15-1823

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,
Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
No. 2:14-cv-03555-ADS-GRB
THE HONORABLE ARTHUR D. SPATT, DISTRICT JUDGE, PRESIDING

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF PLAINTIFF APPELLANT

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a, AARP Experience Corps, AARP Insurance Plan, also known as the AARP Health Trust, and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

Respectfully submitted,

s/Susan Ann Silverstein
Susan Ann Silverstein
Senior Attorney

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonprofit, nonpartisan organization that helps people turn their goals and dreams into possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is deeply concerned about the fair housing rights of its members 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.

[1] Amicus curiae certifies that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than amicus curiae, their members and their counsel) contributed money intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

Congress enacted the Fair Housing Act (FHA) in 1968 with the ultimate purpose of creating truly integrated and balanced living patterns. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The FHA states that "the policy of the United States is to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

In order to accomplish these goals, Congress ensured that the FHA addresses not only intentional denial of housing to those wishing to rent or buy dwellings, but also reaches the discriminatory effects of neutral policies, without requiring proof of discriminatory effect, as the Supreme Court recently affirmed. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. ___, 135 S. Ct. 2507 (2015). The FHA also prohibits practices throughout the housing market that create a culture of discrimination and exclusion by including provisions such as its prohibition on discriminatory statements, notices and advertising. 42 U.S.C. § 3604(c). These anti-exclusionary provisions apply without regard to the intent of the individual or entity being held accountable, may apply where the responsible party does not itself even engage in the sale or rental of housing, or is specifically exempt from the substantive provisions of the FHA. In drafting the FHA with such broad liability provisions Congress sought to ensure that protected classes do not encounter exclusionary messages and that its goal of integration would truly be

achieved. In 1988 Congress added people with disabilities as a protected class to the FHA with the express purpose of addressing the historical segregation of people with disabilities 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 principles of integration and an inclusionary housing market apply to all the classes protected by the FHA.

Harassment and the creation of hostile environments continue to be part of the mechanism by which the culture of segregation is enforced, and thus an appropriate target for FHA enforcement. The psychological harm to individuals who suffer discrimination based harassment can be worse than the harm they suffer if they are actually denied a unit based on discrimination. If a landlord has actual knowledge that one of its tenants is harassing another based on a discriminatory reason, and fails to take actions reasonably calculated to end the harassment, the landlord is not liable for the harassing tenant's act of discrimination based harassment itself. Rather, the landlord is liable *as a landlord* for failing to act in its capacity as a landlord. The landlord is liable for not taking actions it has the power to take as a landlord under the governing landlord-tenant law, provided through the terms of the lease, statutory, and common law. These actions are those that the landlord takes on a regular basis during the course of ordinary business. The FHA requires landlords to be held responsible for their failure to take reasonable

corrective action in response to known discrimination based harassment, a responsibility far more important, but no more onerous, than its duty to enforce rules about noise or late payment of rent.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT A LANDLORD'S FAILURE TO TAKE CORRECTIVE ACTION AGAINST A TENANT WHO IT KNOWS IS RACIALLY HARASSING ANOTHER TENANT DOES NOT VIOLATE THE FAIR HOUSING ACT.

A. The district court's rulings undermine the purposes and goals of the FHA to end segregation, create equal housing opportunity and integrate the housing market.

In 1968, in the wake of the assassination of Dr. Martin Luther King, Jr., in the setting of national social unrest, and to address the underlying causes of that upheaval, Congress enacted Title VIII of the Civil Rights Act, the Fair Housing Act (FHA), 42 U.S.C. § 3601-3619. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. ___, 135 S. Ct. 2507 (2015). Just two years earlier, as the country was already struggling,

> President Lyndon Johnson [had] established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. After extensive fact-finding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. ... The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated

> communities. The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white— separate and unequal." (Internal citations omitted).

Id. at 2516. In response, Congress passed the "comprehensive and enforceable" anti-discrimination housing law the Kerner Commission recommended. *Id.* The FHA states that is it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. At the time of its passage the FHA prohibited housing discrimination based on race, color, national origin, religion and sex. 42 U.S.C. § 3604(a). In 1988, Congress added familial status and disability as protected classes under the FHA. *See* Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (1988).

