Case No. 20-12620-HH

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

RITA FOX,
Plaintiff-Appellant,
v.
LUCILLE GAINES, ET AL.
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Florida
Case No. 19-cv-81620-Singhal

BRIEF OF *AMICI CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, AND OTHER CIVIL RIGHTS GROUPS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE

Amici Curiae National Fair Housing Alliance, American Civil Liberties Union, National Women's Law Center, and Other Civil Rights Groups certify that the following is a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations known to them that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

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Corporate Disclosures:

There are no corporate disclosures.

Dated: September 30, 2020

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INTEREST OF AMICI

The National Fair Housing Alliance (NFHA) is a nonprofit corporation that represents approximately 150 private, non-profit fair housing organizations throughout the country. NFHA is dedicated to ending housing segregation and ensuring equal housing opportunities for all people. NFHA and its members engage in efforts to end segregation and ensure equal housing opportunities through leadership, education and outreach, membership services, public policy initiatives, advocacy, community development, and enforcement. On the front line in the fight against housing discrimination, NFHA and its members regularly rely on the Fair Housing Act to undertake investigation, enforcement, and education initiatives in cities and states across the country, including on issues of sexual harassment when providing housing and housing-related services. In early 2020, NFHA teamed up with the U.S. Department of Housing and Urban Development to produce and issue an educational Podcast entitled "Safe at Home" that captures first-person accounts of three women who experienced sexual harassment and used the Fair Housing Act to stop this pernicious behavior.

The Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Continuum, Inc., Fair Housing Center of Greater Palm Beaches, Inc., Fair Housing of Northern Alabama, Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., and Savannah-Chatham

County Fair Housing Council, Inc. are NFHA fair housing organization members in the three States in this Circuit.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over four million members dedicated to preserving the Constitution and civil and human rights. The ACLU Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women's full equality in American society. These efforts include challenging housing discrimination experienced by women, with a particular focus on advancing the right to obtain and maintain safe and secure housing. The ACLU has litigated Fair Housing Act cases in courts across the country and advocated for housing policies at the federal, state, and local levels. The ACLU of Florida is a state affiliate of the ACLU, with over 42,000 members.

The National Women's Law Center (NWLC) is a nonprofit legal organization dedicated to advancing and protecting the legal rights of women and girls and all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in a range of areas including income security, employment, education, and reproductive rights and health, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. The NWLC Fund also houses and administers the TIME'S UP Legal Defense Fund. NWLC has participated as counsel or amicus

curiae in a range of cases to secure the equal treatment of women and girls under the law including in the context of sexual assault and other forms of sexual harassment.

The National Alliance for Safe Housing (NASH) is a national nonprofit organization with a mission to ensure that survivors of domestic and sexual violence have a full range of safe housing options, through improved access, increased resources, and innovative solutions, ultimately catalyzing a safe housing movement. NASH advances this mission by aligning systems and changing public policy to promote safe housing; engaging communities and supporting partnerships to support safe housing; and advocating for programs and innovative practices to facilitate safe housing. Since its inception, NASH has worked closely with communities across the country to ensure that policies and systems help survivors access and maintain safe housing options and services.

The National Network to End Domestic Violence (NNEDV) is a not-for profit organization incorporated in the District of Columbia to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV was instrumental in promoting Congressional enactment and implementation of the

Violence Against Women Act. NNEDV works with federal, state and local policy makers and domestic violence advocates throughout the nation to identify and promote policies and best practices to advance victim safety. NNEDV is deeply concerned about access to safe housing. The Fair Housing Act prohibits sex discrimination, and victims of sexual harassment by landlords and property managers deserve protection and recourse under federal law.

INTRODUCTION

The question presented is whether a landlord commits sex discrimination barred by the Fair Housing Act ("FHA") when he first conditions a tenant's rent reduction on her acquiescence to sexual conduct and then retaliates against her when she no longer acquiesces. The District Court answered that question "no." It erroneously concluded that sex "discrimination" under the FHA does not include sexual harassment. Making things worse, the District Court further reasoned that, because (it believed) a landlord may lawfully coerce a tenant into sexual conduct in this way, he may freely retaliate against her for ending what the District Court improperly labeled the "relationship." This Court should reverse, and make clear that the conduct at issue here is not just appalling, but is also discriminatory.

As the Department of Housing and Urban Development ("HUD") has stated and most courts to consider this question have held, the FHA's ban on sex-based discrimination includes prohibitions on quid-pro-quo sexual harassment, sexual

harassment that creates a hostile housing environment, and retaliation for objecting to sexual harassment or any other form of sex discrimination—all of which Plaintiff Rita Fox alleges she experienced. Identical language in Title VII of the Civil Rights Act has been construed to bar such conduct in employment, and there is no reason why it should not do the same in housing. Moreover, contrary to the District Court's apparent belief, tenants' civil rights can be violated even if they seemingly "submit" to sexual activity under such circumstances, given the power asymmetry between landlords and tenants. Acquiescence to quid-pro-quo sexual harassment does not amount to a "relationship."

All of this matters a great deal, well beyond the question of who wins or loses this case. Sexual harassment in housing is pervasive. Too many landlords and housing managers abuse their positions of power by sexually harassing tenants or coercing them to submit to sexual demands, depriving tenants of a sense of security in their own homes. The pandemic has only exacerbated this problem, as many tenants have become even more vulnerable to harassment because they are unable to pay rent due to job loss or reduced hours. Amber Jamieson, *Her landlord asked to spend the night with her after she lost her job and couldn't afford rent*, Buzzfeed (May 14, 2020), https://www.buzzfeednews.com/article/amberjamieson/renter-sexually-

harassed-by-landlord-during-coronavirus. This Court should make clear that landlords who engage in such conduct violate the FHA.

