.O.H.A. June 7, 1996) (landlord made unwanted sexual comments and advances and attempted to evict tenant after she filed a complaint against him); *HUD v. Kogut*, HUDALJ 09-93-1245-1, 1995 WL 225277 (H.U.D.O.H.A. Apr. 17, 1995) (landlord groped tenant and then evicted her when she rebuffed him). In 2008, HUD issued a memorandum underscoring the issue of sexual harassment in housing and addressing housing providers' FHA liability. *See* Kim Kendrick, Assistant Secretary for Fair Housing and Equal Opportunity, *Questions and Answers on Sexual Harassment under the Fair Housing*

⁶ DOJ has the power to investigate reports of sexual harassment, *Sexual Harassment in Housing Initiative – What Can DOJ Do?*, U.S. Dep't of Justice, <https://www.justice.gov/crt/sexual-harassment-housing-initiative-what-can-doj-do> (updated Nov. 7, 2018), and has pursued many civil enforcement actions regarding sexual harassment in housing over the past several decades, *see Recent Accomplishments of the Housing and Civil Enforcement Section*, U.S. Dep't of Justice, <https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section#jp%20harassment> (updated Mar. 11, 2020).

Act (Nov. 17, 2008), <https://www.hud.gov/sites/documents/QANDASEXUALHARASSMENT.PDF>.

Specifically, HUD observed that housing providers may be held liable for tenant-on-tenant harassment that they knew about and failed to address. *See id.* at 3 (“Some courts have held owners and managers, including condominium associations, liable in situations where they knew of tenant-on-tenant harassment and did not take remedial action.”). Further, HUD informed housing providers that they should take steps to stop tenant-on-tenant sexual harassment. *See id.* at 5 (“In the event that an individual alleges sexual harassment and/or files a complaint against . . . another tenant or resident, the owner or manager . . . should . . . take steps to stop any harassment that may be occurring . . .”). In 2016, HUD again emphasized the importance of protecting tenants from harassment by issuing a regulation that provided clarity on how HUD will evaluate complaints of quid pro quo harassment and hostile environment harassment under the FHA. *See* 81 Fed. Reg. 63,054; 24 C.F.R. § 100.600 (“Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, or use or enjoyment of a dwelling . . .”).

Consistent with this history, at the invitation of this Court in this case, the United States submitted an *amicus* brief, noting that its 2016 rule formalized HUD’s longstanding view that a housing provider may be liable under the FHA for failing

to take appropriate corrective action to address tenant-on-tenant harassment that the housing provider knew or should have known about and had the power to correct. Brief of the United States as Amicus Curiae in Support of Neither Party at 6, 8. Critically, throughout the brief, the U.S. recognized the FHA’s application to sexual harassment by other tenants and articulated its view that housing providers should be held liable in these situations. *See id.* at 7, 17.

In short, the federal government has consistently demonstrated its understanding of the gravity of the problem of sexual harassment in the housing context. This understanding has led to the government’s commitment to, and recognition of, the FHA’s protections against sexual harassment, including tenant-on-tenant harassment, which are necessary to effectuate the FHA’s purpose of combatting the ongoing legacy of residential segregation and creating “truly integrated and balanced living patterns.” *Trafficante*, 409 U.S. at 211–12.

II. THE FHA’S PROTECTIONS AGAINST HOSTILE HOUSING ENVIRONMENTS CREATED BY TENANT-ON-TENANT HARASSMENT ALIGN WITH OTHER FEDERAL CIVIL RIGHTS PROTECTIONS.

Since their enactment, the FHA’s protections have developed in tandem with the schemes set forth in other federal civil rights statutes, including Title VII (employment) and Title IX (education). The concurrent evolution of these protections reflects their shared purpose in promoting equal opportunity for all in critical aspects of life. Accordingly, this Court should recognize that the FHA

requires housing providers to take reasonable steps to address discriminatory harassment that they know or should know about and have the power to correct, consistent with the protections extended by the FHA's sister statutes, Title VII and Title IX. To hold otherwise would represent a significant divergence from the civil rights laws that apply in workplaces and schools.

