# 15-1823

## United States Court of Appeals
*for the*
## Second Circuit

Donahue Francis,

*Plaintiff-Appellant,*

– v. –

Kings Park Manor, Inc., Corrine Downing,

*Defendants-Appellees,*

Raymond Endres,

*Defendant.*

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

# BRIEF OF AMICI CURIAE LATINOJUSTICE PRLDEF ET AL. IN SUPPORT OF PLAINTIFF-APPELLANT AND AFFIRMANCE OF PANEL DECISION ON *EN BANC* REVIEW

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# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Rules**

**Other Authorities**

## INTEREST OF AMICI CURIAE[1]

*Amici curiae* on this brief ("New York Fair Housing Advocates") are New York–based legal and advocacy organizations that represent and advocate for the rights of African-Americans, Latinos, and other minority or disenfranchised populations to fight against discrimination. Each organization works to eliminate housing discrimination and to ensure fair housing opportunities for all people within their communities through direct representation, impact litigation, policy advocacy, assistance with local initiatives, and/or education.

The New York Fair Housing Advocates understand the pivotal role that local communities and housing owners and managers can play to promote or discourage access to safe and affordable housing and have seen firsthand the devastating effect on the people we serve when housing opportunities are unfairly denied. Therefore, the New York Fair Housing Advocates have an interest in ensuring that landlords and their agents will protect residents from discrimination and harassment on the basis of race, color, national origin, disability, or other protected status.

We are:

- **LatinoJustice PRLDEF** ("LatinoJustice") utilizes the law, advocacy, and education to champion an equitable society and to protect and

[1] *Amici* hereby certify that no party or person other than *amici* and their counsel authored this brief or contributed money intended to fund their preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

The New York Fair Housing Advocates submit this brief pursuant to the Court's invitation for *amicus curiae* briefs. *See* Feb. 6, 2020 Order at 1.

defend the constitutional rights of the pan-Latino community in the United States and Puerto Rico. For forty-eight years, LatinoJustice has successfully litigated numerous cases challenging multiple forms of discrimination, including discriminatory housing practices affecting Latino immigrant tenants' rights to secure and maintain affordable housing.

- **The Legal Aid Society** ("LAS") is the oldest and largest program in the nation providing direct legal services to low-income families and individuals in New York City. The Civil Practice's Comprehensive Housing Practice is LAS's largest practice area and comprised over 50% of LAS's total caseload during the last fiscal year. LAS has prioritized preventing displacement and ensuring equal access to housing throughout its 140-year history.

- **Empire Justice Center** ("Empire Justice") is a New York public interest law firm that provides direct legal representation on behalf of the poor, disabled, or disenfranchised, as well as advocacy and training to other fair housing advocates. Empire Justice has first-hand experience in Long Island in fair housing advocacy, foreclosure prevention, and direct representation in housing and disability discrimination matters.

- **Long Island Housing Services, Inc.** ("LIHS") is the primary not-for-profit fair housing organization in Long Island with a mission to eliminate housing discrimination and to promote racial integration and development of affordable housing. LIHS pursues its goals through advocacy and counseling in homelessness prevention, rental strategies, landlord-tenant disputes, and government-assisted programs. LIHS's enforcement efforts include investigating and litigating fair housing cases, advocating for victims, and providing direct legal representation.

- **The Community Service Society of New York** ("CSS") has addressed the root causes of economic disparity in New York City for more than 175 years, primarily through anti-discrimination litigation, advocacy, and community engagement, including in the fields of affordable housing and criminal justice reform. CSS works with tenant leaders, policy makers, and other advocates on a variety of affordable housing issues.

- **Justice For All Coalition** ("JFAC") is a volunteer-led, community-based organization fighting for fair and decent housing, well-paid jobs, and just development for the residents of Western Queens. JFAC's work is focused on holding the New York City Housing Authority accountable for providing habitable, safe, and healthy living conditions to public housing residents and advocating for affordable housing for all New Yorkers.

## INTRODUCTION

The allegations in the Complaint "tell a story that remains too common today." Maj. Op. at 4. Fifty-two years after the enactment of Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act ("FHA"), Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2018)), communities of color around the United States are still plagued by the problem that Congress sought to address when it enacted the FHA: the segregation and exclusion of individuals from housing on the basis of race. Enacted in a period of utmost urgency amidst rising racial tensions and violence and the immediate aftermath of the assassination of Dr. Martin Luther King, Jr., the FHA was intended to serve as a touchpoint for steering the country away from its legacy of segregation and creating a more integrated society.

Where landlords fail to act when a tenant harasses and threatens another tenant repeatedly, the suffering tenant gets the message: He is not welcome there. The type of severe and repeated harassment from a neighbor that Mr. Francis experienced regularly in his own home—which his landlord and building

management, Kings Park Manor, Inc. and Ms. Downing (collectively, "KPM") knew of, but consciously failed to act on—was a denial of the FHA's promise of securing his right to reside in a home of his choosing and free from racially animated harassment. To give substance to this promise, this Court should affirm the Majority's holding that "a landlord may be liable under the FHA for intentionally discriminating against a tenant by . . . choosing not to take any reasonable steps within its control to address [known] tenant-to-tenant harassment . . . that is specifically based on race." Maj. Op. at 16–17.

