15-1823

United States Court of Appeals
for the Second Circuit

DONAHUE FRANCIS,

Plaintiff-Appellant,

against

KINGS PARK MANOR, INC., AND CORRINE DOWNING,

Defendants-Appellees,

RAYMOND ENDRES,

Defendant.

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

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for the City of New York
100 Church Street
New York, New York 10007
212-356-5042 or -2501
dmatza@law.nyc.gov

RICHARD DEARING
CLAUDE S. PLATTON
DANIEL MATZA-BROWN
of Counsel

May 7, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT[1]

The City of New York submits this *amicus* brief in support of appellant's position that the Fair Housing Act (FHA) requires landlords to reasonably respond to severe tenant-on-tenant discriminatory harassment just as they do to other forms of tenant misconduct. As both the owner of residential buildings and a municipal government dedicated to eradicating discrimination in a densely populated and diverse locale, the City takes seriously both the rights of tenants to be free from discriminatory harassment and landlords' concerns about unwarranted liability for misconduct beyond their control. And appellant's position appropriately accounts for both.

For more than four decades, the City's Department of Housing Preservation and Development (HPD) has directly owned residential properties occupied by New Yorkers. And more than 350,000 of the City's residents make their homes in buildings managed by the New York City Housing Authority, a public-benefit corporation that receives

---

[1] The City of New York certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party, other than the City of New York, made a monetary contribution to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

roughly $200 million in operating funds from the City each year and is the country's largest public housing authority.[2]

The City has also long fought to ensure that all New Yorkers enjoy fair access to safe and secure housing. HPD and other agencies enforce laws and regulations necessary to protect tenants' health and safety—including protecting tenants from discriminatory harassment.[3] And, for more than half a century, the City's Commission on Human Rights (CCHR) has enforced the City's antidiscrimination laws, including the nation's first law prohibiting discrimination in private housing, enacted in 1958.[4] The City's leadership in this area reflects its understanding that stable housing free from discrimination is critical for the millions of individuals and families of every stripe who make their homes in apartments in the nation's most densely populated major city.

---

[2] *See* Council of the City of New York, "Report to the Committee on Finance and the Committee on Public Housing on the Fiscal 2020 Executive Budget," at 3, 13 (May 7, 2019), *available at* https://on.nyc.gov/3bTGI9m.

[3] *See* HPD, "Tenant Harassment," *available at* https://on.nyc.gov/3aUmlr6 (last visited April 28, 2020).

[4] NYC Human Rights, "Commission's History," *available at* https://on.nyc.gov/3fbE1SK (last visited April 28, 2020); The New York Times, "Mayor Picks Unit on Housing Bias: Panel to Review Complaints Under New York City Law," at A1 (Sept. 22, 1958), *available at* https://nyti.ms/2KSbG5C.

This brief draws from the City's long years of experience in these multiple roles. And this experience confirms that appellant's position is not just the correct interpretation of the FHA, but also workable and properly balanced. Holding landlords responsible for deliberate indifference to discriminatory harassment committed in their buildings recognizes the considerable power that landlords possess under leases and state law. It is also in line with the interpretation given to other civil-rights statutes that require parties in a position of authority—most notably, employers and school administrators—to take reasonable steps to intercede when informed of discriminatory harassment occurring within their purview. Intervention by landlords, who generally know their buildings well and can take a measured approach to conflict between tenants, is an important alternative to other avenues of recourse, such as police intervention.

The City also keenly understands the negative consequences that would result if landlords were unreasonably held liable for matters beyond their control. The City believes the appellant's position strikes an appropriate balance between protecting tenants from discriminatory harassment and imposing a burden on landlords that does not exceed

their practical abilities under the circumstances. Notwithstanding the concerns raised in the panel dissent about unbounded landlord liability for the conduct of third parties or unwarranted evictions in response to allegations of harassment, the FHA leaves landlords with discretion to choose appropriate means of responding to tenant complaints. What landlords cannot do, however, is look the other way when faced with complaints that tenants are suffering severe discriminatory harassment at the hands of their neighbors.

