22-1209

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GILEAD COMMUNITY SERVICES, INC., and
CONNECTICUT FAIR HOUSING CENTER, INC.,

Plaintiffs-Appellees,

v.

TOWN OF CROMWELL,

Defendant-Appellant.

ENZO FAIENZA, ANTHONY SALVATORE, and JILLIAN MASSEY,

Defendants.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF NATIONAL FAIR HOUSING ALLIANCE; CNY FAIR HOUSING, INC.; FAIR HOUSING JUSTICE CENTER; HOUSING OPPORTUNITIES MADE EQUAL, INC.; LONG ISLAND HOUSING SERVICES, INC.; AND WESTCHESTER RESIDENTIAL OPPORTUNITIES, INC. AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Joseph J. Wardenski
WARDENSKI P.C.
195 Plymouth Street, Suite 519
Brooklyn, NY 11201
(347) 227-2500
Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae National Fair Housing Alliance; CNY Fair Housing, Inc.; Fair Housing Justice Center; Housing Opportunities Made Equal, Inc.; Long Island Housing Services, Inc.; and Westchester Residential Opportunities, Inc. are all nonprofit organizations. They have no parent corporations and no publicly held corporation owns a portion of any of them.

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are all nonprofit fair housing organizations that work to ensure equal housing opportunities in their communities and engage in efforts to end residential segregation.

The National Fair Housing Alliance ("NFHA") is a national organization dedicated to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of 167 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals. NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through leadership, homeownership, credit access, tech equity, education, member services, public policy, community development, and enforcement initiatives. Relying on the Fair Housing Act ("FHA") and other civil rights laws, NFHA undertakes important enforcement initiatives in cities and states across the country

[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* National Fair Housing Alliance; CNY Fair Housing, Inc.; Fair Housing Justice Center; Housing Opportunities Made Equal, Inc.; Long Island Housing Services, Inc.; and Westchester Residential Opportunities, Inc. certify 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 *Amici Curiae*, their members, and their counsel) contributed money intended to fund the preparation or submission of the brief.

and participates as *amicus curiae* in other cases to further its goal of achieving equal housing opportunities for all.

CNY Fair Housing, Inc. ("CNY Fair Housing"); Fair Housing Justice Center (the "FHJC"); Housing Opportunities Made Equal, Inc. ("HOME"); Long Island Housing Services, Inc.; and Westchester Residential Opportunities, Inc. ("WRO") are nonprofit, public interest fair housing organizations within the Second Circuit and members of NFHA.

CNY Fair Housing is a nonprofit organization dedicated to eliminating housing discrimination, promoting open communities, and ensuring equal access to housing opportunity for all people in Central and Northern New York. With a service area spanning 17 counties, CNY Fair Housing advances its mission through education, state and local policy advocacy, client counseling, and enforcement. CNY Fair Housing's mission, and in particular its efforts to combat zoning practices that limit housing opportunities for individuals with disabilities, would be impaired by the restrictions on liability and available relief under the FHA sought by the Town of Cromwell in its appeal.

The FHJC is a nonprofit civil rights organization dedicated to eliminating housing discrimination, promoting policies that foster open, accessible, and inclusive communities, and strengthening enforcement of fair housing laws. The FHJC serves all five boroughs of New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester. The FHJC uses testing and other tools to investigate allegations of housing discrimination. When the FHJC uncovers evidence of discrimination, it files lawsuits and other enforcement actions alleging violations of the FHA, including requests for punitive damages and claims relying on the motivating factor test, and its interests will be adversely affected if these FHA protections are weakened.

HOME is a civil rights organization whose mission is to promote the value of diversity and to ensure all people an equal opportunity to live in the housing and communities of their choice—through education, advocacy, the enforcement of fair housing laws and the creation of housing opportunities. HOME, based in Buffalo, New York, is the only agency in Western New York providing comprehensive services for victims of housing discrimination. Founded in 1963, HOME has nearly

500 members from a wide range of personal and professional backgrounds who pay dues to support HOME's mission and desire to live in a community free of housing discrimination and residential segregation. Punitive damages and the motivating factor standard have served as an important means for HOME to further its mission of ensuring equal access to housing for all.

Long Island Housing Services, Inc. is an over 50-year-old civil rights organization focused on fair housing. It provides fair housing education, advocacy, counseling, investigation and enforcement in Suffolk and Nassau counties in New York. Long Island Housing Services' mission is the elimination of unlawful housing discrimination and promotion of decent and affordable housing through advocacy and education. Its enforcement activities are bolstered by the ability to seek money judgments in federal courts against those violating fair housing laws, including punitive damages, and through the use of the motivating factor standard.