There is no basis for the Dissent's concern that clarifying that the FHA requires a landlord to take action when confronted with the egregious conduct presented here would create new and unworkable obligations. Landlords already have legal responsibilities to protect their tenants from similar forms of third-party harm or harassment and have multiple tools at their disposal to prevent such injury. Landlords are also better positioned to address conflicts between tenants in the first instance and thereby potentially prevent situations from escalating—in turn preserving the resources of public authorities.

The FHA was intended to create a more fully integrated society by ending discriminatory housing practices and providing fair housing to all. To achieve that objective, it is not enough simply to guarantee access to fair housing; the FHA also

guarantees that this access will be meaningful, by recognizing the remedy against post-acquisition discriminatory conduct as sought here.

## ARGUMENT

### I. THE FHA WAS INTENDED TO ADDRESS POST-ACQUISITION DISCRIMINATORY CONDUCT THAT PREVENTS THE USE AND ENJOYMENT OF ITS NEWLY CREATED ACCESS TO FAIR HOUSING

The interpretation of a remedial statute requires the consideration of the problem Congress sought to address. *See Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (remedial statutes should be liberally construed); *Henderson v. Def. Contract Admin. Servs. Region*, 370 F. Supp. 180, 183 (S.D.N.Y. 1973) (same, in Title VII setting). This is especially true of the FHA, the product of a turbulent moment of American history and a critical capstone of the legislative initiatives of the Civil Rights Era.[2] As contemporaneous records, its own text, and legislative history show, the FHA was broadly written to address rising racial tensions, violence, and segregation that were in part due to stark disparities in housing due to racial (and other) discrimination and to promote integration in all neighborhoods.

#### A. The Historical Context in Which the FHA Was Passed Demonstrates That Congress Intended to Address Post-Acquisition Discriminatory Conduct

Enacted a week after the assassination of Dr. Martin Luther King, Jr., the FHA came into being at a time of racial disparities and violence, as well as

[2] *See infra* Section I.A.

national efforts to counteract them. This context included widespread acts of violence and intimidation leveled against African-Americans (and other people of color) that deprived them of the enjoyment of their homes in white neighborhoods. Congress was well aware of this in its consideration of the FHA,[3] and the purpose and scope of the FHA must be analyzed in light of the confluence of events that led to its passage. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426–29 (1968) (interpreting the Civil Rights Act of 1866 in light of Congress's awareness of private acts of discrimination against African-Americans).

*1. There Were Widespread Post-Acquisition Racial Violence and Intimidation Against African-Americans at the Time of the FHA's Passage*

One hundred years after Congress passed the Civil Rights Act of 1866, which guaranteed "[a]ll citizens of the United States . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, *hold*, and convey real and personal property," *see* 42 U.S.C. § 1982 (emphasis added), that right had not fully materialized for African-Americans. The 1960s saw many white neighbors—sometimes as vigilante mobs—wage a campaign of terror to exclude and remove African-Americans from predominantly white neighborhoods through cross burnings, vandalism, derogatory epithets, bombings, and other tactics. *See* Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White*

[3] *See infra* Section I.B.

*Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology 335, 340–42, 345 (2001) (book review).

In the mid-1960s, as Boston initiated a program to integrate its mostly-white public housing in white neighborhoods, participating African-American tenants reported being victims of assaults, death threats, damaged cars, racial epithets on their doors, rocks thrown through windows, and more. *Id.* at 353. For example, one elderly African-American woman had her apartment stoned, resulting in twenty-four broken windowpanes. *Id.* at 352–53.

In Detroit, there were over two hundred reported incidents of window breaking, arson, vandalism, physical attacks, and other racial crimes against African-Americans moving into white neighborhoods in the early 1960s. *Id.* at 347; *see also* Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev. 537, 540–41 (2008) (describing collective efforts prior to the FHA to terrorize African-Americans who moved into white neighborhoods). One interracial couple who moved into a "sundown community" in Detroit (that is, African-Americans were expected to leave before sundown or risk facing racial terror and violence) was subjected to threats and intimidation by a mob of white residents. *See* Rubinowitz & Perry, *supra*, at 352 (adding that local police failed to intervene, prompting the Governor of Michigan, George Romney, to dispatch the National Guard).