The Supreme Court has long recognized that the ultimate purpose of the FHA was to create "truly integrated and balanced living patterns." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (*quoting* 114 Cong. Rec. 3422 (1968) (Statement of Senator Mondale)). The principles embodied in the FHA reflect a "policy that Congress considered to be of the highest priority." *Id.* The Supreme Court has also recognized that "the language of the Act is broad and inclusive," *Trafficante*, 409 U.S. at 209, and has repeatedly stated that it can be "give[n] vitality . . . only by a generous construction." *Id.* at 212. *See also*, *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 731 (1995).

In crafting the FHA, Congress understood that reaching the goal of fair housing across the land would require far more than prohibiting intentional discrimination and individual acts related to the refusal to rent or sell housing. The FHA recognizes disparate impact claims, in which policies that might appear neutral on their face, such as zoning laws, but have discriminatory effects, can violate the Act. *See generally Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507. Even beyond wanting the FHA to remedy the economic problems associated with segregated housing patterns, such as lost suburban job opportunities for minorities, Congress sought to address the specific problem of "lack of experience in actually living next" to each other. 114 Cong. Rec. 2275 (1968) (statement of Sen. Mondale). Congress intended to benefit not only black Americans, or other minority groups, or the protected classes delineated in the Act, but "the whole community." 114 Cong. Rec. 2706 (1968) (statement of Sen. Javits).[2]

Many provisions of the FHA address Congress's concern with ending a culture of discrimination and exclusion. For instance, the FHA prohibition against discriminatory advertising reaches those who are otherwise not engaged in any

[2] Likewise, Congress sought to reduce residential segregation when it banned familial status and disability discrimination in passing the FHAA. The prohibition against discriminatory advertising is meant to reduce barriers that might deter persons with disabilities from seeking homes and neighborhoods that must be open to them under the FHA. *Hous. Opportunities Made Equal v. Cin. Enquirer, Inc.*, 943 F.2d 644, 652 (6th Cir. 1991).

other discriminatory housing practices or who are not even otherwise covered by the FHA. *See* 42 U.S.C. § 3604(c). Thus, a newspaper can be held liable for publishing a discriminatory ad even if it does not sell or rent dwellings. *U.S. v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972). In addition, § 3604(c) is essentially a strict liability statute – all that is required is that the challenged statement, notice or ad be made with respect to the sale or rental of a dwelling and that it indicates discrimination to an ordinary reader or listener. Robert Schwemm, *Hous. Disc. Law and Litig.* § 15.1 (2015). There is no requirement that the publisher of the statement, notice, or advertisement have the intent to discriminate. *Id*. Congress considered the importance of creating non-exclusionary environments so seriously that even the set of small-lodging landlords who are exempt from FHA coverage can *legally withhold a housing unit from someone in a protected class but not say or advertise that fact. Hunter*, 459 F.2d at 213 (even exempted landlord has no right to publicize intent to discriminate).

> Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aims of the Act: seeing large numbers of "white only" advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a non-discriminatory basis.

Hunter, 459 F.2d at 214. Congress, through § 3604(c), sought to eradicate discriminatory messages of exclusion related to the housing market broadly. Statements beyond those made in the context of advertising that provide a message of exclusion are prohibited within the broad ambit of § 3604(c), including forbidding the recording of deeds with racially restrictive covenants. *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972).

Appropriate landlord liability for tenants who create discriminatory hostile environments, like liability for advertising, notices and statements, also advances the goals of the FHA by regulating and restricting activities that create the "public impression that segregation in housing is legal." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990). It also embodies "the public interest in open housing" *Id.* at 31. Congress understood the need to protect "against [the] psychic injury caused by discriminatory statements made in connection with the housing market." *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 424-25 (2d Cir. 2005). Just as ads that use exclusionary and targeted language lead to the perception that discrimination in housing is both acceptable and the norm, in contrast to the intent of the FHA, *Spann*, 465 F.2d at 30, the use of such language in and around one's home, and tolerated by one's landlord, leads to the inevitable conclusion that discrimination is acceptable and the norm.