WRO is a New York nonprofit corporation with its principal place of business in White Plains, New York. It is the mission of WRO to promote equal, affordable and accessible housing opportunities for all

residents in the region in which it operates, all of which is within the Second Circuit. To achieve its mission, WRO's fair housing department provides education about fair housing rights and responsibilities, conducts investigations of allegations of housing discrimination, conducts systemic testing for fair housing violations, and enforces the fair housing laws. The organization has and continues to seek punitive damages and use the motivating factor test standard as part of its multi-faceted approach furthering fair housing.

All *amici* are dedicated to vigorous enforcement of the FHA. *Amici*'s interests will be adversely affected by a decision that unduly restricts causation or punitive damages under the FHA and limits the strength of the FHA as a tool for combatting residential segregation and housing discrimination.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fair Housing Act (the "FHA"), 42 U.S.C. §§ 3601–3619, is a far-reaching federal civil rights law that both protects individuals from discrimination in housing and seeks to eradicate systemic discrimination and segregation throughout the United States. Since the FHA's enactment in 1968, private enforcement actions, including

against municipalities, have been essential to fulfill Congress's broad purpose of combating discrimination in the housing sector of the nation's economy and combating the pernicious effects of housing segregation on other aspects of American life. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015).

In its appeal, Defendant-Appellant Town of Cromwell ("Cromwell") asks this Court to curtail the FHA's protections in two major ways: (1) contrary to the plain text of the FHA and Congress's intent, by holding that municipalities are exempt from punitive damages liability in FHA cases, and (2) to make it more difficult for victims of discrimination to challenge FHA violations by replacing the well-settled motivating factor test with the "but-for" test. These arguments rest on a misapplication of Supreme Court case law interpreting other civil rights laws. This Court should reject them.

First, Cromwell argues, incorrectly, that the Supreme Court's 1981 decision in *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), which held that punitive damages are not available against municipalities under 42 U.S.C. § 1983 ("§ 1983"), enacted as part of the Civil Rights Act of 1871, 17 Stat. 13 (1871) (the "1871 Act"), established

a categorical rule that exempts local governments from punitive damages under the FHA and other statutes. That argument fails because *Fact Concerts* only applied to § 1983, with an analysis rooted in the specific legislative history of the 1871 Act that has no bearing on the quite different history of the FHA. Under the *Fact Concerts* analysis itself, Cromwell's argument fails. Not only does the FHA explicitly provide for punitive damages against all defendants, including municipalities, but the relevant legislative history shows no evidence that Congress intended to exclude municipalities from this key part of the FHA's broad remedial scheme. *See infra* § II.B.2.-3.

Second, Cromwell asks this Court to ignore well-established precedent to find that the "but-for" causation standard must be met in FHA cases. Cromwell argues that the Supreme Court's decision in *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020), which held that the "but-for" standard applies to claims under 42 U.S.C. § 1981 (§ 1981), also applies to the FHA. But § 1981, like § 1983, is distinguishable from the FHA based on its different text, legislative history, and purpose. *Comcast*, like *Fact Concerts* before it, was grounded in a statute-specific analysis of § 1981,

and does not demand that this Court apply the "but-for" standard to FHA claims. *See infra* § III.B. Nor does it justify a departure from Second Circuit precedent confirming that the motivating factor standard, not the "but-for" test, applies to FHA claims. *See Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 616 (2d Cir. 2016).

ARGUMENT

I. THE HISTORY AND PURPOSE OF THE FAIR HOUSING ACT REQUIRE A GENEROUS CONSTRUCTION OF ITS PROTECTIONS AND REMEDIES.

A. Congress Passed the FHA in 1968 to Eradicate Housing Discrimination and Segregation in the United States.

In response to widespread protests against segregative housing policies and urban inequality in the mid-1960s, President Lyndon B. Johnson convened the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11,365, 3 C.F.R. § 674 (1966-1970 Comp.). The Kerner Commission's report, released in February 1968, "'identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest.'" *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 529 (citing Otto Kerner *et al.*, *Report of the National Advisory Commission on Civil Disorders* (1968) ("Kerner

Rep.")). It described the nation as "moving toward two societies, one black, one white separate and unequal," Kerner Rep. at 1, and recommended that Congress "enact a comprehensive and enforceable open housing law," *id*. at 13.