There is no shortage of such reported incidents of racial harassment and violence against African-Americans who had the temerity to seek to live in white neighborhoods. In 1964, a white mob "chanted hate messages and threw rocks and bottles" at two African-American college students in Chicago the weekend after the students moved in. *Id.* at 352. Soon after, while the students were at school, neighbors entered and smeared the walls with excrement; the students were then summarily evicted by the police. *Id.* The following year, the home of African-American basketball star Bill Russell was vandalized in a predominantly white Boston suburb, with personal belongings destroyed and feces left on his bed. *Id.* at 378 & n.205.[4]

*2. Other Minorities Also Suffered from Post-Acquisition Racial Violence and Intimidation*

Other minorities also suffered from the discriminatory exclusion from white neighborhoods at the time of the passage of the FHA. The experiences of Puerto Ricans and Chinese-Americans are illustrative.

[4] In 1966, Dr. King, Jr. himself was struck in the head by a rock as an angry mob chanted "Kill him!" as he led a fair-housing demonstration through an all-white Chicago neighborhood. David Bernstein, *The Longest March*, Chicago Magazine (July 25, 2016), https://www.chicagomag.com/Chicago-Magazine/August-2016/Martin-Luther-King-Chicago-Freedom-Movement/. For many additional stories, including those that resulted in the death of African-American residents of white neighborhoods due to racial violence, *see, e.g.*, Rubinowitz & Perry, *supra*, at 353–67, 377–82.

Puerto Ricans, who began to migrate to the United States well before the late 1960s and primarily settled in New York City and throughout the northeast, were also subjected to systemic discrimination and segregation—including by landlords. *See* Anne M. Santiago, *Patterns of Puerto Rican Segregation and Mobility*, 14 Hispanic J. Behavioral Sci. 107, 113 (1992) (noting that the severity of housing discrimination against Latinos was similar to what was encountered by African-Americans). Puerto Ricans were (and continue to be) often seen as "black" and suffered from discriminatory and exclusionary conduct. *See* Virginia Sanchez Korrol, *History of Puerto Ricans In the US – Part III*, Ctr. for Puerto Rican Studies, https://centropr.hunter.cuny.edu/education/story-us-puerto-ricans-part-three (describing "[t]he crumbling tenements or cold water flats that sheltered most Puerto Rican migrants" and noting that Puerto Ricans were "perceived as blacks, sharing the brutal racist discrimination that permeated African American life in the United States"). As a result, Puerto Ricans have largely lived in segregated communities, including in New York City, *see* Santiago, *supra*, at 110, and have regularly lacked access to social institutions and public accommodations, including dignified housing. *See* Sanchez Korrol, *supra*.

Intimidation and other exclusionary tactics were also deployed against Asian-Americans in white enclaves. For example, in the 1960s, the first Chinese families to move into Monterey Park, Los Angeles—a predominantly white

neighborhood—received death threats and required police protection. *See* Mary Szto, *From Exclusion to Exclusivity: Chinese American Property Ownership and Discrimination in Historical Perspective*, 25 J. Transnat'l L. & Pol'y 33, 87 (2015–2016).

While the primary impetus for the FHA was the need to address the widespread racial violence and exclusion against African-Americans, the FHA also addresses discriminatory conduct against other minority populations, who were regularly subjected to pervasive racist treatment, including severe harassment in efforts to push them out of white neighborhoods.

B. The Text and Legislative History of the FHA Show that Congress Intended the FHA to Have a Broad Remedial Scope to Eliminate All Forms of Housing Discrimination Practices and to Fulfill Congress's Intent to Create a More Integrated Society

The text of the FHA demonstrates Congress's intent to address the post-acquisition conduct in question, and the legislative history confirms that intent.[5] "[T]he language of the [FHA] is broad and inclusive" and should be given a "generous construction." *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205,

[5] *See generally Statutory Interpretation: Theories, Tools, and Trends* 16–18, Congressional Res. Serv. (updated Apr. 5, 2018), https://crsreports.congress.gov/product/pdf/R/R45153 (describing a recent "convergence" in different approaches to statutory interpretation and noting that the majority opinion and the dissent in a recent Supreme Court case considered the same sources for statutory analysis, including legislative history and "the problem that Congress faced" when enacting the statute (citing *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938, 942 (2017) (Roberts, J.); *id.* at 950 (Sotomayor, J., dissenting))).

209, 211–12 (1972) (standing exists for *current* tenants' claims for landlord discrimination against nonwhite rental applicants).

The FHA ambitiously states its broad purpose: "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. On its face, the FHA seeks to "promote 'open, integrated residential housing patterns and to prevent the increase of segregation.'" *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 240 (E.D.N.Y. 1998) (quoting *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)). *See generally* Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. L. Rev. 1 (2008).

The plain language of Sections 3604(b) and 3617 reaches post-acquisition conduct. Section 3604(b) prohibits discrimination "in the *provision of services or facilities* in connection" with the "terms, conditions, or privileges of sale or rental of a dwelling," while Section 3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person . . . in the exercise or enjoyment of, or on account of his *having exercised or enjoyed*," a right granted or protected by Section 3604, among others. 42 U.S.C. §§ 3604(b), 3617 (emphasis added). This language extends past the signing of a sale or rental agreement, and prohibits discriminatory conduct that makes residents fear for their safety and security in their homes. *See* Plaintiff-Appellant's Brief at 23–28; *see also Jones*, 392 U.S. at

413, 417 (describing the FHA as a "comprehensive open housing law" that is "applicable to a broad range of discriminatory practices" and flagging the "provision of services or facilities" language in Section 3604(b)).

