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

BRIEF OF AARP AND AARP FOUNDATION, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., HUMAN RIGHTS CAMPAIGN, JUSTICE IN AGING, MOBILIZATION FOR JUSTICE, NATIONAL DISABILITY RIGHTS NETWORK, AND SERVICES & ADVOCACY FOR GLBT ELDERS (SAGE) AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations committed to the wellbeing, equality, independence, and dignity of people throughout the United States. Because of their unique interests and expertise they have joined in this brief to argue the importance of robust enforcement of the Fair Housing Act to ensure fair and equal housing for all and that holding landlords liable for hostile housing environments created by residents of their properties, is both necessary to protect vulnerable populations and consistent with landlords existing obligations and business practices.

The individual statements of interest of all *amici* are contained in Appendix 1. *Amici* are:

AARP and AARP Foundation; Lambda Legal Defense and Education Fund, Inc.; Human Rights Campaign; Justice in Aging; Mobilization for Justice, National Disability Rights Network, and Services & Advocacy for GLBT Elders (SAGE).

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Amici file this brief pursuant to the Court's March 18, 2020 Order, stating that "Amicus Curiae briefs from interested parties continue to be invited." Order 2, ECF No. 220.

INTRODUCTION

The broad goal of the Fair Housing Act ("FHA") is to create fair housing throughout the United States through the elimination of segregation and discrimination on the basis of race, color, national origin, sex, disability, and family status. Thus, the FHA creates liability for a wide variety of practices, including discriminatory advertisements and statements, based on their discriminatory nature, not the individual's subjective intent. Harassment has always been, and continues to be, one way that discrimination is expressed and segregation is enforced, sending the message loudly and clearly that a class of people – to which an individual belongs – is not wanted. When a landlord knows that one tenant is severely or persistently harassing another tenant and yet does not take reasonable steps within its control to remedy the harassment, the landlord is liable for discriminatory conduct under the FHA.

Vulnerable populations across the protected characteristics of the statute face the deprivation of equal housing opportunity posed by harassment. People with disabilities face their own history of segregation and harassment, which continues despite efforts towards

greater community integration. Lesbian, gay, bisexual, and transgender ("LGBT") people still face widespread harassment in their homes, including in their retirement years. Indeed, those who are most vulnerable are often the most likely to be subject to harassment – and most likely to be reliant on those providing their housing to take reasonable steps within their control to stop or limit harassment.

Luckily, there are reasonable corrective actions landlords can take within the scope of their duties as landlords. In fact, those actions are already required by state law, and landlords perform them as part of their everyday business practices, to protect the health and safety of tenants, to communicate with their tenants, and to manage to behavior of their tenants. Thus, the liability imposed under the FHA does not create additional, burdensome responsibility, but is part of the package of existing obligations willingly taken on by landlords when agreeing to lease homes to tenants in a country that seeks to ensure fair housing to all.

ARGUMENT

I. The Fair Housing Act's Broad Promise Of Equal Housing Opportunity Obligates Housing Providers To Act To End Discriminatory Harassment.

Congress enacted the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 et seq., "to eradicate discriminatory practices within a sector of our Nation's economy," "to provide . . . for fair housing throughout the United States," and to "provide[]a clear national policy against discrimination in housing," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (quotations omitted). Its goal was to create "truly integrated and balanced living patterns" – a "policy that Congress considered to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (Statement of Sen. Mondale)).

Through its "broad and inclusive" language, which can be "give[n] vitality . . . only by a generous construction," *id.* at 209, 212, Congress set forth robust anti-discrimination provisions to eliminate discriminatory housing practices and bring about residential integration. *See U.S. v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988). In furtherance of its stated purpose – "to provide, within

constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601 – the FHA prohibits practices throughout the housing market that create a culture of discrimination and exclusion. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968) (FHA is "applicable to a broad range of discriminatory practices"); *Comer v. Cisneros*, 37 F.3d 775, 789 (2d Cir. 1994) (FHA prohibits "a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.") (quotation omitted).

Not only does the FHA bar particularized acts motivated by discriminatory animus, such as explicit refusals to sell or lease dwellings, it also addresses the obligations of all those engaged in activities in the national housing market that are necessary to further fair housing. For example, the FHA's prohibition on discriminatory statements, notices and advertising, 42 U.S.C. § 3604(c), may apply regardless of the intent of the party being held accountable, whether that party even engages in the sale or rental of housing, or whether they are subject to the substantive provisions of the FHA. *See, e.g., Ragin v. New York Times Co.*, 923 F.2d 995, 999-1002 (2d Cir. 1991); *U.S. v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972). Such broad

liability provisions seek to ensure that protected classes do not encounter exclusionary messages and advance the goals of the FHA by regulating and restricting activities that create the "public impression that segregation in housing is legal." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990).