As a threshold matter, the FHA indisputably bars post-acquisition discrimination—*i.e.*, discriminatory conduct that occurs after a tenant acquires housing. *Amici* endorse Plaintiff-Appellant's argument that the plain language of the FHA contemplates discriminatory conduct occurring after a tenant acquires housing, a conclusion supported by its textual similarities with Title VII. Pl.'s En Banc Opening Br., at 23–28; *see also Davis v. City of N.Y.*, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012) (concluding that the FHA prohibits post-acquisition discrimination while noting “[t]he inclusion of the word ‘privileges’ [in Section 3604(b)] implicates continuing rights, such as the privileges of quiet enjoyment of the dwelling”) (citation omitted). Additionally, the FHA's widely recognized application to post-acquisition conduct is consistent with the schemes of Title VII and Title IX, which apply to discriminatory conduct arising after a hiring decision or admission to an education institution.⁷ *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64

⁷ Limiting liability for post-acquisition conduct, as requested by Defendant-Appellee, would also threaten the well-established case law prohibiting *landlords* from sexually harassing their *tenants*. *See, e.g., Glover v. Jones*, 522 F. Supp. 2d

(1986) (recognizing Title VII liability for hostile environments created by sexual harassment in the workplace); *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–44 (1999) (recognizing Title IX liability for hostile environments created by sexual harassment in schools). Given courts’ longstanding practice of interpreting the FHA’s protections in accordance with Title VII and other civil rights schemes, this Court should hold that the FHA bars discriminatory conduct occurring before, during, and after a tenant’s acquisition of housing.⁸

The FHA also mirrors Title VII with respect to the type of harassment that the statutes prohibit. Over the past several decades, courts have consistently relied on

496, 503 (W.D.N.Y. 2007); *Rich v. Lubin*, No. 02 Civ. 6786-TPG, 2004 WL 1124662, at *4 (S.D.N.Y. May 20, 2004). Such an outcome would leave women, and particularly low-income women of color, especially vulnerable to sexual harassment by landlords and its lasting consequences on physical and mental health, job stability, and housing security. Oliveri, *supra*, at 620–21.

⁸ Notably, courts in this Circuit have found “provisions of the FHA to reach post-acquisition discrimination, even where the discriminatory conduct does not rise to the level of actual or constructive eviction.” *Mazzocchi v. Windsor Owners Corp.*, 204 F. Supp. 3d 583, 607–08 (S.D.N.Y. 2016) (holding that Section 3604 of the FHA “reaches post-acquisition conduct—even where that conduct falls short of constructive or actual eviction”); *see also Mohamed v. McLaurin*, 390 F. Supp. 3d 520, 547 (D. Vt. 2019) (recognizing that a “‘post-acquisition’ hostile housing environment claim is cognizable under § 3604 of the FHA”); *Davis*, 902 F. Supp. 2d at 436 (concluding that the FHA “is best understood to prohibit post as well as pre-acquisition discrimination in the provision of housing-related services”); *Viens v. Am. Empire Surplus Lines Ins. Co.*, 113 F. Supp. 3d 555 (D. Conn. 2015) (“[T]he FHA . . . appl[ies] to post-acquisition claims, because (1) the words ‘privileges’ and ‘services or facilities’ in the statutes connote continuing rights beyond the acquisition of housing; (2) HUD regulations . . . recognize such claims, and (3) such claims are consistent with the ‘broad and liberal construction’ given to the FHA...” (internal citations omitted)).