The legislative history also confirms that the FHA was not intended to be limited to pre-acquisition conduct, but was intended to cast a wide net to remediate disparities in U.S. neighborhoods and to promote racial integration. In 1966, President Lyndon B. Johnson proposed a bill to Congress to expand upon President John F. Kennedy's Executive Order 11063, which had directed the federal government to "prevent discrimination because of race, color, creed, or national origin . . . in the sale, leasing, rental, or other disposition of [certain government-owned or funded] residential property and related facilities . . . , or *in the use and occupancy thereof*." 27 Fed. Reg. 11527, 11527 (Nov. 20, 1962) (emphasis added); *see also Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Housing Before the Subcomm. on Hous. & Urban Affairs of the S. Comm. on Banking & Currency*, 90th Cong. 1, 16–21 (1967) ("Subcommittee Hearing") (statement of Ramsey Clark, Att'y Gen. of the United States) (discussing the limitations of the Executive Order).

While various iterations of the FHA bill were introduced to Congress from 1966 to 1968, the substantive equivalents of Sections 3604(b) and 3617 remained largely the same. *See, e.g.*, Robert G. Schwemm, *Neighbor-on-Neighbor*

*Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 Case W. Res. L. Rev. 865, 886–88 (2011). Notably, earlier versions of the FHA's stated policy was more specific: to "prevent discrimination . . . in the purchase, rental, financing, *and occupancy of housing* throughout the United States." Subcommittee Hearing at 439 (emphasis added) (bill introduced on March 22, 1967); *see also United States v. Koch*, 352 F. Supp. 2d 970, 977 (D. Neb. 2004) ("[O]ne need look no farther than [the FHA's policy statement], as it was *initially* presented by Senator Mondale,[6] to recognize that Congress was not unconcerned with the need to prevent discrimination that might arise during a person's occupancy of a dwelling." (emphasis in original)). The final version of the law contains an expanded statement of the FHA's legislative purpose, "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, which plainly encompasses goals beyond simply securing bare access to housing.

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[6] Senator Walter F. Mondale of Minnesota was one of the FHA's early champions, later joined by Senators Edward W. Brooke III of Massachusetts, the first African-American Senator elected by popular vote, and Everett M. Dirksen of Illinois, the Republican minority leader whose support was critical to the FHA's passage in the Senate.

Much of the debate and deliberations over the FHA occurred in the Senate. For a narrative of the Senate leading up to the passage of the FHA, *see generally* Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 Harv. J. on Legis. 247, 260–66, 271–76 (2016). Notably, the bill, in its variations, often had bipartisan and even majority support in the Senate, but was often stymied by a filibuster that could only be defeated by a super-majority vote. *Id.*

This was no accident: Congress was well aware of the discrimination and violence that African-Americans were suffering even after successfully obtaining housing in a white neighborhood. For example, speaking before a Subcommittee in the Senate considering the FHA, Roy Wilkins, Executive Director of the NAACP, testified that "in Long Island, for example, we had conflict, struggle, riots, and cross burnings, and threats, and all this kind of thing about [African-Americans] moving into [white] neighborhood[s]." Subcommittee Hearing at 111. And on the floor of the Senate, the necessity of a fair housing bill that would promote an integrated society was repeatedly emphasized. *See, e.g.*, 114 S. Cong. Rec. 3419, 3422 (Feb. 20, 1968) ("America's goal must be that of an integrated society . . . , and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation."); *see also* Subcommittee Hearing at 4 (statement of Ramsey Clark, Att'y Gen. of the United States) ("We must show . . . that different races can live together in a free country with equality and justice.").[7]

[7] Congress was also informed by the work of the Presidential National Commission on Civil Disorders (which included Senator Brooke, *see supra* note 6). *See* 114 S. Cong. Rec. at 3422 ("The National Advisory Commission on Civil Disorders soon is expected to tell the American people that they are in deep trouble."). The "Kerner Report" on unequal housing was released about a month prior to the FHA's passage, and it found that the United States was "moving toward two societies, one black, one white—separate and unequal" before recommending the "[e]nactment of a national, comprehensive and enforceable

Congress was also concerned about the need to remedy the loss of personal dignity suffered by African-Americans—including war veterans—as a result of discriminatory housing practices. *See, e.g.*, 114 S. Cong. Rec. at 3422. As Senator Mondale observed:

> It is impossible to gage the degradation and humiliation suffered by a man . . . when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood. . . . A white gangster or an American Nazi would have no questions asked other than his ability to pay.