The legislative history of the FHA makes clear that protection from the emotional injury resulting from discriminatory statements was one of the purposes behind the enactment of § 3604(c). For example, Senator Mondale remarked, "I still believe that one of the basic and most fundamental objections to discrimination in the sale or rental of housing is the fact that through public solicitation the [African-American] father, his wife and children are invited to go up to a home and thereafter be insulted solely on the basis of race." 114 Cong. Rec. 5641 (1968). As the following section demonstrates, protection against the emotional harm of racial and other harassment rooted in discrimination and protection from having to live in a discriminatory hostile environment is at the core of Congress's goal of providing fair housing for all and in enacting its full array of provisions that prohibit discrimination and foster integration.

B. Harassment is the means by which anti-integrationist movements are historically enforced, discrimination is expressed and segregation is furthered.

More than forty-five years after the enactment of the FHA racial and other discrimination based harassment remains pervasive,[3] comprising about 15% of the

[3] *See, e.g.,* Jeannine Bell, *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.")

complaints filed with HUD and state and local fair housing agencies.[4] Harassment cases also continue to be filed at private non-profit fair housing agencies although, as the National Fair Housing Alliance has noted, rates of harassment are likely to be well underreported because, "it is often committed against individuals with high housing insecurity, including poor women of color and people with disabilities." Nat'l Fair Hous. Alliance, *Where You Live Matters: 2015 Fair Housing Trends Report*, 25 (2015), *available at* http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=SYWmBgwpazA%3d&tabid=3917&mid=5321.[5]

Harassment, threats, and violence have a long-established and continuing history in this country as a means to enforce the racial caste system and in particular segregation. *See generally*, Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing* (2013).

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[4] Of all claims filed with HUD and state and local fair housing agencies in fiscal year 2013, 15% were filed under §3617. U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing, FY 2012-2013* (2014), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf. §3617 covers certain types of harassment, such as coercion and retaliation. A claim against a landlord for failure to take reasonable action against a co-tenant for harassment would more properly be brought under §3604, but HUD does not have statistics breaking down how many of those cases are filed or include claims or facts based solely on harassment.

[5] Hate crime experts suggest that a large portion of such crimes occur in and around the *victims'* homes. Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing* 200 (2013). As in the subject case, an incident may be a hate crime and a basis of a FHA violation.

In order to serve its function, much of the policing behavior occurs at or before move-in:

> Move-in violence directed at minorities who have just moved to neighborhoods is so threatening because it self-consciously invokes a well-known history of violence directed at minorities who "stepped out of line." In the Reconstruction South, for instance, minorities who transgressed social boundaries were lynched. Though it has been decades since blacks were lynched, moving to white neighborhoods may feel to some minorities as if they are crossing some sort of invisible color barrier. Contemporary incidents, even if there are proportionally few of them, reinforce the notion that minorities who move to white neighborhoods are breaking some sort of color barrier. If an incident happens, it becomes hard not to see it as a message that the minority family does not belong. It is therefore not surprising that many minorities victimized by move-in violence leave the neighborhood.

Bell, *supra*, at 200-201. Within this historical context harassment based on race or minority status *in or directed at one's home or living place* cannot be passed off as unimportant or minor.

"Since the founding of the United States, American legal doctrine has enshrined this cultural understanding of the home as a place that is specially protected." Bell, *supra*, at 16. It is the importance that we as individuals and as a society that we ascribe to a "home" that accounts for the fact that harassment in one's home may cause harm even greater than that caused by being denied the home in the first instance. Someone who has been subject to repeated harassment

where there is no physical injury may take longer to recover emotionally and in day to day activities than someone who suffered a major physical assault.

> If one is convinced that being a victim was a coincidence of time and place, at least one can try to avoid those circumstances. But correctly believing that one is being attacked for how one looks, or for one's identity in a given group, can create an ongoing level of fear that one is forever at risk.

Geoffrey L. Greif & Paul H. Ephross, *Group Work with Populations at Risk* 237 (3rd ed. 2010).