Though its original motivation was the eradication of racial segregation, Congress's commitments to integration and inclusionary housing apply to all of the characteristics protected by the FHA. *See, e.g.*, *Curto v. A Country Place Condo. Ass'n, Inc.*, 921 F.3d 405, 411 (3d Cir. 2019) ("Our vehement disapproval of segregation does not weaken when we adjudicate sex discrimination rather than racial discrimination cases."). Congress expanded on this commitment in 1988, adding people with disabilities as a protected class expressly to address their historical segregation and to further their integration into the mainstream of society. H.R. Rep. No. 100-711 at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179. The FHA's goals of equal housing opportunity and non-discriminatory housing patterns were intended to benefit "the whole community." 114 Cong. Rec., *supra*, at 2706 (statement of Sen. Javits).

Moreover, Congress intended the FHA to be broadly remedial, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), and its provisions aim to make whole those who have been injured by discriminatory housing practices. Vigorous, expansive enforcement of those provisions is critical for ending discrimination, including against those "whose complaint is that the manner of managing a housing project affects the very quality of their daily lives." *Trafficante*, 409 U.S. at 211 (quotation omitted). This is precisely the case for a tenant who has faced discriminatory harassment severe or pervasive enough to create a hostile housing environment. Making a housing provider accountable for failing to maintain its properties free from discrimination is a matter of "hold[ing] those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law [so that] the goal of equal housing opportunity is to be reached." *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992).

II. Discriminatory Harassment Is A Tool Of Segregation And Deprives Vulnerable People Of Equal Housing Opportunity.

A. Discriminatory Harassment Perpetuates Segregation And Undermines The Intent Of The FHA.

More than fifty years after the enactment of the FHA, segregation remains pervasive.

> [I]n today's America, approximately half of all Black persons and 40 percent of all Latinos live in neighborhoods without a White presence. The average White person lives in a neighborhood that is nearly 80 percent White. Persons with disabilities are also often segregated or prevented from living in their community of choice, both because a great deal of housing is inaccessible and because they experience high levels of discrimination.

Nat'l Fair Hous. All., *The Case for Fair Housing: 2017 Trends Report* 6 (2017).[2]

Harassment, threats, and violence have a long-established and continuing history in this country as a means to enforce segregation. *See generally* Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing*, 5 Ohio St. J. Crim. L. 47 (2013). Even now, harassment and efforts to keep neighborhoods segregated continue to be pervasive. *See,* Jeannine Bell,

[2] https://bit.ly/CaseforFairHousing.

Restraining the Heartless: Racist Speech and Minority Rights, 84 Ind. L.J. 963, 964 (2009) ("[I]n the past twenty years, minorities moving to all-White neighborhoods in cities across the country have faced slurs, epithets, and other expressions of racism directed at them by White neighbors who wish to drive them out of the community.") Discriminatory harassment claims comprise about 18% of the complaints filed with HUD and state and local fair housing agencies.[3] Harassment cases also continue to be filed at private non-profit fair housing agencies; in fact, these complaints have increased sharply from 2016-18. Nat'l Fair Hous. All., *Defending Against Unprecedented Attacks on Fair Housing: 2019 Fair Housing Trends Report* 9 (2019).[4]

[3] Of all FHA claims filed with HUD and state and local fair housing agencies in fiscal year 2017, 17.8% were filed under 42 U.S.C. § 3617. *See* U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing* 16 (2017) (identified in chart 2.2 as § 818), *available at* https://bit.ly/HUD2017Report. Because hostile housing environment claims violate 42 U.S.C. § 3617 (making it illegal to "coerce, intimidate, threaten, or interfere" with anyone's exercise or enjoyment of their rights under the FHA), along with the far broader 42 U.S.C. § 3604(b) (prohibiting discrimination "in the terms, conditions, or privileges of [the] rental of a dwelling"), the number of claims filed under § 3617 is a rough correlate for the rate of hostile housing environment claims filed.

[4] https://bit.ly/2019HousingTrends.

Rates of harassment are likely to be significantly underreported, however, because victims fear additional harassment, retaliation, or loss of housing. *Id*.

Harassment thus not only thwarts efforts at integration on an individual level, but also ensures that communities remain separated – the exact problem Congress enacted the FHA to overcome. *Trafficante*, 409 U.S. at 211. Applying the FHA to provide redress for discriminatory harassment therefore furthers its goal of "promot[ing] freedom of choice in housing and to prevent[ing] humiliation resulting from . . . discriminatory housing practices." *Burney v. Hous. Auth. of Beaver Cty.*, 551 F. Supp. 746, 769 (W.D. Pa. 1982) (FHA grants people "freedom to move where they will and 'removes the opportunity to insult and discriminate against a fellow American because of his color'" or other protected characteristic) (quoting 114 Cong. Rec., *supra*, at 5643).

B. Discriminatory Harassment In The Home Is Particularly Egregious Given The Special Position The Home Occupies.

Our culture and legal doctrine recognize the home as far more than a physical structure, location, or property transaction. *See* D. Benjamin Barros, *Home As A Legal Concept*, 46 Santa Clara L. Rev. 255

(2006). "[An] overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). This respect is enshrined in the Constitution, *see, e.g.*, U.S. Const. amends. III, IV, and motivates contemporary privacy, search-and-seizure, tort, and criminal law. *See Barros, supra* at 260-269; *Curtis v. Thompson*, 840 F.2d 1291, 1299-1301 (7th Cir. 1988) (reviewing Supreme Court case law recognizing "the right to privacy in the home as fundamental to this nation's concept of ordered liberty," the role of the home as "the sacred retreat to which families repair for their privacy and daily way of living," and "the very basic right to be free from sights, sounds, and tangible matter in the privacy of our homes.") (citations omitted).