After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, and the widespread civil unrest in cities throughout the nation following his death, Congress passed the FHA as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 81-89 (1968) (the "1968 Act"). Congress intended for the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *see also* H.R. Rep. No. 100-711, at 15 (1988) ("1988 House Report") (explaining the FHA "provides a clear national policy against discrimination in housing"). Congress, in passing the FHA, explicitly did not just target individual discriminatory landlords. It recognized that discriminatory housing practices harm not only individuals but "the whole community." 114 Cong. Rec. 2706 (1968). The FHA was intended to end housing segregation and achieve equality more broadly. Acknowledging that the most effective way to combat broad social issues like segregated schools was "to attack the segregated

neighborhood," Congress concluded that "fair housing is one more step toward achieving equality in opportunity and education . . . ." *Id.* at 3421 (statement of Sen. Mondale)). The scope and purpose of the FHA reflects the scale of the problems that motivated its passage. The FHA aims to replace racial segregation with "truly integrated neighborhoods." *Id.* at 3422.

B. Through the Fair Housing Amendments Act of 1988, Congress Expanded and Strengthened the FHA's Protections and Remedies.

In 1988, Congress substantially amended the FHA to add people with disabilities and families with children as protected groups, and to significantly strengthen enforcement of the FHA through increased administrative enforcement mechanisms and a broader suite of available remedies for violations of the FHA. *See* Fair Housing Amendments Act §§ 1-15, Pub. L. 100-430, 102 Stat. 1619–36 (1988) (the "1988 Amendments"). Through the 1988 Amendments, Congress intended to strengthen and expand the already expansive remedial purpose from the 1968 Act.

The added ban on disability discrimination was intended to be "a clear pronouncement of a national commitment to end the unnecessary

exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals." 1988 House Report at 18. Like the 1968 Act, the 1988 Amendments were aimed at addressing community-wide issues such as the segregation of people with disabilities. The 1988 Amendments sought to ensure that people with disabilities "should be fully integrated into our society to the maximum extent possible; not segregated off to someplace else." 134 Cong. Rec. 19,878 (Aug. 2, 1988) (statement of Sen. Harkin).

C. The Supreme Court Has Repeatedly Held That the FHA's Broad Remedial Purpose Requires a Generous Construction of Its Provisions.

Congress passed the FHA "to eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Cmtys. Project*, 576 U.S. at 536 (citing 42 U.S.C. § 3601; 1988 House Report at 15). "'[T]he language of the FHA is broad and inclusive,' 'prohibits a wide range of conduct,' 'has a broad remedial purpose,' and 'is written in decidedly far-reaching terms.'" *Ga. State Conf. of NAACP v. City of LaGrange*, 940 F.3d 627, 631–32 (11th Cir. 2019) (quoting *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1278 (11th Cir. 2019)); *see also Trafficante v.*

Metro. Life Ins. Co., 409 U.S. 205, 209 (1972). Consistent with the FHA's broad language and expansive remedial purpose, the Supreme Court has repeatedly held that the FHA must be given a "generous construction" to carry out a "policy that Congress considered to be of the highest priority." *Trafficante*, 409 U.S. at 209–12.

II. PUNITIVE DAMAGES ARE AVAILABLE AGAINST MUNICIPALITIES IN FAIR HOUSING ACT LAWSUITS.

Defendant-Appellant urges this Court to adopt a categorical immunity from punitive damages for municipality defendants in FHA cases. In doing so, they misread the Supreme Court's decision in *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), which only applied to claims brought under § 1983. The *Fact Concerts* Court's conclusion that municipalities are immune from punitive damages liability in § 1983 cases was grounded in the Court's close examination of the legislative history of the 1871 Act, including the Court's assessment of whether the 1871 Congress intended that municipalities would be subject to punitive damages under § 1983. *Fact Concerts*, 453 U.S. at 264–66.

For the reasons that follow, *Fact Concerts* does not compel a finding that municipalities are immune from punitive damages in FHA lawsuits because (1) the text of the FHA unambiguously permits

punitive damages awards whenever a discriminatory housing practice has been established, 42 U.S.C. § 3613(c)(1), *see United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005), and (2) the legislative history of the 1968 Act and 1988 Amendments shows that Congress intended for all remedies, including punitive damages, to be available against municipality defendants.