*Id.* Such concerns show that Congress intended the FHA to enable all persons to access and occupy a home anywhere without being discriminated against on account of race or other discriminatory bases.

The Dissent, relying on a highly criticized Seventh Circuit decision,[8] argues that the FHA's legislative history only shows that it was concerned with access to housing, and that the Act's focus was "the widespread practice . . . of refusing to sell or rent homes in desirable residential areas to members of minority groups."

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open-occupancy law." Otto Kerner et al., *Report of the National Advisory Commission on Civil Disorders* 1, 263 (1968).

[8] *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328–29 (7th Cir. 2004), *abrogated in part by Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (*en banc*) (recognizing that its holding "effectively overrules *Halprin* as far as § 3617 is concerned"); *see also Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 861 (7th Cir. 2018) ("As we recognized in [*Bloch*], the protections afforded by the [FHA] do not evaporate once a person takes possession of her house, condominium, or apartment.").

Dissent at 5 (internal quotation marks omitted). While entry to fair housing may have been Congress's principal focus, it does not follow that Congress intended to create an ineffective remedy and an illusory benefit by providing for no recourse against post-acquisition discrimination. Just as Congress was *focused* on the exclusion of African-Americans but enacted a statute that provided a broader protection of other minority groups, here the purpose of the FHA demonstrates that the Act is a broadly drawn statute intended to eliminate all obstacles to the achievement of its goal of ending discrimination in housing.

## II. POST-ACQUISITION RACIAL HARASSMENT HAS PERSISTED AFTER THE PASSAGE OF THE FHA

While progress has been made since its passage,[9] the FHA's promise of fair housing throughout the United States has yet to be fully realized. In particular, post-acquisition harassment of racial minorities designed to keep them out of predominantly white neighborhoods persists, and tenants and homeowners of color continue to face insidious barriers to fair housing. As a result, post-acquisition housing discrimination, in the form of unjustified eviction, selective building code enforcement, and even hate crimes, remains a major national problem.

[9] *See* Margery A. Turner et al., U.S. Dept. of Hous. & Urb. Dev. ("HUD"), C-OPC-21304, *Discrimination in Metropolitan Housing Markets: National Results from Phase I of the HDS2000* at 3-5 (2002) (finding rates of discrimination to be in decline from prior study, while also noting a number of concerning upward trends).

New York is no exception; particularly in the dense, urban populations of New York City and its environs, racial tensions in housing are exacerbated by high housing costs and rapid demographic shifts. An examination of the current state of housing discrimination and the collective experiences of the New York Fair Housing Advocates' work reveal that the ongoing practice of racial harassment has frustrated the FHA's broader goal of creating integrated neighborhoods.

A. The Prevalence of Post-Acquisition Housing Discrimination in the United States Demonstrates the Insidious Ways in Which Discrimination Continues to Manifest Itself in Housing

Discriminatory practices in housing are still a fact of life for many Americans. Thousands of complaints of housing-related, race-based discrimination, harassment, and hate crimes are filed in the United States each year. Lindsey Augustine et al., Nat'l Fair Hous. All. ("NFHA"), *2019 Fair Housing Trends Report* 9, 16 (2019). Yet these complaints likely account for only a small portion of the true incidence of housing discrimination nationwide, estimated at approximately 4 million instances per year. *Id.* at 13–14.

Reports of housing discrimination have been on the rise in recent years. *Id.* at 12 (number of complaints in 2018 is the highest recorded by NFHA and an 8% increase from 2017). Specifically, housing-related racial harassment complaints—*i.e.*, coercion, intimidation, threats, or interference with housing—have risen over the past several years, from 640 in 2016 to 747 in 2017, then to 897 in 2018. *Id.* at

18. These statistics show that vigorous enforcement and generous interpretation of the FHA are now as important as ever.

Academic analyses of post-acquisition discrimination in housing also suggest that post-acquisition discrimination is increasingly a prominent—if not the dominant—form of housing discrimination. *See, e.g.*, Scott Gilbert, *Survey of Post-Acquisition Claims at the JMLS Fair Housing Clinic in 2007* (Jan. 28, 2008) (unpublished, on file with the author) (finding that 68% of housing discrimination complaints brought to a law school fair housing clinic were post-acquisition).[10] The prevalence of post-acquisition discrimination may reflect a reality that, in the intervening years since the passage of the FHA, there has been a shift in discriminatory housing practices from the "front end" to the "back end" of occupying a home. *See* Greenberg, *supra*, at 132, 141 (surmising that landlords may be more careful not to discriminate at the point of sale or rental).[11] The issue

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[10] *See also* Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 Harv. C.R.-C.L. L. Rev. 115, 121–22 (2016) (finding, in a survey of 1,086 Milwaukee households between 2009 and 2011, the eviction rate of Hispanic tenants was higher in predominantly white neighborhoods and when renting from non-Hispanic landlords after controlling for factors such as income).