Though the courts have applied the same analytical framework for finding hostile environments in the workplace and the home, they have recognized that "harassment in the home is in some respects more oppressive" than harassment in the workplace, noting that it completely invades a person's life, and there is no escape. *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 n.1 (C.D. Cal. 1995). An employee can leave an offensive work environment by going home, but a person living in a

hostile housing environment has no refuge. *See Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010) (harassment in plaintiff's home deemed "even more egregious" because home is "a place where [she] was entitled to feel safe and secure and need not flee"). As one commentator has noted,

> More than simply a physical place, the home is an embodiment of myriad intangible traits that are personally and culturally revered: identity, family, refuge from the pressures of public life, a place to relax, recoup, and rejuvenate . . . . From an appreciation of the privileged status of the home in both our legal system and our culture comes the deduction that an injury inflicted in this cherished place twice offends: once in the act itself against the injured party, and once again as a breach of our intimate veneration for the home itself.

Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 Law & Ineq. 351, 371 (2000). By depriving a person of "their most fundamental and precious haven from abuse," *id.*, discriminatory harassment palpably denies equal housing opportunity.

C. Discriminatory Harassment Denies Equal Housing Opportunity To Vulnerable Individuals.

While harassment and hate crimes have frequently enforced segregation based on race and ethnicity, Bell, *Hate Thy Neighbor,*

supra, at 74, they have served the same pernicious function with regard to other vulnerable groups, including persons with disabilities, older individuals, and LGBT people.[5]

1. Discriminatory harassment denies equal housing opportunity to individuals with disabilities.

People with disabilities have been subjected to their own historical system of segregation, violence, abuse, and harassment based on their status—a system designed to keep them out of the mainstream of society. *See* Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 Md. L. Rev. 162, 166-173 (2004). Justice Thurgood Marshall exposed the "lengthy and tragic history" of legally enforced segregation of people with intellectual disabilities "that can only be called grotesque" in his partial dissent in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part).

[5] For those who possess multiple marginalized identities, the likelihood of experiencing harassment and being denied equal housing opportunity only increases. *See, e.g.,* Melvin J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 Harv. J. L. & Gender 301, 304 (2019); Griff Tester, *An Intersectional Analysis of Sexual Harassment in Housing*, 22 Gender & Soc'y 349, 354-55 (2008).

Harassment plays a distinct role in the segregation of people with disabilities. "It prevents people from taking advantage of the right to work, to be educated, or to use public services in an integrated fashion. It induces people to rely on segregated settings in order to obtain respite from mistreatment." Weber, *supra*, at 177.

In adding disability as a protected characteristic to the FHA, Congress explicitly sought to rectify this history of exclusion for all people with disabilities:

> The Fair Housing Amendments Act . . . is a clear pronouncement of the national commitment to end the unnecessary exclusion of person[s] with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.R. Rep. No. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179. Accordingly, the FHA recognizes harassment and hostile environment claims based on disability. *See Neudecker v. Boisclair*, 351 F.3d 361, 365 (8th Cir. 2003) (plaintiff's allegations that other tenants "constantly harassed and threatened him based on his disability" stated FHA claim). Of all harassment claims filed in 2018, the largest portion

(43.5%) were disability based, whereas race- and sex-based claims each comprised about 16%. *See* Nat'l Fair Hous. All., *Defending*, *supra*, at 18.

Supervisors and co-workers often expect people with disabilities to put up with harassment, including badgering them with deeply personal questions and judging their disabilities, decisions, and accommodations. *See* Jenny Dick-Mosher, *Bodies in Contempt: Gender, Class and Disability Intersections in Workplace Discrimination Claims*, 35 Disability Stud. Q. 4928 (2015).[6] Yet the case law demonstrates how the pervasiveness and vileness of this harassment can completely disrupt tenants' ability to live in their home in peace. For example, one tenant – a man living with HIV – was subjected to a pattern of verbal and physical harassment within his apartment building over the course of eighteen months. His harassers repeatedly and regularly called him names, told him they hoped he would die, threatened him, shared his health condition with all the other residents of the building, improperly accessed his private medical information, disabled the locks to his doors, turned off his electricity, and had his apartment burglarized. *See*

[6] https://dsq-sds.org/article/view/4928/4028.

119-121 E. 97th St. Corp. v. N.Y.C. Comm'n on Human Rights, 642 N.Y.S.2d 638 (N.Y. App. Div. 2006).