A. The *Fact Concerts* Holding Was Grounded in § 1983's Specific Legislative History, Which Differs Markedly from that of the FHA.

The sole question presented in *Fact Concerts*—and the only one decided in that case—was "whether a municipality may be held liable for punitive damages under § 1983." *Fact Concerts*, 453 U.S. at 249. On that precise question, the Court carefully considered the legislative history of § 1983 to conclude that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 271. The Supreme Court did not, as Cromwell argues, hold that this holding would apply to the FHA or other statutes that have markedly different purposes, statutory language, and legislative histories. Rather, the Court noted, "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21.

The FHA has, since its passage, expressly authorized punitive damages against all defendants, including municipalities. 42 U.S.C. § 3613(c)(1). In that material respect, the plain text of the FHA is distinguishable from § 1983 and meets the "general rule" regarding the availability of punitive damages described in *Fact Concerts*. This Court can conclude that punitive damages against municipalities are available based on that unambiguous statutory language alone. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); *City of LaGrange*, 940 F.3d at 631 (in construing a provision of the FHA, noting that "where the language of the statute is unambiguous, we need look no further and our inquiry ends" and therefore declining to read a limitation into the statute that was absent from the text). This Court's analysis can stop here.

But even if this Court looks to the FHA's distinct legislative history in the present inquiry, as the Supreme Court did for § 1983 in *Fact Concerts*, that history supports the conclusion that Congress

intended to hold municipalities, like all defendants, liable for punitive damages in appropriate cases.

In passing § 1983 in 1871, Congress showed no intent to expose municipalities to punitive damages; all evidence, the Supreme Court concluded in *Fact Concerts*, suggested the contrary. *Fact Concerts*, 453 U.S. at 263–64. The Supreme Court observed that "municipal immunity from punitive damages was well established at common law by 1871," and therefore presumed that Congress was familiar with this immunity when it passed § 1983. *Id*. at 263. The Court's inquiry thus focused on whether the 1871 Congress intended to override municipalities' common law immunity against punitive damages for § 1983 claims. *Id*. at 263–64. Following a searching review of the history of the 1871 Act, the Court concluded that not only was there no evidence in the legislative history that Congress intended to abolish the common law immunity against punitive damages in § 1983, "the limited legislative history relevant to this issue suggests the opposite." *Id*. at 264.

At its passage, it was far from clear whether the 1871 Act applied to municipalities at all. A proposed amendment to the 1871 Act, which would have held liable "'the inhabitants of the county, city, or parish'

where certain acts of violence occurred," though passed by the Senate, was excised from the bill by the Conference Committee before the law's final passage. *Monroe v. Pape*, 365 U.S. 167, 188–89 (1961) (quoting Cong. Globe, 42d Cong., 1st Sess. 663 (1871)). The record shows that a representative of the House Conferees insisted that the "section imposing liability upon towns and counties must go out or we should fail to agree." *Id.* at 190. Although the Supreme Court concluded over a century later that municipalities are proper defendants under § 1983, *see Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978), the *Monell* Court's extended exploration of the legislative history and the vigorous disagreement between the Justices as to the meaning of that history underscore the original ambiguity about municipal liability under § 1983.

The legislative history of the 1871 Act is similarly ambiguous on the question of whether Congress intended for punitive damages to be available against *any* defendant. The Supreme Court ultimately determined, as a general matter, that punitive damages were available under § 1983. *See Smith v. Wade*, 461 U.S. 30, 35–36 (1983). But, as Justice Rehnquist's dissenting opinion described the relevant legislative

history, "the foundation upon which the right to punitive damages under § 1983 is precarious, at the best." *Id.* at 84–86 (Rehnquist, J., dissenting).

As evidence that the 1871 Congress did not intend to allow punitive damages against municipalities in § 1983 cases, the *Fact Concerts* Court pointed specifically to debate around a proposed amendment to the 1871 Act, in which members of Congress showed "substantial resistance" even to compensatory damages against municipalities. *Fact Concerts*, 453 U.S. at 264–65. Without evidence of Congressional intent to the contrary, the Court saw no policy justification to disturb the common-law immunity against punitive damages under § 1983. *Id.* at 271.

B. The FHA's Text and Legislative History Congress's Intent to Make Punitive Damages Available Against All Defendants, Including Municipalities.