ARGUMENT

THE FHA PROMOTES FAIR AND STABLE HOUSING BY REQUIRING LANDLORDS TO TAKE REASONABLE STEPS TO RESPOND TO KNOWN DISCRIMINATORY CONDUCT

Our homes are our "safest refuge." *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quoting and translating 3 E. Coke, Institutes of Laws of England 162 (6th ed. 1680) (quotation marks and alterations omitted)). That is especially so in the nation's densely populated cities, where the home offers a rare respite from the tumult of urban existence. While our social outings, errands, and daily commutes expose us to vulgarities, interruptions, and even confrontations, we get to leave all that behind when we return home. In

America, we are told, a person's home is their castle—a special sanctuary from life's threats and pressures.[5]

This key piece of the American dream was hard-won. Before the passage of the FHA in 1968, many Americans were routinely and systemically denied the sanctuary of safe and stable housing because of the color of their skin, their religion, or their national origin. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015). The FHA, with its broad language and sweeping goals, made clear that Americans could no longer be denied a home on those grounds. *See Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994) (FHA embodies a "broad legislative plan to eliminate all traces of discrimination within the housing field" (quotation marks omitted)).

Fulfilling this promise takes more than prohibiting direct discriminatory treatment of tenants and prospective tenants by their

---

[5] "We have, after all, lived our whole national history with an understanding of the ancient adage that a man's house is his castle." *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quotation marks omitted); *see generally McDonald v. City of Chicago*, 561 U.S. 742, 886 (2010) (Stevens, J., dissenting) (noting that the home is a "special sanctuary in modern life"); 137 Cong. Rec. 35283, 35302 (1991) (statement of Rep. Markey) (home is the "sanctuary from which [Americans] escape all the other trials that society and [the government] cause them"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 220 (1890).

landlords. As this lawsuit shows, a hateful neighbor can try to drive people from their home with incessant racial slurs, anti-religious tirades, sexual harassment, or worse.[6] The FHA was meant to eradicate such discrimination from the arena of housing—indeed, such harassment echoes the private violence that provided the backdrop for the FHA's passage decades ago.[7]

It serves not just the FHA's text (*see* En Banc Opening Brief of Appellant ("App. Br.") 23-28) but its remedial goals to hold landlords liable for deliberate indifference to discriminatory harassment of tenants by other tenants. Landlords, already legally responsible for remedying unsafe housing conditions, are well situated to respond to known instances of discriminatory harassment, and such landlord involvement will generally deter tenants from engaging in further harassment. This flexible requirement to intercede is not unduly burdensome, particularly because the law already requires landlords to

---

[6] *See* Deborah Dubroff, *Sexual Harassment, Fair Housing, and Remedies: Expanding Statutory Remedies into a Common Law Framework*, 19 T. Jefferson L. Rev. 215, 222 (1997) ("Women who are sexually harassed at work can retreat to their homes; women sexually harassed at home have no secure retreat.").

[7] *See, e.g.*, Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing* 35-43, 49-51 (2013).

address housing conditions that threaten habitability and peaceful enjoyment.

A. Requiring landlords to reasonably respond to known discriminatory conduct incentivizes appropriate landlord action and deters tenant-on-tenant harassment.

A range of sound principles favor requiring landlords to respond to known instances of severe or pervasive tenant-on-tenant discriminatory harassment. Landlords are often well positioned to effectively and efficiently respond to such harassment. And when legal incentives spur landlords to reasonably respond to incidents of discriminatory harassment, housing conditions improve because tenants themselves are deterred from engaging in such harassment.

Landlords already have legal and contractual obligations that require them to address threats to habitability and quiet enjoyment. New York law, for example, mandates that tenants "shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." N.Y. Real Property Law § 235-b(1). This broad warranty of habitability places an "unqualified obligation" on the landlord to "keep the premises habitable," without

regard for whether threatening conditions are created by the landlord, by tenants, by third parties, or by natural disasters. *Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (1979).