Title VII jurisprudence when delineating the scope of the FHA’s protections, in light of the statutes’ nearly identical operative language and shared purpose as set forth by Congress. In *Shellhammer v. Lewallen*—the first FHA decision of which *amici* are aware involving sexual harassment in housing—the Sixth Circuit imported the Title VII framework when analyzing an FHA hostile-environment claim. 770 F.2d 167, 1985 WL 135005 at *1–3 (6th Cir. 1985) (unpublished table decision) (*per curiam*). In doing so, the Sixth Circuit relied on the Eleventh Circuit’s decision in *Henson v. City of Dundee*, 682 F.2d 897, 901–05 (11th Cir. 1982), a Title VII sexual harassment case that was foundational to Supreme Court jurisprudence in this area. *See Schwemm & Oliveri, supra*, at 777. Four years later, the Supreme Court resolved its first Title VII sexual harassment case by holding that a hostile work environment created by sexual harassment may constitute discrimination in the “terms, conditions, or privileges” of employment—the same operative language mirrored in Section 3604(b) of the FHA. *Meritor Sav. Bank*, 477 U.S. at 64–66.

Consistent with these cases, courts overwhelmingly “rely on Title VII precedents in establishing the contours of sexual harassment law under the FHA.” *Schwemm & Oliveri, supra*, at 782 (citing string of FHA cases that rely on Title VII in analyzing hostile environment claims). Indeed, this Court has “pointedly accepted the relevance of Title VII cases to Title VIII cases.” *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15

(1988), *superseded by regulation on other grounds*, 24 C.F.R. § 100.500(c); *see also Glover v. Jones*, 522 F. Supp. 2d 496, 503–04 (W.D.N.Y. 2007) (“[T]he legal standard for sexual harassment claims under the FHA has been analogized in the Second Circuit to the standard pertaining to hostile work environment claims under Title VII.” (quoting *Rich v. Lubin*, No. 02 Civ. 6786(TPG), 2004 WL 1124662, at *4 (S.D.N.Y. May 20, 2004))). It is unsurprising, then, that courts and HUD have adopted Title VII’s framework when considering housing providers’ obligations to address sexual harassment by tenants. *See Fahnbulleh*, 795 F. Supp. 2d 360; *see also* 81 Fed. Reg. 63,054, 63,055.

Limiting the FHA’s scope to exclude liability for failing to address discriminatory tenant-on-tenant harassment would put the FHA at odds with Title VII precedent and administrative guidance. Under Title VII, an employer may be liable for failing to take reasonable steps to address sexual harassment of its employees by non-employees, such as clients and customers. *See, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir. 1998); *Lopes v. Caffè Centrale LLC*, 548 F. Supp. 2d 47, 53 (S.D.N.Y. 2008); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1112 (8th Cir. 1997) (holding non-profit residential home was liable under Title VII for resident’s repeated sexual assault of the caregiver-employees because residential home “had the ability to alter those conditions to a substantial degree”); *Folkerson*

v. Circus Enter., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (“[A]n employer may be liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective action when it knew or should have known of the conduct.”).

Title VII protections against sexual harassment also have been bolstered by agency interpretation, through the U.S. Equal Employment Opportunity Commission (EEOC). Its regulations provide for employer liability for failing to address harassment where the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action. 29 C.F.R. § 1604.11(e). Critically, an employer’s obligations under Title VII do not turn on whether a hostile environment was created by an employee versus a non-employee.

Similarly, it is well established that Title IX requires schools to address known sexual harassment committed by students or employees. *See, e.g., Davis*, 526 U.S. at 643–45. The Supreme Court in *Davis* first held that a school can be sued for money damages when it fails to address student-on-student sexual harassment that creates a hostile environment, *id.*, and courts have recognized time and again that institutions must protect against discriminatory hostile environments—including when the environment was created by students, *see, e.g., Doe ex rel. A.N. v. East Haven Bd. of Educ.*, 200 F. App’x 46, 47–49 (2d Cir. 2006); *Doe ex rel. Doe v.*

Coventry Bd. of Educ., 630 F. Supp. 2d 226, 232 (D. Conn. 2009); *see also* Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 Am. U. J. Gender Soc. Pol’y & L. 575 (2000). These critical protections recognize the widespread and devastating impact of sexual harassment and hold institutions accountable for addressing such conduct when they are aware of it and have the power to correct it. *See* Laura Foster, Comments, *A Modified Approach to Claims of Sexual Harassment Under Title IX: Finding Protection Against Peer Sexual Harassment*, 67 U. Cin. L. Rev. 1229, 1241 (1999); *see also* Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,039–40 (Mar. 13, 1997) (making clear that schools are “obligat[ed] to provide an environment free of discrimination”).