The question over whether punitive damages against municipalities are available under any statute *other* than § 1983 is a statute-specific inquiry that considers—as the Supreme Court did in *Fact Concerts*—whether Congress intended to override the common law immunity when it passed the statute in question. Unlike § 1983, where

there was no evidence of an intent to expose municipalities to punitive damages (or even to liability at all), the text and legislative history of the FHA reveal precisely the opposite: Congress, in both 1968 and 1988, plainly intended for municipalities to be sued under the Act and expressly provided for punitive damages against all defendants. Applying the *Fact Concerts* inquiry to the FHA, this Court should find that punitive damages are available against municipalities.

1. The FHA has always applied to municipalities, as Congress intended.

Unlike § 1983, where Congress's intent in exposing municipalities to liability at all was ambiguous at best, there is no dispute that Congress intended to hold municipalities liable for FHA violations in both the 1968 Act and the 1988 Amendments. Ever since the FHA was enacted, municipalities have been the subject of some of the most well-known and significant cases brought under the law. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 435 (1985); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Even before *Monell*, when municipalities were considered immune from suit under § 1983, courts unanimously held that municipalities were nevertheless subject to liability under the FHA. *See, e.g.*, *United States v. City of*

Black Jack, 508 F.2d 1179, 1183–84 (8th Cir. 1974) (distinguishing the FHA from § 1983 because of the "legislative history peculiar to 1983"); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). Indeed, in its 2015 decision affirming the availability of disparate impact claims under the FHA, the Supreme Court observed that lawsuits against municipalities challenging "unlawful practices includ[ing] zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland" of FHA jurisprudence. *Inclusive Cmtys. Project*, 576 U.S. at 539–40 (citing *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18 (2005); *City of Black Jack*, 508 F.2d at 1182–88; *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009)).

Lest there was doubt before, the legislative history of the 1988 Amendments makes clear that Congress intended for the law to apply against municipalities without limitation. *See* 1988 House Report at 24 ("The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning policies and practices.").

In contrast to § 1983's legislative history, where Congress rejected an amendment that would have explicitly provided for municipal liability, *see supra* at 15-16, the 1988 Congress rejected a proposed amendment to the 1988 Amendments that would have shielded municipalities from liability for some zoning decisions. *See* 1988 House Report at 89.

2. Congress intended for punitive damages to be an essential part of the FHA's remedial scheme, without exception.

In contrast to § 1983, which Congress designed to be a procedural mechanism for individuals to challenge violations of their constitutional rights, Congress intended for the FHA to be a tool both to vindicate individual rights and to conquer systemic housing discrimination and segregation across the country. *See supra* at 11-12. To further Congress's broad remedial purpose, the FHA has explicitly permitted punitive damages since it was enacted in 1968. Unlike § 1983, which was silent on the availability of punitive damages against any defendant, "[t]he FHA expressly provides for the recovery of punitive damages by plaintiffs who have suffered discriminatory housing practices," *Space Hunters, Inc.*, 429 F.3d at 427 (citing 42 U.S.C. § 3613(c)(1)), and has done so ever since its passage in 1968.

The 1968 Act provided that a court may, among other forms of relief, "award to the plaintiff actual damages and not more than $1,000 punitive damages." Pub. L. 90-284, 82 Stat. 73, 88 (1968). The 1988 Amendments expanded the relief available to private plaintiffs by eliminating the cap on punitive damages. As amended, the FHA now provides that, "if the court finds a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages," in addition to appropriate injunctive and equitable relief. 42 U.S.C. § 3613(c)(1). Thus, under the "general rule" "that no punitive damages are allowed unless expressly authorized by statute," *Fact Concerts*, 453 U.S. at 260 n.21, punitive damages are plainly allowed under the FHA and always have been. The statutory text contains no distinctions between types of defendants against whom punitive damages may be awarded, and this Court should not read such a distinction where none exists. *See City of LaGrange*, 940 F.3d at 631.

The legislative history of the 1988 Amendments also shows that Congress expressly intended to address the inadequate enforcement of the FHA since its enactment by, *inter alia*, encouraging private enforcement of the law and deterring violations by increasing the

financial consequences of noncompliance. 1988 House Report at 415. Among the other improvements to the FHA made by Congress through the 1988 Amendments, the 1988 Amendments abolished the earlier $1,000 cap on punitive damages, amending 42 U.S.C. § 3613 to authorize courts to award a prevailing plaintiff "actual and punitive damages," with no statutory limitation.