Harassment not only controls efforts at integration on an individual level. It ensures that communities remain separated by race – the exact problem the Fair Housing Act was enacted to overcome. *Trafficante*, 409 U.S. at 211. Research has demonstrated the correlation between hate crime and segregation, in one study showing that more racially motivated hate crimes occur in more racially segregated cities. Bell, *supra*, at 74.

That there is both greater tolerance in our modern society and that we as a society are still having to deal with hate crimes may at first seem like a paradox. *See* Bell, *supra*. Despite the fact that the country is more racially diverse than has ever been, spatial segregation has changed very little over the last twenty years.[6]

[6] *See* John R. Logan & Brian J. Stults, *Racial and Ethnic Separation in the Neighborhoods: Progress at a Standstill* (2010), http://www.s4.brown.edu/us2010/Data/Report/report1.pdf.

Spatial segregation leads to targets of racial harassment and violence feeling outnumbered, vulnerable, and unprotected. As a result, if they choose to move, they are likely to move out of the neighborhood entirely, which often forces them back to their prior, less integrated neighborhood, more likely to have been poor, dangerous and lacking in opportunity. Bell, *supra,* at 203.

Harassment and threats of violence are even more ominous when they come from known neighbors close to your own home than from the general neighborhood or community at large. In one review of race-based housing discrimination cases, the author described an "extreme" case of harassment very similar to what the appellant here had to endure:

> Such was the experience of Alicia, an African American mother renting an apartment in a large complex. After several altercations, the boyfriend of her white neighbor (Betty) made several threats. According to the qualitative material and investigative documents:
>
> Brian Stanley, who is Betty's boyfriend and who is moving on to the property, has harassed Complainant and has threatened to kill Complainant, Complainant's boyfriend, and their "Nigger" baby because of their allegations against Betty. The property manager, Jason Short, has been aware of the harassment and threats since April, and is still allowing Brian Stanley to move on to the property.

Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Probs. 49, 64 (2009). In particular, although "not all cases are this extreme, 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). *Id.* Even if the resident does not move, "the psychological research has demonstrated that targets of bias-motivated crimes suffer substantial harm." Bell, *supra,* at 85. Some tenants have no choice whether to move if they are harassed, they are unable to move because of the cost or difficulty in getting out of a lease, and then must continue to be in direct contact with the offending co-tenant. Roscigno, et al., *Complexities, supra,* at 62. One reason that harassment, threats and the creation of a hostile environment creates such psychological harm is that, in fact, many acts of neighborhood terrorism begin with incidents of harassment—vandalism or the use of slurs and epithets—that have a low offense level but are nevertheless terrifying to those targeted. Bell, *supra*, at 177.

People with disabilities have also been subjected to their own historical system of segregation, violence, abuse and harassment based on their status and designed to keep them out of the mainstream of society. 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). In adding disability as a protected class to the FHA, Congress explicitly sought to rectify this history of exclusion not only for people with intellectual disabilities, but for all people with disabilities:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act, as amended [29 U.S.C. § 794] is a clear pronouncement of the national commitment to end the unnecessary exclusion of person 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.

Likewise, for people with disabilities:

> [h]arrassment is a special case of exclusion. Harassment operates to perpetuate segregation. 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.

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 less

pleasant visitations of aging related impairments behind closed doors. Housing provider policies may collude to support discriminatory residential preferences for those who rely on walkers or scooters to stay out of preferred dining rooms or to hide their mobility aides out of sight. *See* Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L. Rev. 121, 204-206 (2004); *see also*, *U.S. v. Covenant Retire. Comty. W., Inc. et al.*, Case No. 1:04-cv-06732-AWI-SMS (E.D.CA 2007) (Consent Order), *available at http://www.justice.gov/sites/default/files/crt/legacy/2012/05/23/covenantsettle.pdf*. In other cases, residents may take the lead in directly harassing other residents out of their long standing social activities once they find out that person uses a higher level of personal care, Paula Span, *An Unexpected Bingo Call: You Can't Play*, N.Y. Times (Feb. 2, 2015), http://www.nytimes.com/2015/02/03/science/a-facilitys-bingo-call-you-cant-play.html?_r=0.,[7] which can lead to social isolation and a cycle of decline in physical and mental health. *See, e.g.* Erin York Cornwell