[11] Unfortunately, public awareness and outreach initiatives have sometimes lagged behind in acknowledging the prevalence of post-acquisition discrimination and the need to maintain legal protections after residents move in. *See, e.g.*, Martin D. Abravanel, HUD, *Do We Know More Now?* 9 (Feb. 2006) (survey to gauge public awareness of housing discrimination law only contained pre-acquisition scenarios). *But see* 24 C.F.R. § 100.7(a)(1)(iii) (2016) (HUD rule stating liability for landlords for certain post-acquisition discriminatory acts).

may be even graver than the data shows. Landlords may take action against their tenants for facially non-discriminatory reasons, but their actions in the aggregate—a data set that is often invisible to all but the landlords—evince a pattern of selective enforcement against tenants of color, who are given no opportunities to correct violations of the lease or building code, while white tenants are routinely given a second, third, or fourth chance before taking action. *See* Greenberg, *supra*, at 141–42.

Courts are no strangers to this phenomenon. The most egregious symbols of racial intolerance continue to be placed on unwelcome neighbors' property decades after the passage of the FHA, such as a noose, *see* Transcript of Sentencing on Nov. 5, 2010 at 8–9, 12, *United States v. Jackson*, No. 3:10-cr-00120 (W.D. La. Nov. 23, 2010) (one-year sentence for hanging a noose in neighbor's carport "to send a message" to the neighbor and her multiracial family), or a burning cross, *see Johnson v. Smith*, 810 F. Supp. 235, 236, 239 (N.D. Ill. 1992) (plaintiffs properly pled a Section 3617 claim where defendants burned a cross in plaintiffs' yard and broke plaintiffs' windows to "terroriz[e] and intimidat[e] [plaintiffs] in the occupancy of their home").

B. Residents of New York in Particular Suffer from Post-Acquisition Discrimination

The State of New York, including New York City and Nassau and Suffolk Counties, is no exception to this trend of post-acquisition discrimination. While

New York and its counties and municipalities, like many others across the nation, have fair housing laws, regulations, and ordinances, *see, e.g.*, N.Y. Exec. Law § 296(5); N.Y. Admin. Code § 8-107(5); Nassau Cty. Admin. Code § 21-9.7; Suffolk Cty. Code § 528-9, experiences like Mr. Francis's are not uncommon. The New York State Division of Human Rights ("NYSDHR"), the agency tasked with enforcement of the New York State Human Rights Law, reported that 530 housing discrimination cases were filed in the 2017-2018 fiscal year. NYSDHR, *Annual Report* 13 (FY2017–2018). In the same span, NYSDHR also opened numerous housing discrimination investigations, including one against landlords in Queens County allegedly perpetrating post-acquisition discrimination against tenants based on national origin. *Id.* at 17.

The story of housing discrimination in the Eastern District of New York, where this case arises, is particularly fraught. Neighborhood hostility and misapplication of local laws have created a discriminatory environment for many Long Island residents. The racial terror that reigned in the years leading up to the FHA[12] has had a resurgence with new demographic shifts in the late 1990s and 2000s. *See* David Holthouse et al., S. Poverty Law Ctr., *Climate of Fear: Latino Immigrants in Suffolk County, N.Y.* 10–11 (Sept. 2009).[13]

[12] *See supra* Section I.A.

[13] Petitioner-Appellant's claims arise out of his residence at Kings Park Manor, which is in Suffolk County.

In 2009, the Southern Poverty Law Center reported that Suffolk County was the cradle of a new wave of white nationalist violence. *Id.* at 5–6. With low-wage workers moving further out on Long Island due to rising housing costs in New York City and its immediate suburbs, Suffolk County has seen an influx of Latino immigrants. *Id.* at 10 (noting formerly all-white suburbs now had Latino populations of 15 to 20% or more). Some residents responded with acts of intimidation and violence against their new neighbors. Interviews with Latino Suffolk County residents reflect that harassment and assault were common. *Id.* at 7–8. And, it seems, tactics designed to drive away unwanted newcomers have changed little in forty years: in December 1999, a house rented to Mexican day laborers was riddled with bullets; in October 2000, neighbors of a Mexican family disrupted a religious celebration by shouting racial epithets and brandishing a club; in July 2003, local teenagers set fire to a Mexican family's house, stating that they attacked the home "because 'Mexicans lived there'"; and in October 2008, a group of white teenagers found Latino children playing on a lawn and broke all of the children's toys. *Id.* at 22–26. Many of these crimes went unpunished. *Id.* at 21–26.