The House Judiciary Committee wrote that "[a]lthough title VIII provides a clear national policy against discrimination in housing, it provides only limited means for enforcement the law," identifying "this shortcoming as the primary weakness in existing law." 1988 House Report at 415; *see also Mitchell v. Cellone*, 389 F.3d 86, 90–91 (3d Cir. 2004) (describing this legislative history and Congress's intent to strengthen enforcement mechanisms in the 1988 Amendments); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30–31 (D.C. Cir. 1990) (noting that because governmental resources for FHA enforcement "are markedly limited," "Congress decided . . . to rely primarily on private suits in which . . . complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority"') (internal quotation marks

omitted); *Price v. Pelka*, 690 F.2d 98, 101 (6th Cir. 1982) ("Private enforcement of the Fair Housing Act . . . not only vindicates the civil rights of the individual victim of discrimination, but promotes the public interest by eradicating housing discrimination.").

In debating the 1988 Amendments, Congress specifically identified the $1,000 cap on punitive damages as frustrating the parallel purposes of robust private enforcement of the FHA and effectively deterring housing discrimination in the two decades following the FHA's enactment. "[T]he limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law." 1988 House Report at 40. The House Judiciary Committee wrote that "[a]lthough private enforcement has achieved success in a limited number of cases, its impact is restricted by the lack of private resources, and is hampered by a short statute of limitations and disadvantageous limitations on punitive damages . . . ." *Id.* at 16. To remove these barriers to the full realization of the statutory purposes of eradicating housing discrimination nationwide, the Committee wrote that, through

the 1988 Amendments, it "intends that courts be able to award *all* remedies provided under this section." *Id.* at 40 (emphasis added).[2]

Nothing in this legislative history suggests that Congress intended to restrict the application of punitive damages—or any other available remedy—to particular classes of defendants. To the contrary, the history indicates that Congress intended to make all authorized forms of relief, including the newly uncapped punitive damages remedy, available from all defendants.

3. Congress could have, but chose not to, exempt municipalities from punitive damages liability when it passed the 1988 Amendments.

Congress's intent to permit punitive damages awards against municipalities is further evidenced by its failure to add such an exemption when it abolished the previous cap on punitive damages. There is little question that the 1988 Congress was aware of the Supreme Court's *Fact Concerts* decision; yet Congress nevertheless

[2] Notably, in FHA cases following the 1988 Amendments, the Second Circuit has expressly recognized the deterrent value of punitive damages, writing that "'[t]he purpose of punitive damages awards is to punish the defendant and to deter him and others from similar conduct in the future.'" *Space Hunters*, 429 F.3d at 428 (quoting *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)).

chose to strengthen and expand the punitive damages remedy using broad statutory language applicable in all fair housing cases.

Congress knew how to carve out public entities from punitive damages liability if it wanted to. In amending Title VII of the Civil Rights Act of 1964 ("Title VII"), for example, Congress expressly added an exemption for punitive damages against public employers in the Civil Rights Act of 1991, 42 U.S.C. § 1981(a)(b)(1) ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision"). Although the FHA contains several explicit exemptions, *see* 42 U.S.C. §§ 3603(b), 3605(c), 3607, it does not exempt municipalities from liability or from any authorized remedies—including punitive damages.

The statute-specific analysis needed to assess whether punitive damages against municipalities are available is highlighted by the Supreme Court's 2003 decision in *Cook County v. United States ex rel. Chandler*, in which the Court held that punitive damages (in the form of treble damages) are available to private relators in *qui tam* actions brough under the False Claims Act. 538 U.S. 119, 133–34 (2003). In *Cook County*, the county defendant argued (as Cromwell does here),

that despite the availability of treble damages under the FCA generally, *Fact Concerts* demanded that the Court recognize a common law immunity for municipalities under the FCA. *Id.* at 129. The Supreme Court rejected that argument because (1) although the FCA did not explicitly apply to municipalities, "neither history nor text points to the exclusion of municipalities from the class of 'persons' covered by the FCA in 1863," *id.* at 129, and (2) if Congress had intended to exclude municipalities from punitive damages liability when it amended the FCA in 1986 to "to make the FCA a more useful tool against fraud in modern times," it would have done so," *id.* at 133 (cleaned up).