Ultimately, this nation’s civil rights framework protects against sexual harassment in every major facet of one’s life, including education, employment, and housing. Together, these protections are necessary to ensuring the equal participation of women and others who face discrimination. The FHA’s prohibition on housing discrimination must include a responsibility to address tenant-on-tenant harassment to effectuate its purpose and goals.

Under Defendant-Appellee's theory, no housing provider could ever be held accountable for failing to address discriminatory harassment by tenants, except when the harassment resulted in constructive eviction of the victim. This outcome would be at odds with Title VII and Title IX—which do not require harassment to result in the victim's constructive termination or departure from school before triggering liability for employers or educational institutions. *See, e.g., Davis*, 526 U.S. at 643–45; *Salamon v. Our Lady of Victory Hosp.*, 867 F. Supp. 2d 344, 364–65 (W.D.N.Y. 2012); *McDonald v. B.E. Windows Corp.*, No. 01 Civ. 6707(RLC), 2003 WL 21012045, at *3–4 (S.D.N.Y. May 5, 2003); *Kudatzky v. Galbreath Co.*, No. 96 Civ. 2693(HB), 1997 WL 598586, at *5 (S.D.N.Y. Sept. 23, 1997). Limiting the FHA's protections in this way would mean that housing providers would have a lesser obligation to address discriminatory conduct against their tenants in tenants' own homes than housing providers would have to address discriminatory conduct against members of their staff in their workplaces. This result would fly in the face of this nation's understanding of the home as a sanctuary worthy of protection. *See* 81 Fed. Reg. 63,055 (HUD recognizing “[o]ne’s home [a]s a place of privacy, security, and refuge”).

As discussed further below, a housing provider's duty to respond to harassment which they know or should know about and have the power to correct can be satisfied by a range of measures, tailored to their circumstances. But

absolving housing providers altogether would undermine the integrity of the FHA's provisions and objectives. It therefore remains vital to recognize housing providers' obligations to take reasonable steps to address hostile environments created by tenant-on-tenant harassment—as courts have consistently recognized in analogous contexts regarding Title VII and Title IX.

III. HOUSING PROVIDERS ARE EMPOWERED TO TAKE REASONABLE STEPS TO ADDRESS TENANT-ON-TENANT HARASSMENT IN ACCORDANCE WITH THE FHA AND THE FIRST AMENDMENT.

A. Housing Providers Have a Variety of Reasonable Steps at Their Disposal to Respond to Tenant-on-Tenant Harassment.

Prompt and appropriate responses by housing providers to tenant complaints of harassment are critical to preventing—or stopping—such harm. As noted by Plaintiff-Appellant, this Court need not reach the question of what legal standard applies in tenant-on-tenant harassment cases to resolve this appeal. However, if this Court does set forth a legal standard, *amici* ask this Court to require a housing provider to take prompt, reasonable steps to address a hostile housing environment caused by tenant-on-tenant harassment when the housing provider knew or should have known of the discriminatory conduct and had the power to correct it, consistent with HUD's regulations. 24 C.F.R. § 100.7(a)(iii); *see also* Brief of the United States as Amicus Curiae in Support of Neither Party at 6. Importantly, what constitutes *reasonable* steps to address the tenant-on-tenant harassment will depend on the

individual circumstances of each situation and consideration of applicable state and local housing laws.