The New York Fair Housing Advocates have on-the-ground experience of combatting such efforts to exclude residents of color, including by local officials through discriminatory applications of building and zoning regulations. In 2015,

for example, Long Island Housing Services, Inc. joined a group of tenants and landlords to sue the Village of Mastic Beach in Suffolk County, alleging that its officials had engaged in a series of discriminatory evictions designed to drive low-income African-American tenants out of their homes and replace them with wealthy white seasonal renters. Complaint at 1–2, *Long Island Hous. Servs., Inc. v. Vill. of Mastic Beach*, No. 2:15-cv-00629 (E.D.N.Y. Feb. 9, 2015). Village officials were charged with fabricating housing code violations, asking state and federal agencies that were providing plaintiffs' housing subsidies to terminate the subsidies, and harassing the tenants and their landlords to force out African-American families. *Id.* at 9–23.

In another instance, the New York Attorney General filed an action against the Village of Freeport in Nassau County following a 22-month investigation, alleging that inspectors had disproportionately targeted Latino homes for searches for housing code violations, regularly entering the homes without warrants and without consent. Complaint at 7–13, *Spitzer v. Vill. of Freeport*, No. 2:02-cv-05359 (E.D.N.Y. Oct. 3, 2002). The inspectors were charged with using police presence to intimidate tenants and gain entry, conducting unnecessarily broad searches, and issuing summonses without providing an opportunity to cure violations. *Id.* at 7–21. While both municipalities settled and agreed to remedial

actions,[14] there is little doubt that these towns are not outliers in engaging in discriminatory practices.

Harassment and racial vitriol still confront newcomers to a neighborhood who do not look like its current residents. And residential segregation still persists, often with life-or-death consequences, as the recent COVID-19 pandemic showcases. *See* Grace Hauck et al., *Coronavirus Spares One Neighborhood and Ravages the Next, Race and Class Spell the Difference*, USA Today (updated May 3, 2020), https://www.usatoday.com/in-depth/news/nation/2020/05/02/coronavirus-impact-black-minority-white-neighborhoods-chicago-detroit/3042630001/ (compiling ZIP-code-level COVID-19 case data and citing housing instability among causes of disparate racial impact).

[14] Under the terms of the 2017 *Mastic Beach* settlement, the Village paid $387,500 to the plaintiffs and agreed to a series of remedial steps. Stipulation and Order of Dismissal at 6–7, *Vill. of Mastic Beach*, No. 2:15-cv-00629 (E.D.N.Y. Aug. 23, 2017). Under the terms of the 2004 *Freeport* settlement, the Village agreed to re-train housing inspectors, follow an updated protocol, improve recordkeeping, and provide an opportunity to cure violations before issuing summonses. Settlement Order at 4–17, *Vill. of Freeport*, No. 2:02-cv-05359 (E.D.N.Y. June 9, 2004). Notably, both actions raised claims under one or either of the FHA provisions at issue in this appeal. If this Court limits the FHA's reach to pre-acquisition conduct, such discriminatory practices will be far more difficult to address.

This is not the future that the drafters of the FHA imagined. As Senator Mondale wrote in 2018:

> The [FHA] has survived long enough to witness a curious debate over its intent. Some scholars have suggested that its functions can be divided into 'anti-discrimination' and 'integration,' with the two goals working at cross purposes. . . . To the law's drafters, these ideas were not in conflict. The law was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift.

Walter F. Mondale, *Walter Mondale: The Civil Rights Law We Ignored*, N.Y. Times (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html.

## III. HOLDING LANDLORDS RESPONSIBLE FOR REMEDIATING ACTS OF TENANT-TO-TENANT RACIAL HARASSMENT UNDER THE FHA DOES NOT IMPOSE NEW OR SUBSTANTIAL BURDENS ON LANDLORDS AND SERVES IMPORTANT PUBLIC POLICY INTERESTS

The dissent's concern that landlord liability under the FHA for known and serious discriminatory tenant-to-tenant conduct will force housing providers to take on impractical burdens, Dissent at 34–35, is predicated on the premise that this is an unworkable burden and a novel responsibility. In truth, holding landlords responsible for severe, pervasive, and known third-party hostile conduct that landlords have ready means of addressing is in line with long-established New York law doctrines that protect against similar infringements against a tenant's quiet enjoyment of his home. *See also* Plaintiff-Appellant's Brief at 36–43.

A. Holding Landlords Responsible for Known, Severe, and Pervasive Tenant-to-Tenant Harassment Is Consistent with Existing Landlord Duties

New York law has long held landlords responsible for acts of third parties under the implied covenants of quiet enjoyment and habitability. *See, e.g.*, *Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (1979) (noting the "unqualified obligation [of] the landlord to keep the premises habitable, [as necessitated] by . . . acts of third parties or natural disaster," and reasoning that, "[i]nasmuch as the landlord is vested with the ultimate control and responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it"); *see also Sargent Realty Corp. v Vizzini*, 421 N.Y.S.2d 963, 965 (Civ. Ct. 1979) ("The Court of Appeals has placed the responsibility for maintaining the premises in a safe habitable condition on the landlord, even where the unsafe condition may have been brought about by the acts of third parties . . . [by] tak[ing] steps to eliminate the condition."); Restatement (Second) of Property (Landlord and Tenant) § 6.1 (1977) (landlord may be held responsible for preventing a tenant from violating another tenant's quiet enjoyment of the premises).