The text and history of the FHA, like that of the FCA, are strong evidence that Congress intended for punitive damages to be available against municipalities and did not intend to extend the common-law immunity against punitive damages to local governments.[3]

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[3] Cromwell suggests that this Court should look to the Supreme Court's decision in *Barnes v. Gorman*, 536 U.S. 181 (2002), which held that punitive damages against municipalities are not available under § 504 of the Rehabilitation Act of 1974 and Title II of the Americans with Disabilities Act. *Barnes* has no application here for one simple reason: *Barnes*'s reasoning was based on the fact that § 504 is a Spending Clause statute (and Title II expressly incorporates § 504's remedies). The contract law analogy *Barnes* employed in concluding that federal funding recipients did not contract for punitive damages liability in exchange for federal funds is inapplicable to claims under the FHA, which is not a Spending Clause statute.

C. Courts Have Repeatedly Declined to Recognize an Implied Bar Against Municipalities' Punitive Damages Liability Where None Exists.

Following *Fact Concerts*, courts have declined to recognize a categorical bar to municipalities' punitive damages liability where, as with the FHA, a federal or state statute expressly authorizes that remedy against all defendants. *See, e.g.*, *Gares v. Willingboro Twp.*, 90 F.3d 720, 726 (3d Cir. 1996) (declining to imply an exception for public employers from a state status's express punitive damages provision). More generally, where a statute contains some exemptions but not others, "courts are loath 'to announce equitable exceptions to legislative requirements or prohibitions that are *unqualified* by the statutory text.'" *Hogar Agua y Vida en el Desierto v. Suarez-Medina*, 36 F.3d 177, 182 (1st Cir. 1994) (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990)). Given the FHA's unambiguous statutory text permitting punitive damages generally, and courts' preference against implying exemptions that have no support in the text or legislative history, this Court should conclude that punitive damages are available against municipalities in FHA lawsuits.

III. THE MOTIVATING FACTOR TEST IS THE CORRECT STANDARD FOR FAIR HOUSING ACT CLAIMS.

A. The History and Purpose of the Fair Housing Act Confirm the Application of the Motivating Factor Test.

The history and purpose of the FHA confirm that the motivating factor test, not the "but-for" test, applies to FHA claims. Consistent with the broad goals and scope of the FHA, every federal appeals court to consider the issue between the FHA's enactment in 1968 and the 1988 Amendments concluded that the motivating factor standard applies to FHA claims. *See Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 616 (2d Cir. 2016) (citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042 (2d Cir. 1979)); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) ("Courts have consistently given an expansive interpretation to the Fair Housing Act; to state a claim under the Act, it is enough to show that race was a consideration and played some role in a real estate transaction."); *Jordan v. Dellway Villa, Ltd.*, 661 F.2d 588, 594 (6th Cir. 1981) ("If race played a part in the claimant's denial, then recovery of damages is mandated."); *United States v. Pelzer Realty Co.*,

484 F.2d 438, 443 (5th Cir. 1973); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970)).

As the Second Circuit recognized in *Mhany Management*, the 1988 Amendments confirmed that the motivating factor test applies in FHA cases. *See Mhany Mgmt.*, 819 F.3d at 616. Despite being aware of the unanimous view of the courts of appeals supporting the motivating factor test, Congress did not act to change the causation standard. *See id*. The failure to act "is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals" finding that the motivating factor test applies to the FHA. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 536; *see also Mhany Mgmt.*, 819 F.3d at 616 ("When Congress amends an act without altering the text, it implicitly adopts the Court's construction of the statute.") (cleaned up); *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 198, 137 S. Ct. 1296 (2017) (applying the same reasoning to the "aggrieved person" standard of the FHA).

After the 1988 Amendments, three additional circuits adopted the motivating factor test. *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005) ("[A] plaintiff must demonstrate that some

discriminatory purpose was a 'motivating factor' behind the challenged action."); *Ave. 6E Invs., Ltd. Liab. Co. v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) ("A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'"); *Sofarelli v. Pinellas Cnty.*, 931 F.2d 718, 722 (11th Cir. 1991) (plaintiff "has to establish that race played some role" in defendants' actions).

At least nine of the circuits, including the Second Circuit, have concluded that some form of the motivating factor test applies to FHA claims. None has held otherwise. In 2016, the Second Circuit specifically rejected the argument that "but-for" causation applies in FHA cases. *Mhany Mgmt.*, 819 F.3d at 616. The Second Circuit declined to extend the Supreme Court's decision holding that plaintiffs must prove "but-for" causation in cases in ADEA to FHA cases. *Id*. The court explained that the argument "runs headlong into Circuit precedent" holding that a form of the motivating factor test applies to FHA claims. *Id*. (citing *Cabrera v. Jakabovitz*, 24 F.3d 372, 383 (2d Cir. 1994)).