Thus, as appellant correctly points out, courts routinely require landlords to address the misconduct of neighboring tenants (App. Br. 44-45 n.12 (collecting authority)). It is well settled, for example, that landlords may be held liable under state law for failing to adequately address a tenant's complaints about a neighboring tenant's excessive noise. *E.g.*, *Brown v. Blennerhasset Corp.*, 113 A.D.3d 454, 455 (1st Dep't 2014); *Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 638 (2d Dep't 1995). And a tenant's severe or pervasive discriminatory harassment of another tenant may constitute a material breach of the lease, thus providing the legal basis for the landlord to take concrete action, up to and including terminating the harassing tenant's lease. *See, e.g.*, *Phillips v. Albanese*, 302 A.D.2d 467, 468 (2d Dep't 2003). Conferred with this authority, landlords are well situated to address tenant-on-tenant harassment.

Precedent regarding schools and workplaces illustrates why it is important that entities in positions of authority reasonably respond to

known instances of discriminatory harassment. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (holding that school administrations can be held liable under Title IX for failing to appropriately address student-on-student harassment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-66 (1986) (holding that employers can be held liable under Title VII for employee-on-employee discriminatory harassment that they fail to properly address). In *Davis*, for example, the Supreme Court held that if a school system had "substantial control over both the harasser and the context in which the known harassment occurs," then the school system could be held liable for an inadequate response to severe and pervasive student-on-student sexual harassment. *Davis*, 526 U.S. at 645. The Court explained that, under such circumstances, the school system's inaction—its deliberate indifference to known harassment—effectively exposed the victim to further harassment. *Id.* And such deliberate indifference by those in charge is itself discriminatory conduct. *See id.*

To be sure, there may be differences in the degree or scope of control that employers, school administration, and landlords possess, which may in turn influence what kinds of responses by those various

actors should be adjudged reasonable. But landlords unquestionably hold significant power: they are "vested with the ultimate control and responsibility for the building" in which their tenants reside. *Park W. Mgmt. Corp.*, 47 N.Y.2d at 327. Landlords thus have the power and ability to address complaints about threats to health, safety, and quiet enjoyment. *See id.* So, much as with school systems, landlords should be accountable if they are deliberately indifferent to complaints about severe or pervasive discriminatory harassment by tenants, while exercising their considerable statutory and contractual authority to redress other forms of tenant misconduct.

Precedent regarding the workplace readily illustrates the benefits of requiring the actor in charge to respond to known instances of discriminatory harassment. When bosses intervene—or fail to intervene—in response to employee misconduct, their choice has significant power to "alter the environment" within the workplace. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998). To that end, employers can take appropriate preventive steps to "encourage employees to report harassing conduct before it becomes severe or pervasive," thereby advancing the "deterrent purpose" of Title VII.

Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).[8] The result is an improved workplace culture in which supervisors and employees alike understand that discriminatory harassment will not be tolerated.

Similar benefits arise when landlords take appropriate steps to respond to known instances of discriminatory harassment. Just as requiring employers to take appropriate steps to avoid hostile work environments ultimately serves Title VII's goals of deterrence, *see Faragher*, 524 U.S. at 806, landlords' responsiveness to harassment complaints serves to deter tenants from harassing their neighbors. A clear warning from a landlord—and the mere possibility of more drastic action raised by such a warning—can be sufficient to halt discriminatory harassment. *See Matter of Perez v. Rhea*, 20 N.Y.3d 399, 405 (2013) (the "deterrent value" of the possibility of eviction is "clearly significant").

If, however, landlords are free to willfully ignore discriminatory harassment without serious consequence, an individual or family subjected to severe or pervasive discriminatory harassment may have

[8] *See* Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 Ind. L.J. 393, 451-52 (2016); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 482 (2001).

no meaningful legal recourse. The only other readily available option, calling the police, may not offer an effective remedy for this tenant-on-tenant harassment. Many types of discriminatory harassment—such as racial slurs—may not rise to the level of criminal conduct that the police could do anything about. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *People v. Dietze*, 75 N.Y.2d 47, 51-52 (1989). And for those forms of harassment that do, the blunt tools of our criminal legal system—criminal sanctions, and the high burden of proof required to impose them—are often ill-suited to disputes between neighbors. Police intervention, especially arrest and detention, may unnecessarily escalate an interpersonal dispute that could have been resolved via a more tempered response of the landlord, who often knows the building and tenants.