Housing providers are well-equipped to meet these obligations and have a wide variety of possible tools to stop known harassment in housing, including the following:

- issue oral and written warnings and notices of lease and/or rule violations;
- notify property management security staff and personnel;
- maintain well-lit public areas;
- change the locks to allow a tenant greater protection;
- allow a tenant experiencing harassment or violence to transfer units or to terminate their lease early if they sought to move;
- issue no-trespass orders against the perpetrator; or
- file a civil complaint against the perpetrator.

See Franklin, supra, at 376; *see also Housing Rights of Domestic Violence Survivors: A state and local law compendium*, National Housing Law Project, at Letter to Advocates (2017), <https://www.nhlp.org/wp-content/uploads/2018/07/2017-DV-State-and-Local-Housing-Laws-Compendium.pdf>. Finally, if used appropriately and in a non-discriminatory way, eviction of the harasser may be an appropriate step in the most extreme cases. *See id.* Ultimately, as noted, what specific action is

appropriate in any given situation will be factually-specific and based on the severity of the harassment in question.

Of course, housing providers also have the ability to implement helpful preventative measures, such as establishing anti-harassment policies and training their staff on how to respond to complaints and prevent housing harassment. *See Preventing and Addressing Harassment in Housing: Fact Sheet for Property Owners and Managers*, U.S. Dep't of Hous. & Urban Dev., <https://www.hud.gov/sites/dfiles/FHEO/images/owners-managers-508.pdf> (“Property Owners and Managers Should[] Establish and enforce anti-harassment policies to help stop inappropriate or offensive conduct early, before it becomes a Fair Housing Act violation.”); Alexandria Lippincott et al., *Preventing and Addressing Sexual and Other Discriminatory Harassment in Housing: Fair Housing Training for PHA Residents & Voucher Program Participants*, U.S. Dep't of Housing and Urban Dev., <https://files.hudexchange.info/course-content/preventing-harassment-for-pha-residents-voucher-program-participants/Preventing-Addressing-Harassment-PHA-Residents-Slides.pdf>. Ultimately, there are many reasonable steps that housing providers may consider taking to combat sexual harassment faced by their tenants.

B. Such Measures to Prevent and Address Harassment Are Reinforced by Other Frameworks.

Beyond the requirements imposed by the FHA, many housing providers are already encouraged, if not outright required, to take measures to address and prevent

discrimination against survivors of sexual assault and other forms of sex-based discrimination. For example, under the Violence Against Women Act's (VAWA's) implementing regulations, HUD asks housing providers to take whatever steps are "permissible and feasible" to allow survivors of domestic violence to stay in their homes. 24 C.F.R. § 5.2009. HUD also encourages housing providers to provide housing transfers to other available units. *Id.* Consistent with these overlapping requirements, courts have found that a housing provider's failure to comply with VAWA can permit an inference that the housing provider discriminated on the basis of sex, in violation of the FHA. *Antonelli v. Gloucester Cty. Hous. Auth.*, No. CV1916962RBKAMD, 2019 WL 5485449, at *7 (D.N.J. Oct. 25, 2019) (collecting cases). Accordingly, it is consistent with existing legal requirements to recognize a landlord's obligation under the FHA to take reasonable steps to address harassment and discriminatory conduct based on sex or other protected characteristics.

C. The FHA's Protections Against Harassment Are Consistent with Free Speech Protections.

Contrary to Defendants-Appellees' contention, reasonable measures by a landlord to address tenant-on-tenant harassment constituting a hostile housing environment do not infringe on the First Amendment rights of accused harassers. *See* Defendants-Appellees' Br. at 47–49. Even were Kings Park Manor a state actor whose conduct the First Amendment constrains, the FHA's protections against

discriminatory harassment comport fully with the First Amendment's guarantees of free speech and expression.