Other cases tell similar stories. *See, e.g.*, *Curley v. Bon Aire Props., Inc.*, 2 N.Y.S.3d 571, 572-73 (N.Y. App. Div. 2015) (tenant subjected to constant campaign of selective enforcement of house rules and offensive comments such as "[g]o take your medicine," "[m]aybe there are other places you could live that better cater to crazy people," and, "[o]ther residents don't like having a mentally disabled person living among them."); *St. Clair v. Vt. Human Rights Comm'n*, No. 2005-476, 2006 WL 5837522, at *3 (Vt. Oct. 2006) (man living with HIV/AIDS faced pattern of harassment, including receiving hate mail, having his health status disclosed to other residents, and being accused of trying "to infect as many people as possible before he died").

For older people, unfortunately, harassment on the basis of disability often manifests in the form of bullying those in a senior community or long-term residential community who are most vulnerable or who choose not to hide the signs of aging-related

impairments behind closed doors.[7] Residents may start harassing another resident, including shunning from longstanding social activities, once they find out that person uses a higher level of personal care. *See* Paula Span, *An Unexpected Bingo Call: You Can't Play*, N.Y. Times (Feb. 2, 2015).[8] This type of exclusion can lead to social isolation and a cycle of decline in physical and mental health. *See, e.g.*, Erin York Cornwell & Linda J. Waite, *Social Disconnectedness, Perceived Isolation, and Health Among Older Adults*, 50 J. Health & Soc. Behav. 31 (2009) (social disconnectedness is associated with worse physical health; loneliness is associated with worse mental health).

2. Discriminatory harassment denies equal housing opportunity to LGBT people.

Harassment on other bases can also pervade senior living communities, as illustrated in *Wetzel v. Glen St. Andrew Living*

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[7] Felicia Jo VandeNest, *Bullying in Senior Living Facilities: A Qualitative Study* 14 (May 2016) (M.A. thesis, Minnesota State University, Mankato) (on file with Cornerstone: A Collection of Scholarly & Creative Works for Minnesota State University, Mankato), https://cornerstone.lib.mnsu.edu/etds/601 (majority of long-term care staff surveyed reported that victims of bullying were more likely to have some kind of cognitive impairment and/or physical disability; none reported that victims were likely to be cognitively or physically able.)

[8] https://bit.ly/NYTBingoCall.

Community, LLC, 901 F.3d 856 (7th Cir. 2018). Ms. Wetzel alleged a relentless pattern of verbal harassment, slurs, threats, intimidation, and three incidents of assault by other residents over the course of more than fifteen months. *Id.* at 859-60. The harassment began after she shared that she was a lesbian who had raised a family with another woman, and occurred in every area of the housing facility – the lobby, dining room, laundry room, mail room, and elevators, as well as in her own apartment – causing Ms. Wetzel to forego services that were part of her lease and effectively retreat from all common spaces. *Id.* at 860-61. Despite her regularly reporting these incidents, rather than taking action to stop the harassing conduct, the facility staff's response ranged from apathetic (telling her not to worry about it, denying her accounts, dismissing incidents as accidents, and calling her a liar) to retaliatory (moving her to less desirable dining room seating, barring her from the lobby, and attempting to evict her). *Id.*

The Seventh Circuit held that the litany of abuse Ms. Wetzel alleged clearly constituted a hostile housing environment based on her sex, including her sexual orientation, in violation of the FHA. *Id.* at 862 (citing *Hively v. Ivy Tech. Comty. Coll. of Ind.*, 853 F.3d 339 (7th Cir.

2017) (en banc) (discrimination based on sexual orientation constitutes discrimination based on sex).[9] The court rejected the housing facility's demeaning depiction of the harassment as "ordinary 'squabbles' and 'bickering' between 'irascible,' 'crotchety senior resident[s],'" finding the harassment to be both severe and pervasive. *Wetzel*, 901 F.3d at 862.

Ms. Wetzel's experience is not unique. LGBT older adults experience high levels of harassment in their homes. *See* Nat'l Res. Ctr. on LGBT Aging, *The Need for LGBT-Inclusive Housing* (2014).[10] In a study of LGBT people living in senior care settings, respondents complained of a variety of discrimination by the providers based on their sexual orientation or transgender status – denials of admission or discharges, refusals to provide basic services, restrictions on medical care, refusals to honor health care directives – but the most frequently reported problem was verbal abuse and harassment by the other residents. Justice in Aging et al., *LGBT Older Adults in Long Term*

[9] *See also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (same), *cert. granted sub nom. Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019).

[10] https://bit.ly/InclusiveHousing.

Care Facilities: Stories from the Field 1-17 (2015).[11] Fear of mistreatment in senior living settings tops the list of LGBT older adults' concerns. In a study done by AARP, 60% reported that they fear verbal or physical harassment, and the vast majority fear not being able to be out or being forced to hide or deny their LGBT identity. *See* AARP Research, *Maintaining Dignity: Understanding and Responding to the Challenges Facing Older LGBT Americans* 12, 45 (2018).[12]

LGBT people are particularly vulnerable to discriminatory harassment in senior housing. Both the perpetrators and targets of this harassment come from a generation when LGBT people not only had fewer legal rights, but were actively criminalized and pathologized, making perpetrators bolder and victims unaware of or afraid to assert their current rights. Movement Advancement Project & Servs. & Advocacy for GLBT Elders, *Understanding Issues Facing LGBT Older Adults* 3-4 (2018).[13] Moreover, victims of this harassment may have faced similar trauma in the past and thus be more easily traumatized in

[11] https://bit.ly/LGBTQLongTermCare.