Furthermore, many New Yorkers simply refuse to call the police due to negative past experiences, distrust, or fear of violence or immigration consequences.[9] For these New Yorkers, it is important that

[9] *See* Karume James, "Afraid to Call the Police," New York Times (Dec. 23, 2016), *available at* https://nyti.ms/3djuaIt; Cora Engelbrecht, "Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation," New York Times (June 3, 2018), *available at* https://nyti.ms/2xCTR7M.

there be other meaningful avenues for addressing tenant-on-tenant discriminatory harassment.

B. Holding landlords responsible for deliberate indifference to discriminatory harassment strikes a sound balance between tenants' rights and landlords' administrative and financial burdens.

The panel dissent envisioned a heavy burden on landlords who are forced to respond to complaints of discriminatory harassment (*see* En Banc Appellant's Appendix ("A.") 235-36, 257-61). The dissent relied in part on comments submitted by certain landlords in 2015 in response to a proposed U.S. Department of Housing and Urban Development rule defining standards for evaluating claims that landlords had failed to redress tenant-on-tenant discriminatory harassment. *See id.* But the HUD rule described a broader theory of landlord liability than appellant raises in this appeal. The City's own experiences, as well as the landlord comments that the dissent relied on, confirm that the position urged by appellant here strikes a workable balance between the interests of landlords and tenants.

As discussed above, landlords are already legally obligated—under the common law, statutes, and leases—to respond to complaints of

severe or pervasive tenant-on-tenant harassment, regardless of whether that harassment is motivated by discrimination. Although the FHA provides important additional *remedies* where a landlord neglects those obligations with discriminatory impact, such liability does not change the fact that landlords already bear responsibility to address severe or pervasive harassment. Explicitly recognizing FHA liability in this context places no additional administrative burden on landlords.[10]

To the extent landlords voiced concerns with HUD's proposed rule, those concerns are not implicated by the more tailored theory of landlord liability urged by the appellant here (*see* App. Br. 5, 17, 19). Some landlords expressed concern, for example, that they would be held strictly liable for a tenant's discriminatory harassment, even if they were unaware of that harassment or if they unsuccessfully tried to

[10] Indeed, some institutional landlords' comments to HUD confirmed the landlords' commitment to preventing tenant-on-tenant harassment. The Cambridge Housing Authority, for example, explained that it responds to complaints of discriminatory harassment by, among other things, investigating and documenting the claim, referring residents to outside resources, and taking lease enforcement action if appropriate. Comment of Cambridge Housing Authority (Dec. 22, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0031.

prevent it.[11] Some landlords thus maintained that only actual knowledge of harassment, rather than constructive knowledge, should trigger their obligation to intervene.[12] Others urged that they should not be held liable in situations where they "promptly investigate[] the situation and take[] steps to prevent future harassment."[13]

Appellant's position is consonant with the landlords' views on those issues. He seeks to hold his landlord liable for exhibiting deliberate indifference to severe harassment against him that was known to the landlord. Appellant's allegations of intentional discrimination do not present—and appellant does not ask the Court to answer—the question of whether FHA liability could attach if the landlord had been unaware of the harassment or had taken steps to

---

[11] Comment of New York City Housing Authority, at 3 (Dec. 21, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0051; Comment of Council for Affordable and Rural Housing *et al.*, at 4 (Dec. 21, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0025 (HUD's rule would "essentially make housing provider[s] guarantors for the conduct of third parties").

[12] *See, e.g.*, Comment of National Association of Home Builders, at 7 (Dec. 21, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0028; Comment of Council for Affordable and Rural Housing *et al.*, at 2.