[7] Older people may of course also be harassed for their membership in other protected classes, such as one example requiring a court ordered intervention to prevent further harassment in a senior citizen housing complex in Attleboro, VT. Rick Foster, *Bullying At Any Age*, Sun Chron. (May 13, 2013), *available at* http://www.thesunchronicle.com/news/local_news/bullying-at-any-age/article_aa7230ce-40ba-5a7b-896f-c8dfd9718161.html. According to the article, aging experts say that bullying among elders is becoming more common, "particularly where older people live together in nursing homes and senior housing and assisted living facilities." Such senior residential facilities are covered dwellings under the FHA. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L. Rev. 121, 150-155. (2004)

& Linda J. Waite, *Social Disconnectedness, Perceived Isolation, and Health Among Older Adults*, 50 J. Health & Soc. Behav. 31 (2009).

Fortunately, landlords have the ability to take reasonable steps to address the harassment. Otherwise, the landlord's failure to act might send the message that hate crime targets should remain in place as events escalate.

II. HOLDING A LANDLORD LIABLE UNDER THE FAIR HOUSING ACT FOR FAILING TO TAKE REASONABLE CORRECTIVE ACTION WHEN IT KNOWS THAT A TENANT IS HARASSING ANOTHER TENANT BASED ON A PROTECTED CLASS IS CONSISTENT WITH A LANDLORD'S DUTIES AND BUSINESS RESPONSIBILITIES AND IS NOT UNDULY BURDENSOME.

The relationship of landlord and tenant is unique among contractual business relationships.

> Home is the ultimate refuge. For most of us, there is a need for a place where defenses can be down, where retreat can be had from both the offensiveness of others and offensiveness to others. And, for most of us, home is that place.

John A. Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 Fordham L. Rev. 223, 224 (1976). Tenant rights to enjoy their leasehold as their home are protected through a complicated framework governing the landlord-tenant relationship that balances tenant leasehold rights with landlord property rights, and landlord obligations related to tenant well-being and tenant obligations to not waste landlord resources; this framework is made up of common law principles having their roots in feudal estates, but is 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).

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) (*quoting* E. Levi, *An Introduction to Legal Reasoning* 8 (1949)). Today, forty-nine states and the District of Columbia have adopted a statutory warranty of habitability.[8] In New York, the warranty of habitability is now codified at N.Y. Real Prop. Law § 235-b. Landlords must also comply with building, safety and other land use codes, as well as occupancy, environmental and civil rights laws and rules.

The scope of a landlord's responsibility under the statutory warranty of habitability does not focus 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*, 47 N.Y.2d 316, 324 (1979) (emphasis added). That a landlord is subject to the warranty of habitability demonstrates that

[8] Michael Brower, Comment, *Trial 2010: A Look Inside Our Nation's Courtrooms: Twentieth Annual DePaul Law Review Symposium: The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DePaul L. Rev. 849, 860-861(2011) (Arkansas being the exception).

expecting a landlord to take reasonable corrective action when it learns of discrimination based harassment is hardly an additional burden.

Along with keeping the premises in good condition, lease enforcement is part of day-to-day normal residential business operations.[9] For instance, landlords send rent demands to tenants who have not paid their rent when due and notify them of any assessed fees. If after the demand, the rent is still unpaid, the landlord may commence an eviction proceeding. In New York, some eviction proceedings for non-payment of rent are governed by N.Y. Real Prop. Acts § 711(2) and are designed to be simple and expeditious. A landlord may enforce other obligations of the lease in a similar manner, by notifying the tenant of the breach, by terminating the tenancy, and commencing an eviction. N.Y. Real Prop. Acts. § 711 (1). While states differ in their procedural requirements for eviction for behavior, New York requires that power to terminate the lease before its natural term has ended have been granted in the written lease agreement. *60 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 156 (2003). According to the pleadings in this case, the Kings Park Manor, Inc. (KPM) standard lease had such a provision.[10] As

[9] As an example, the National Association of Residential Property Managers includes these tasks as among those its members can effectively perform: "negotiate with tenants, handle difficult issues and enforce the terms of the rental agreement" and "evict tenants." *See* Why Use a NARPM® Member? http://www.whyuseone.com/*last visited* September 20, 2015.