Thus, the history and purpose of the FHA including the 1988 Amendments against the backdrop of the unanimous view of the Courts

of Appeals and circuit precedent, all lead to the conclusion that the motivating factor test applies to the FHA.

B. The History, Purpose, and Text of § 1981 Differ Significantly from the FHA.

The FHA's history, purpose and text differs substantially from § 1981. In *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020), the Supreme Court examined § 1981's text and history and held that "but-for" causation applies to § 1981 claims. *Id*. at 1015. In reaching its conclusion, the *Comcast* Court considered several factors, *id.* at 1015–18, each of which weighs against applying "but-for" causation to the FHA.

First, the Supreme Court explained that the text of § 1981, which guarantees that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," 42 U.S.C. § 1981, suggests "but-for" causation. *Comcast*, 140 S. Ct. at 1015. The Court reasoned that the language suggests "but-for" causation because if a "defendant would have responded the same way to the plaintiff even if he had been white[,]" then "the plaintiff received the 'same' legally protected right as a white person" and § 1981 would not be violated. *Id*. By contrast, the "broad and inclusive" text of FHA, *Trafficante*, 409 U.S.

at 209, is more like Title VII than § 1981. Like Title VII, the FHA prohibits specific discriminatory practices because of a protected class, rather than providing equality of rights compared to white citizens similar to § 1981. *Cf.* 42 U.S.C. § 3604(f)(1) (making it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap") and 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

Second, the Civil Rights Act of 1866 explicitly incorporates the common law, which in 1866 often provided for "but-for" causation." *Comcast*, 140 S. Ct. at 1016 (citing 42 U.S.C. § 1988 ("[I]n all cases where [the laws of the United States] are not adapted to the object [of carrying the statute into effect] the common law . . . shall . . . govern said courts in the trial and disposition of such cause."). The FHA, however, contains no such provision incorporating the common law.

Third, comparing the statutory histories of § 1981 and Title VII, the Court found that "we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard." *Comcast*, 140 S. Ct. at 1017. Because the history of the FHA is substantially more like Title VII than § 1981, *Comcast*'s holding that the "but-for" standard applies to § 1981 claims does not extend to the FHA.

Congress enacted § 1981 in 1866, nearly 100 years before Congress passed Title VII, and amended it through the same 1991 Civil Rights Act that added the motivating factor test to Title VII. *See id.* In contrast, Congress enacted the FHA just four years after the Title VII and amended it in 1988. Unlike § 1981, Congress did not amend the FHA when it enacted the 1991 Civil Rights Act and amended both § 1981 and Title VII simultaneously.

Furthermore, the FHA and Title VII were both enacted to eliminate discriminatory practices within a sector of the economy. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 539. The FHA and Title VII "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination," *Huntington Branch, NAACP*, 844 F.2d at 935

(citing *Trafficante*, 409 U.S. at 211–12; *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–36 (1971)). Both statutes "require similar proof to establish a violation." *Huntington Branch, NAACP*, 844 F.2d at 935 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221, 226–27 (5th Cir. 1971); *United States v. Hunter*, 459 F.2d 205, 217 (4th Cir. 1972)).

Thus, the factors considered in *Comcast* weigh against applying "but-for" causation to the FHA. Instead, "looking to the [FHA's] text and history," as required under *Comcast*, 140 S. Ct. at 1013, mandates the conclusion that the motivating factor test applies to the FHA.

CONCLUSION

For the reasons explained above, *Amici Curiae* respectfully submit that punitive damages against municipalities are available under the Fair Housing Act and that the motivating factor test remains the correct standard in evaluating claims under the Fair Housing Act. Accordingly, *Amici Curiae* urge this Court to rule in favor of Plaintiffs-Appellees.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and L.R. 29.1(c). It contains 6,792 words, calculated using Microsoft Word's word-count feature, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)–(6) and L.R. 32.1. It has been prepared using Microsoft Word in a 14-point proportionally spaced typeface, Century Schoolbook.

DATED: December 20, 2022

/s/ Joseph J. Wardenski
Joseph J. Wardenski

CERTIFICATE OF SERVICE AND FILING

I hereby certify under penalty of perjury that on December 20, 2022, I served a copy of this proposed Brief of Amicus Curiae in Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Court's 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.

Dated: December 20, 2022

/s/ Joseph J. Wardenski
Joseph J. Wardenski