In one New York case, the court held that a landlord breached the implied warranty of habitability by taking no steps to stop loud and continuous noise emanating from another apartment, which was "so intense and so long-lasting as to render the apartment uninhabitable," where the landlord had notice of the noise and "could have taken steps to try to make the premises habitable" but did not. *Cohen*

*v. Werner*, 368 N.Y.S.2d 1005, 1006–08 (Civ. Ct.), *aff'd*, 378 N.Y.S.2d 868 (2d Dep't 1975). This was true, the court held, "even if the landlord did not cause the uninhabitability." *Id.* at 1008; *see also Auburn Leasing Corp. v. Burgos*, 609 N.Y.S.2d 549, 551 (Civ. Ct. 1994) (landlord breached warranties of quiet enjoyment and habitability by failing "to take steps to protect the tenants" from third-parties, despite having "undisputed knowledge" that tenants were "bullied, harassed, [and] threatened with violence in many forms").

Landlords also have a "common-law duty to take minimal precautions to protect tenants from foreseeable harm, a duty which encompasses a third party's foreseeable criminal conduct." *Raghu v. 24 Realty Co.*, 777 N.Y.S.2d 487, 488 (1st Dep't 2004) (internal quotation marks and citations omitted); *accord Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548 (1998). *Cf. Basso v. Miller*, 40 N.Y.2d 233, 241 (1976) (holding that landlords owe anyone on their property a duty of reasonable care to maintain their property in a safe condition, as in the case of the owner of a park, whose dangerous road conditions caused a motorcycle accident). Landlords have also been found responsible for failing to protect a tenant's exclusive right under a lease to access certain parking facilities, where

such access was severely restricted by another tenant's use. *See Arbern Realty Co. v. Clay Craft Planters Co.*, 727 N.Y.S.2d 236, 237 (2d Dep't 2001).

Here, the repeated and pervasive—even *criminal*—harassment that Plaintiff-Appellant suffered restricted his ability to peacefully enjoy his home, and it was both known and intentionally went unaddressed by Defendant-Appellees. Complaint at 6–10. To hold KPM responsible here would be no significant departure from KPM's other existing duties.

B. Leveraging Landlords' Unique Ability to Prevent Tenant-to-Tenant Racial Harassment Furthers Important Public Policy Interests

Landlords are well positioned to address tenant-to-tenant harassment efficiently if they are incentivized to do so. Landlords exercise significant control over their tenants, controlling the "terms, conditions, or privileges" of the lease as well as the "provision of services or facilities" in connection with the lease. *See* 42 U.S.C. § 3604(b). Further, landlords already are expected to expend resources as a routine matter to monitor and maintain their properties; to require that landlords take action in cases of known, severe, and repeated harassment is no more onerous than to require them to take action in cases of pervasive noise, smoke, crime, or other hazards to personal safety and enjoyment of one's home.

Absent liability under the FHA, landlords receiving complaints of harassment may ignore the discrimination, as KPM did here—or even worse, they may further the discrimination by retaliating against the complainant. In fact, the

New York Fair Housing Advocates regularly see holdover eviction proceedings against tenants perceived as "troublesome" due to complaints that they were harassed by their neighbors.

Finally, holding landlords responsible for preventing severe and repeated harassment can be expected in many cases to prevent harmful escalations and preserve the resources of public authorities. While Mr. Francis's situation led to the repeated intervention of the police and an eventual criminal conviction, it is unknown whether the situation would have escalated so far had KPM expressed their awareness and disapproval of the situation earlier on. *See generally* Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 Calif. L. Rev. 617, 619–20, 627–28 (2006) (arguing for "preventative policing" by non-investigative, non-police parties of "low-level" criminal or disorderly activity, which, if unaddressed, undermines and fragments communities by signaling "rejection of . . . law-abiding behavior"). This is exacerbated by the likelihood that tenants of color, who are often reluctant to seek redress from law enforcement, may not turn to law enforcement for help until a situation has turned especially dire. *See* NPR, Robert Wood Johnson Found. & Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Experiences and Views of African Americans* 12 (Oct. 2017), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/21/2017/10/NPR-RWJF-HSPH-Discrimination-African-

Americans-Final-Report.pdf (31% of African-Americans have avoided calling police due to concerns of discrimination).

## CONCLUSION

For the reasons stated above, this Court should affirm the Majority's holding that a landlord may be liable under the FHA for choosing to not take any reasonable steps within its control to address pervasive tenant-to-tenant, racially discriminatory harassment of which it has actual notice.

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**CERTIFICATE OF COMPLIANCE**

**WITH FRAP 29(a)(5) AND 32(a)(7)(B)**

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the applicable type-volume limitations. Specifically, this brief complies with the type-volume and word count limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1 because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,872 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the 2013 version of Microsoft Word in 14-point Times New Roman font.

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