[12] https://bit.ly/MaintainingDignity.

[13] https://bit.ly/UnderstandingIssues.

the present. Equal Rights Ctr., *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples* 10 (2014).[14] Finally, LGBT seniors' need for the housing or services offered may be so great that it outweighs the pain of discrimination. They may endure harassment because they have no other options. *Id*. at 8.

This vulnerability to harassment in housing is not unique to older members of the LGBT community, as stigma and discrimination across the life course undermine the ability of LGBT people to access stable, safe, and affordable housing. *See* Adam P. Romero et al., *LGBT People and Housing Affordability, Discrimination, and Homelessness* 4 (2020).[15] This includes family rejection, widespread discrimination in employment and other settings, and the residual effects of marriage discrimination translating into having fewer financial and/or social resources. *Id*. LGBT people are significantly more likely to be renters, where they face widespread harassment and discrimination, and must

[14] https://bit.ly/OpeningDoors2014.

[15] https://bit.ly/LGBTHousing2020.

therefore look to their housing providers to ensure equal housing opportunity. *See id.* at 3-4.

3. Poverty exacerbates the vulnerability of tenants to discriminatory harassment.

When neighbor-on-neighbor harassment has these profound negative effects, "the powerlessness and lack of ability to get help from individuals who hold authority (i.e., the landlord/manager) is common," leading the victim "in many of the cases, if the harassment does not cease. . . to move (exclude themselves)." Vincent J. Roscigno et al., *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Probs. 49, 64 (2009). Even if the resident does not move, "the psychological research has demonstrated that targets of bias-motivated crimes suffer substantial harm." Bell, *Hate Thy Neighbor*, *supra*, at 85.

Some tenants do not have the option to move because of the cost or difficulty in getting out of a lease, so they must continue to be in direct contact with the offending co-tenant. *Id.* at 62. This is a particular challenge for low-income people, which many members of vulnerable populations likely to face harassment are. For example, adults with disabilities are twice as likely to live in poverty as those without a

disability. *See* Nat'l Council on Disability, *National Disability Policy: A Progress Report* 21 (2017).[16] As well, after controlling for other factors that affect risk of poverty, such as age, race, disability, and language, LGBT adults, as a whole, have at least 15% higher odds of being poor than non-LGBT adults, with transgender people and bisexuals especially vulnerable. *See* Romero, *supra*, at 3, 10. Those with low incomes face limited housing options, and may therefore be forced to put up with intolerable harassment just to have a roof over their heads. *See* Lindemyer, *supra*, at 371-72 (noting that "[r]ental housing inherently implicates issues of economic status," leaving those for whom home ownership is unattainable at the mercy of landlords).

III. Holding Landlords Liable For Failing To Take Corrective Action For Discriminatory Tenant-on-Tenant Harassment Is Consistent With Their Legal Responsibilities And Is Not Unduly Burdensome.

Fortunately, landlords can take reasonable steps to address the harassment. As the *Wetzel* court made clear, landlords have "'an arsenal of incentives and sanctions . . . that can be applied to affect conduct'"

[16] https://bit.ly/DisabilityPolicy2017.

and are only held liable for failing to end tenant-on-tenant harassment when they fail to use them. 901 F.3d at 865.

A. Landlords' Existing Legal Obligations To Their Tenants Establish Responsibilities That Require Them To Remedy Harassment On Their Property.

Because of the paramount importance of a person's right to be secure in his or her home, relationships between landlords and tenants create significant responsibilities for landlords. Landlords' obligations derive from common law principles having their roots in feudal estates, but are primarily determined by modern contract law, with substantive and procedural rights further determined by statute. *See generally*, Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. Rev. 503 (1982).

1. Landlords' duties under the implied warranty of habitability already require them to remedy nuisances caused by other tenants.

One of a landlord's most substantial obligations under the common law is the implied warranty of habitability. Acknowledged by the courts as early as 1931, it is a covenant that the leased premises will be fit to live in. *Id*. at 546 (1982). Today, forty-nine states and the

District of Columbia have adopted a statutory warranty of habitability.[17] *See, e.g.*, N.Y. Real Prop. Law § 235-b.