[13] Comment of San Diego Housing Commission, at 2 (Dec. 21, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0039; *see also* Comment of New York City Housing Authority, at 3; Comment of Texas Department of Housing and Community Affairs, at 1 (Dec. 21, 2015), *available at* https://www.regulations.gov/document?D=HUD-2015-0095-0048.

respond to it. And under the theory of liability urged by appellant, a landlord would not be held liable under the FHA if the landlord reasonably addressed complaints of discriminatory harassment just as the landlord handled other tenant complaints, using the means available under state law and the relevant lease.

This standard accords with the obligations imposed under parallel civil-rights statutes. Under Title VII, this Court requires an employer to demonstrate that it took "appropriate remedial action" in response to an employee's complaint of workplace sexual harassment. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013). And the Supreme Court has held that school administrations may be held liable under Title IX for inadequately addressing student-on-student sexual harassment only if their response was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

Applying a similarly flexible standard to landlords would ensure that landlords are free to exercise their sound judgment in deciding how best to respond to complaints of discriminatory harassment. *Cf. Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 666 (2d Cir. 2012) (under Title IX, victims "do not have a right to specific remedial measures").

Depending on the particular circumstances, a landlord's appropriate remedial actions may include warning the offending tenant, involving agencies with expertise investigating charges of discrimination in housing (such as CCHR, the State Division of Human Rights, or HUD), or—if less drastic action proves ineffective—beginning formal eviction proceedings.

A landlord's reasonable decision about how to respond may also take into account the strength of the tenant's evidence. For instance, a landlord may respond to videotaped or undisputed instances of severe harassment more decisively than to undocumented, uncorroborated cross-complaints of harassment by two tenants. And a flexible standard for assessing the adequacy of such responses may often lend itself to resolution in the defendant's favor on a motion to dismiss or for summary judgment—just as in Title IX cases, *see Davis*, 526 U.S. at 649.

This standard also addresses another risk raised by the dissent—the possibility that tenants "improperly accused of discrimination" will face unwarranted eviction (A.235-36). A flexible standard, such as one prohibiting deliberate indifference, allows landlords to consider that

risk, and to consider the strength of the evidence, in deciding what actions to take in response to discriminatory harassment. *Cf. Davis*, 526 U.S. at 648 (rejecting the suggestion that "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages" under Title IX (quotation marks omitted)).

Further, New York law provides numerous legal safeguards to protect against wrongful evictions which, taken together, strongly encourage landlords to pursue less drastic measures before resorting to eviction proceedings. Before seeking eviction based on a tenant's serious lease violation (such as the tenant's discriminatory harassment of a neighbor), a landlord must provide the tenant a formal Notice to Cure, and allow the tenant at least 30 days to cure the problem. *See* N.Y. Real Property Actions and Proceedings Law § 753. The landlord must serve a notice of termination if the tenant does not timely cure. *See id.* And to obtain a warrant of eviction, the landlord must go to housing court and prove the tenant's serious lease violation by a preponderance of the evidence. *See West Haverstraw Preserv., LP v. Diaz*, 94 N.Y.S.3d 541, 2018 NY Slip Op 50085(U) (App. Term 2d Dep't 2018). Free legal

representation is available for many New York City residents facing eviction.[14]

These safeguards, and others, offer strong protection against the dissent's specter of "improper[] accus[ations]" of discrimination (A.235-36). Neither this concern about false accusations, nor the others voiced by the dissent, should stop this Court from reaching the sound conclusion that, under the FHA, a landlord must reasonably respond—just as it responds to other tenant complaints—to complaints of severe or pervasive discriminatory harassment.

[14] New York City Housing Court, "Free Lawyers for Tenants," *available at* https://www.nycourts.gov/COURTS/nyc/housing/freeLawyerQualify.shtml (last visited May 7, 2020).

CONCLUSION

The district court's dismissal of appellant's Fair Housing Act claims should be reversed.

Dated: New York, NY
May 7, 2020

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for the City of New York

By: /s/ Daniel Matza-Brown
DANIEL MATZA-BROWN
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-5042
dmatza@law.nyc.gov

RICHARD DEARING
CLAUDE S. PLATTON
DANIEL MATZA-BROWN
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 3,702 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/ Daniel Matza-Brown
DANIEL MATZA-BROWN