The FHA targets conduct, not speech. *See generally* 42 U.S.C. §§ 3604, 3617. Like any other content-neutral regulation of conduct, its prohibition of discriminatory terms and conditions of housing does not trigger heightened scrutiny under the First Amendment. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (upholding a hate-crimes penalty enhancement law against First Amendment challenge because the statute prohibited conduct on a content-neutral basis without explicitly targeting expression); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”).

This is so even when those protections impact speech incidentally by proscribing discriminatory conduct that takes a communicative form. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (“[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1943))).

That landlords may take reasonable action to prevent discriminatory harassment involving speech is underscored by the array of contexts in which courts have imposed liability on institutions—including housing providers under the FHA—for failing reasonably to do so. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (finding liability under Title VII for employer that did not remedy hostile environment created in part by employee’s lewd remarks and offensive statements about women); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018) (finding landlord liable under the FHA for knowing failure to address one tenant’s “threats, slurs, derisive comments . . . and taunts” directed at another tenant). The First Amendment does not proscribe reasonable preventative steps to combat harassment. *See, e.g., Davis*, 526 U.S. at 649 (finding plaintiff stated a claim under Title IX, over First Amendment concerns raised in dissent, for school board’s failure to prevent hostile environment created in part by one student’s vulgar statements to another).

In sum, housing providers have a number of measures at their disposal to address sexual harassment in housing, and these approaches do not burden an accused harasser’s First Amendment rights.

CONCLUSION

For the reasons stated above, as well as those stated in the brief of Plaintiff-Appellant, this Court should reverse the district court’s judgment and make clear

housing providers' responsibilities under the FHA to address discriminatory tenant-on-tenant harassment when it knew or should have known of the conduct and had the power to correct it.

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APPENDIX

American Federation of State, County and Municipal Employees, AFL-CIO
(AFSCME)

American Jewish Committee

Americans United for Separation of Church and State

Asian Pacific Institute on Gender-Based Violence

Black Women's Health Imperative

California Women Lawyers

Champion Women

Chicago Alliance Against Sexual Exploitation

Clearinghouse on Women's Issues

Coalition of Labor Union Women

Equal Rights Advocates

Gender Justice

GLBTQ Legal Advocates & Defenders

HOPE for All: Helping Others Prosper Economically

In Our Own Voice: National Black Women's Reproductive Justice Agenda

KWH Law Center for Social Justice and Change

Legal Aid at Work

Legal Services of Northern Virginia

Legal Voice

MANA, A National Latina Organization

National Advocates for Pregnant Women

National Alliance for Safe Housing

National Asian Pacific American Women's Forum

National Association of Social Workers (NASW)

National Association of Women Lawyers

National Black Justice Coalition

National Center for Transgender Equality

National Coalition Against Domestic Violence

National Coalition for Asian Pacific American Community Development

National Coalition on Black Civic Participation

National Council of Jewish Women

National Council on Independent Living

National Crittenton

National Housing Law Project

National Network to End Domestic Violence

National Organization for Women Foundation

National Urban League

Oklahoma Call for Reproductive Justice

Religious Coalition for Reproductive Choice

Sanctuary for Families

SisterLove, Inc.

SisterReach

The Women's Law Center of Maryland

Washington Lawyers' Committee for Civil Rights and Urban Affairs

Washington State Coalition Against Domestic Violence

Women Lawyers On Guard Inc.

Women's Bar Association of the District of Columbia

Women's Bar Association of the State of New York

Women's Law Project

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief of the American Civil Liberties Union, New York Civil Liberties Union, National Women's Law Center, and 49 Additional Women's Rights Organizations as Amici Curiae In Support of Plaintiff-Appellant:

(1) complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), stating that amicus briefs cannot be more than 6,500 words, because it consists of 29 double-spaced pages and contains 6,496 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface the 2013 version of Microsoft Word, in 14-point Times New Roman font.

/s/ Devi M. Rao
Devi M. Rao

May 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2020, I electronically filed the foregoing Amici Brief 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 appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Devi M. Rao
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