A landlord's responsibility under the warranty of habitability does not hinge on whether the landlord caused the condition that made the premises uninhabitable; it extends to conditions "occasioned by ordinary deterioration, work stoppage by employees, acts of third parties or natural disaster." *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1294 (N.Y. 1979). Nor is the warranty limited to the physical conditions of the property, such as lack of heat, hot water, and peeling paint, but also applies to infringements on the ability to use and enjoy one's home. For example, landlords breach the implied warranty of habitability when they fail to rectify a nuisance caused by another tenant. If loud and continuous noise by another tenant makes the premises uninhabitable, "the tenant is entitled to relief even if the landlord did not cause the uninhabitability, at least in situations where, as here, the landlord could have taken steps to try to make the premises habitable

[17] Michael Brower, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DePaul L. Rev. 849, 860-861 (2011).

by trying to restrain the loud and continuous noise made by the other tenant but chose to do nothing at all." *Cohen v. Werner*, 368 N.Y.S.2d 1005, 1008 (N.Y. Civ. Ct. 1975), *aff'd*, 378 N.Y.S.2d 868 (N.Y. App. Term 1975). *See also In re Nostrand Gardens Co-Op v. Howard*, 634 N.Y.S.2d 505, 505–06 (N.Y. App. Div. 1995) (landlord liable for failing to take steps to abate nuisance from late night and early morning noise emanating from neighbor's apartment).

This includes when the nuisance caused by the other tenant takes the form of harassment. In *Auburn Leasing Corp. v. Burgos*, 609 N.Y.S.2d 549, 551 (N.Y. Civ. Ct. 1994), one tenant was repeatedly harassed by another – her car was repeatedly damaged, people would bang on her door making threats and cursing, and stones were thrown and shots fired at her door. *Id.* at 550. The court dismissed the landlord's complaint seeking damages after she vacated the premises due to the harassment, finding that the landlord "became obliged to take steps to protect the tenant" from the harassment and that its failure to do so "breached the statutory implied warranty of habitability . . . as well as the express warranty of use and quiet enjoyment." *Id.* at 551.

Requiring landlords to take reasonable steps to ensure habitability by eliminating discriminatory harassment is thus entirely consistent with landlords' existing duties under the implied warranty of habitability to make the premises habitable for their tenants by remedying a nuisance caused by another tenant.

2. Taking reasonable steps to remedy tenant-on-tenant harassment is consistent with landlords' existing duties under common law property and tort principles.

In addition to ensuring premises are fit for habitation, landlords have a common-law duty to protect tenants from foreseeable harm, and specifically to protect them from "foreseeable criminal conduct by a third person" by "tak[ing] minimal precautions." *Mason v. U.E.S.S. Leasing Corp.*, 756 N.E.2d 58, 60 (N.Y. 2001). Claims of tenants attempting to hold their landlords liable for criminal conduct of a third party have regularly been allowed to go to trial. *See, e.g., Ramos v. N.Y.C. Hous. Auth.*, 48 N.Y.S.3d 198, 200 (N.Y. App. Div. 2017) (landlord liability for third-party assault based on showing that "negligent failure to provide adequate security was a proximate cause of the injury").

This obligation extends to foreseeable harm caused by other tenants. In *Reinert v. 291 Pleasant Avenue, LLC*, No. 570508/10, 2011 WL 4084251 (N.Y. App. Term Sept. 14, 2011), the court reinstated a tenant's damages claim against a landlord for injuries sustained in an assault by another tenant in a common hallway. Finding that the plaintiff had repeatedly notified her landlord in writing of the other tenant's prior conduct, including verbal insults, threats of harm, acts of vandalism, and a prior assault, the court concluded she should be able to show both the foreseeability of the assault and that the landlord had "the ability and opportunity to control the offending tenant." *Id*. at *2.

These same landlord liability principles are embodied in the FHA, obligating landlords to ensure equal housing opportunity to the tenants to whom they rent apartments. *See, e.g.*, *Wetzel*, 901 F.3d at 864-66 (FHA imposes on landlord "duty not to discriminate in housing conditions," which is violated if landlord "had, but failed to deploy, available remedial tools" to end tenants' discriminatory harassment of another); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012) (Congress intended FHA to apply to landlord-tenant relationship to prevent transactions that

"deprived protected classes of housing opportunities"); *Bethishou v. Ridgeland Apartments*, No. 88-C-5256, 1989 WL 122434, at *1 (N.D. Ill. Oct. 2, 1989) ("The Fair Housing Act places on the owner of rental property the responsibility for insuring that the property complies with the Act.") (quotation omitted).

As the Supreme Court has recognized, "an action brought for compensation by a victim of housing discrimination is, in effect, a tort action[,]" *Meyer v. Holley*, 537 U.S. 280, 285 (2003), with the FHA defining a "legal duty" to refrain from discriminatory housing practices and "authoriz[ing] the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Recognizing the obligation to end and remedy discriminatory tenant-on-tenant harassment is thus consistent with both the FHA and the landlord's existing obligations under the common law.

B. Landlords Already Have The Authority And Ability To Enforce The Lease And Remedy Tenant Complaints.

Along with maintaining habitable and safe premises, tenant management and lease enforcement are part of day-to-day residential

business operations. Contrary to the dissent's assertion that landlords have no way to control tenants perpetrating harassment, Livingston Dissenting Op. 21-22, ECF No. 176, landlords regularly shape the desired behavior of their tenants through their ordinary interactions.[18]

One formal way is through written notices of violations. For instance, in New York, landlords may send a notice to the tenant stating that rent has not been received within five days of the date stated in the lease. *See* N.Y. Real Prop. Law § 235-e(d). The notice must inform tenants of the right to cure this violation of the most essential lease obligation by demanding that the tenant pay the rent within 14 days or face an eviction proceeding. *See* N.Y. Real Prop. Acts. Law § 711(2).