[10] In the KPM standard lease, KPM reserves the ability to terminate the lease on

part of the summary proceeding, "the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable." N.Y. Real Prop. Acts. § 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) (Internal cites omitted). Serious and persistent race based harassment and threats to someone's life would fit this description. In at least one case, 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, were sufficient to allege objectionable behavior that would warrant eviction under a nuisance standard. *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117 (2003).

Landlords are not the only party who assert their rights under the lease. It is entirely part of the normal course of residential management for tenants to make complaints – the quotidian mechanism that tenants use to enforce the lease. Complaints may be about needed repairs, infestations or snow removal. They may

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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." Joint Appendix 53.

be about 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, and the management, owe the tenant the duty to review all complaints received. And, just as in many of these situations, if the facts checked out, the landlord's duty to take reasonable corrective action would not be imposed because of, or arise out of, the discriminatory action of the other tenant – just as if the complaining tenant slipped on the snowy walk the landlord would not be charged with the fault of an unusually snowy winter. Instead, the liability arises precisely out of the responsibility of the landlord to act *as* a landlord: once the landlord knows of discrimination based harassment to take reasonable corrective steps, such as sending out a notice of lease under the lease, the first step towards eviction.[11] *See* Cassia Pangas, Comment, *Making the Home More Like A Castle: Why Landlords Should Be Held Liable for Co-Tenant Harassment*, 42 U. Tol. L. Rev. 561, 585 (2011).

[11] Similarly, but even more expansively, there is a broad trend to hold landlords responsible for crime in their buildings foreseeably resulting from a failure to take proper safety precautions and even to hold them responsible for crime coming from their buildings and infesting neighborhoods if they don't take appropriate actions. Suzanne G. Liverman, Note, *Drug Dealing and Street Gangs – The New Nuisances: Modernizing Old Theories and Bringing Neighbors Together In the War Against Crime*, 50 Wash. U. J. Urb. & Contemp. L. 235 (1996). Under this theory, the landlord is not liable for the *crime*, but for failing to take reasonable corrective steps *as a landlord* in the relevant situation.

> 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.

Id. at 589. Of course, landlords are free to use remedies other than eviction so long as they are reasonable calculated to end the harassment, and depending on what is available under the lease and in their jurisdiction, such as the equitable relief of an injunction, conditional stays, and even moving and rent abatement -- or other creative responses that satisfy the complaining tenant. Humbach, *Landlord Control, supra,* at 262.

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, 42 U. Tol. L. Rev. at 578 (citing *Bradley v. Carydale Enterprises*, 707

F.Supp 217, 224 (E.D.VA 1989). Without this protection, the goals of the Fair Housing Act could never come to fruition; those protected the FHA might be given the illusion of housing choice but made to suffer without practical recourse to suffer harassment and hostility if they stay or to give up and move from a community where they believed they were welcome. It has long been the case that landlords have the ability to seek eviction or another remedy at law when one tenant's behavior becomes objectionable to the neighbors. Humbach, *Landlord Control, supra,* at 238. This type of progressive lease enforcement is both common sense and everyday business practice. The threat of eviction may be the only consequence that will stop discrimination-based harassment in its tracks. A landlord's failure to take reasonable corrective action when it learns of such harassment should be actionable under the FHA.

CONCLUSION

For all of these reasons, the Court should reverse the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

Dated: September 22, 2015

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CERTIFICATE OF COMPLIANCE

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Dated: September 22, 2015

/s/Susan Ann Silverstein
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CERTIFICATE OF SERVICE

I, Susan Ann Silverstein, hereby certify under penalty of perjury that on September 22, 2015, I served a copy of Brief Amicus Curiae of AARP in Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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