[18] The National Association of Residential Property Managers includes tasks to get desired outcomes from tenants -- "negotiate with tenants, handle difficult issues and enforce the terms of the rental agreement" and "evict tenants" -- as among those its members can effectively perform. *See Why Use a NARPM® Member?*, National Association of Residential Property Managers, https://bit.ly/WhyNARPM (last visited May 7, 2020).

N.Y. Real Prop. Acts Law § 711 provides a similar procedural mechanism for commencing a behavior-based eviction unrelated to rent payment. New York requires that the power to terminate the lease before its term has ended be explicit in the lease agreement. *See 40 W. 67th St. Corp. v. Pullman*, 790 N.E.2d 1174, 1181 (N.Y. 2003). The Kings Park Manor, Inc. standard lease had such a provision.[19] As part of the resulting eviction proceeding, the landlord must establish "that the tenant is objectionable." N.Y. Real Prop. Acts. Law § 711(1). "To make a tenancy objectionable, the use of the property by the tenant must be unwarrantable, unreasonable, or unlawful, to the annoyance, inconvenience, discomfort, or damage of another. Objectionable involves the idea of continuity or recurrence, an isolated instance of objectionable conduct is insufficient." *Valley Courts, Inc. v. Newton*, 263 N.Y.S.2d 863, 866 (Syracuse City Ct. 1965) (citation omitted). Serious and persistent race-based harassment and threats to someone's life fit

[19] Their lease reserves the ability to terminate on notice if the tenant were to " . . . allow or commit any objectionable or disorderly conduct, noise or nuisances in dwelling unit by the Tenant, his/her guests or invitees that disturbs or interferes with the rights, comforts or conveniences of other residents." J.A. at 53.

this description. Use of racial epithets and threats of violence against other tenants and a doorman, verbal abuse and threats of physical violence to a neighbor sufficient to warrant a call to the police, and an altercation with a superintendent, have been held sufficient to allege objectionable behavior that would warrant eviction. *See Domen Holding Co. v. Aranovich*, 802 N.E.2d 135 (N.Y. 2003).

Using these ordinary tools usually suffice to respond to a tenant's harassing behavior.

> Typically, tenants respond to the threat of eviction by changing their behavior, because the threat of eviction is a powerful remedy. When faced with such a threat, tenants have a choice between simply stopping their campaign of harassment or relocating. In many instances refraining from harassing is much easier than finding a new, suitable place to live . . . Through the threat of eviction, landlords are capable of ending harassment.

Cassia Pangas, *Making the Home More Like A Castle: Why Landlords Should Be Held Liable for Co-Tenant Harassment*, 42 U. Tol. L. Rev. 561, 589 (2011). *See also Wetzel*, 901 F.3d at 865 ("The mere reminder that eviction (along with liability for attorneys' fees) was a possibility might have deterred some of the bad behavior."). Of course, landlords are free to use remedies other than eviction so long as they are

reasonably calculated to end the harassment. For example, as the *Wetzel* court noted, depending on lease terms, a landlord could update its handbook or policies to clarify anti-harassment rules, or suspend common area privileges for those who perpetrate harassment. 901 F.3d at 865. The key is that landlords act reasonably in utilizing whatever tools they have at their disposal to remedy the hostile housing environment. *See* Aric Short, *Not My Problem. Landlord Liability for Tenant-on-Tenant Harassment*, 72 Hastings L.J. (forthcoming 2021) (manuscript at 45-49).[20]

By the same token, those ordinary tools provide tenants with a mechanism to notify landlords of matters requiring redress. Tenants make complaints as part of the normal course of residential management. They may complain about broken windows, rats, or lack of snow removal. They may report improper behavior by a manager, repeated loud noise by a hard-of-hearing neighbor, or harassment by a co-tenant. The owner of the premises owes the tenant the duty to review all complaints received and take reasonable corrective action. While

[20]*Available at* https://bit.ly/LandlordLiabilityApr2020.

"[e]xactly what steps must be taken by a landlord in any particular case will be fact-dependent," a landlord could be expected to respond promptly to harassment claims, conduct a reasonable investigation, create an incident report, and, upon concluding that unlawful harassment has taken place, "such harassment could be addressed, depending on its severity, with warnings, the threat of eviction, or even actual eviction." Short, *supra*, at 46-47.

To be clear, the landlords' obligation to respond to the harassment does not arise because they are to blame for the discriminatory action of the other tenant, just as they could not be blamed for an unusually snowy winter if the complaining tenant slipped on the snowy walk. Instead, the liability arises precisely out of the responsibility of the landlord to act as a landlord and address the hazard. Stated differently, a decision to reverse and remand in this case is not an endorsement of a rule that would hold a landlord accountable for the racist opinions, sexist standards, or disability stereotypes held by its tenants – or more importantly, for the actions taken by the tenants based on those personal beliefs. Rather, the landlord would be held liable for the failure to do its job, for its failure to investigate and resolve the complaint of

harassment, for tolerating the harassment and failing to remedy it, actions that "fit squarely within the statutory prescription against discrimination in the provision of services in connection with her rental of one of their dwellings" Pangas, *supra* at 578 (citing *Bradley v. Carydale Enters.*, 707 F. Supp. 217, 224 (E.D. Va. 1989)). A landlord's failure to employ the tools at its disposal to remediate a tenant's harassment should be actionable under the FHA.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the district court and make clear that the FHA's broad promise of equal housing opportunity obligates those who have undertaken to provide rental housing to use the tools they have to end discriminatory hostile housing environments created by residents of their properties.

Respectfully submitted,

/s/ *Karen L. Loewy*

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Dated this 7th day of May, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), the undersigned certifies that this brief:

(i) complies with the type-volume limitations of Federal Rules 29(a)(4)(G) and 32(a)(7)(B)(i) and Second Circuit Rule 29.1(c) because it contains 6,673 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Karen L. Loewy*

CERTIFICATE OF SERVICE

I certify that on this 7th day of May, 2020, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Karen L. Loewy*

APPENDIX 1

APPENDIX 1 – STATEMENTS OF INTEREST

AARP AND AARP FOUNDATION

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation advocate for the fair housing rights of people who desire to age in place in their homes and the ability of the oldest and most vulnerable portion of the population to have access to appropriate housing options in their community. AARP has an interest in vigorous enforcement of the Fair Housing Act and its prohibitions against discrimination.

LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBT people, and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or amicus in seminal cases regarding the rights of LGBT people and people living with HIV under federal anti-discrimination laws. *See, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc), *cert. granted sub nom. Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

Of special relevance here, Lambda Legal successfully represented the plaintiff-appellant in *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018), in which the Seventh Circuit held that the Fair Housing Act "creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment." *Id.* at 859. Lambda Legal has also served as counsel or *amicus curiae* in other cases to address discrimination and

harassment faced by LGBT people and people living with HIV in housing, including; *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) and *Franke v. Parkstone Living Center, Inc.*, No. 4:09-CV-00341, 2009 WL 10711616 (E.D. Ark. 2009). Lambda Legal is committed to ensuring that non-discrimination protections are appropriately understood and applied to comprehensively address the housing disparities experienced by the diverse individuals and families of the communities we serve.

HUMAN RIGHTS CAMPAIGN

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. HRC advocates for fair and equal housing policies and legislation at the federal and state levels, and as *amicus* in other appellate cases, *see, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015).

JUSTICE IN AGING

Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, we seek to ensure the health and economic security of older adults with limited income and resources.

Since 1972, Justice in Aging (formerly the National Senior Citizens Law Center) has worked to promote the independence and well-being of low-income older adults, especially women, members of the LGBT community, people of color, people with disabilities and people with limited English proficiency.

We work to ensure access to benefits programs that allow low-income older adults to live with dignity and independence. In addition, we work to reduce housing instability and homelessness among low-income older adults. We are concerned about the impact of discrimination against older adults based on race, age, national origin, or as members of the LGBT community.

MOBILIZATION FOR JUSTICE

Mobilization for Justice (formerly MFY Legal Services) envisions a society in which there is equal justice for all. Mobilization for Justice's mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. Mobilization for Justice does this by providing the highest quality direct civil legal assistance, conducting community education and building partnerships, engaging in policy advocacy, and bringing impact litigation. Mobilization for Justice provides New Yorkers who have disabilities with the legal assistance they need to remain in the community, including helping them combat the discrimination that they face in housing. Because of the far-reaching implications of this matter for its clients, Mobilization for Justice has a substantial interest in the outcome of this matter.

NATIONAL DISABILITY RIGHTS NETWORK

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and ones affiliated with the Native American Consortium, which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally-based advocacy services to people with disabilities in the United States. NDRN and its members advocate for the fair housing rights of people with disabilities to have access to appropriate and accessible housing options in their communities. NDRN has an interest in vigorous enforcement of the Fair Housing Act and its prohibitions against discrimination.

SERVICES & ADVOCACY FOR GLBT ELDERS (SAGE)

Services & Advocacy for GLBT Elders (SAGE) is the largest and oldest national organization dedicated to improving the lives of LGBT older adults. Founded in 1978, SAGE coordinates a network of affiliates across the country, offers supportive services and consumer resources for LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for aging providers and LGBT organizations, largely through its National Resource Center on LGBT Aging. Recognizing that LGBT older people face profound challenges in securing welcoming and affordable housing, SAGE launched our national LGBT Elder Housing Initiative. Aimed at increasing the LGBT-welcoming elder housing options available to LGBT older people across the country, the Initiative leverages five strategies to bring systemic change to the housing sector. These strategies include: building LGBT-friendly housing in New York City; advocating nationally against housing discrimination; training eldercare providers to be LGBT culturally competent; educating LGBT older people about their housing rights; and helping builders across the U.S. replicate LGBT-friendly elder housing.