STATEMENT OF THE CASE

I. Factual Background

Plaintiff Rita Fox, a single mother, was desperate for affordable housing after suffering a foreclosure in 2014. She contacted defendants Dana James Gaines ("Gaines") and his mother Lucille Gaines. Lucille owns a multi-unit rental property in Jupiter, Florida, while Gaines is the on-site property manager authorized to act on her behalf. From the first day Ms. Fox visited the property as a prospective renter, Gaines commented on her looks and told her he would hold the property available for her in exchange for a kiss. He then called her several times over the next few weeks. With no other rental options available in her price range, Ms. Fox reluctantly entered into a lease—and, at Gaines's insistence, gave him a kiss as he delivered the key. Doc. 39 ¶¶ 18–30.

Once Ms. Fox lived on the property, Gaines continually sexually harassed her, including by offering her help with rental payment in exchange for sexual conduct. Desperate for money, Ms. Fox eventually began periodically giving in. Far from being satisfied, Gaines only intensified his harassment; he sent her lewd texts, questioned her about her whereabouts, demanded that she not have male visitors, and even installed surveillance cameras that faced her apartment. Doc.

39 ¶¶ 18–30. Eventually, Ms. Fox made clear she no longer would participate in the "quid-pro-quo" arrangement whereby she received reduced rent in exchange for her sexual conduct. In retaliation, Gaines began to serve her with fraudulent violation notices. He repeatedly filed eviction notices and even filed an eviction claim (which he voluntarily dismissed), although Ms. Fox was not behind on her rent. Although Ms. Fox agreed to leave by a certain date, while she was still legally a tenant, Gaines unsuccessfully asked the police to arrest her for trespassing. As a final insult, he refused to return her security deposit. Doc. 39 ¶¶ 43–58.

II. Procedural Background

Ms. Fox brought claims against Gaines and Lucille under three provisions of the FHA: (1) Section 3604(b), which bars sex discrimination in the terms and conditions of rental housing; (2) Section 3604(c), which bars discriminatory statements based on sex connected to such housing; and Section 3617, which bars retaliation for or interference with the exercise of fair housing rights. The District Court dismissed all three claims.

The District Court reasoned that Gaines's demands for sexual conduct throughout Ms. Fox's tenancy were not discrimination against Ms. Fox because of "sex," since his conduct was not "*because* she is a female, or *because* of her sexual orientation, or *because* of her sexual identity." Doc. 51 at 6 (emphasis in original) ("District Court Op."). It reasoned that the FHA "uses the term 'discriminate';

nowhere does it use the term 'harassment.'" *Id.* at 8. Consequently, the Court appeared to conclude, sexual harassment is not a form of discrimination under the FHA.

Based on this premise, the District Court found that Gaines's demands for sexual conduct throughout Ms. Fox's tenancy did not violate Section 3604(b) or Section 3604(c) of the FHA, and thus retaliating against her for refusing to continue was not actionable, either. *Id.* at 6. It concluded that "retaliation for ending sexual relations" cannot be a violation of the FHA. *Id.* at 5.

With respect to the Section 3617 claim, the District Court found that this provision required Ms. Fox to show "discriminatory conduct that is so severe and pervasive that it will have the effect of causing a protected person to abandon the exercise of his or housing rights." *Id.* at 4 (quoting *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1144 (S.D. Fla. 2004)). It found that the allegations of the Complaint made out harassment that rose to such a level, *id.* at 4–5, but nonetheless dismissed the harassment claim based on the reasoning above.

The District Court acknowledged that it was ruling contrary to "the overwhelming weight of federal authority." *Id.* at 6 (quoting *Noah v. Assor*, 379 F. Supp. 3d 1284, 1288 (S.D. Fla. 2019)). It also acknowledged that it was ruling contrary to a HUD regulation directly on point. *Id.* at 7. Finally, it acknowledged

that underlying both the weight of judicial authority and the HUD regulation is the well-settled principle that harassment constitutes discrimination under Title VII of the Civil Rights Act. *Id.* at 8. However, it stated, this Circuit has not ruled on the issue, and until it does, "the Court is not at liberty to rewrite the FHA." *Id.* at 7.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Fair Housing Act's Prohibition Against Sex-Based Discrimination Bars Landlords From Conditioning the Terms and Conditions of Housing on Sexual Behavior or Conduct, Retaliating Against a Tenant Who Refuses to Engage in Such Behavior or Conduct, or Otherwise Sexually Harassing a Tenant.

The Fair Housing Act was enacted in 1968 with the ambitious project of comprehensively addressing entrenched patterns of residential segregation. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 530 (2015) ("*ICP*"); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 502 (9th Cir. 2016). Heeding a warning from the Kerner Commission that the nation was "moving towards two societies, one black, one white—separate and unequal," *see ICP*, 135 S. Ct. at 2516 (internal quotation marks omitted), Congress declared in enacting the FHA that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601. Congress deemed this policy "to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal citation omitted). The Supreme Court has accordingly held that the "broad and inclusive" reach of the

FHA demands that its provisions be afforded a "generous construction." *Trafficante*, 409 U.S. at 209; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *see also Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1223 (11th Cir. 2016) ("[T]he Supreme Court has repeatedly instructed us to give the Fair Housing Act a broad and inclusive interpretation.") (internal quotation marks omitted).

Remedying sex discrimination originally was not part of this ambitious project. But in 1974, Congress amended the FHA to add sex as a protected class, subject to the same expansive protections as the original protected classes. *See* Housing and Community Development Act of 1974, Pub. L No. 93-383, sec. 527 § 808(b)(3), 88 Stat. 633, 729. Since then, Congress has added familial status and disability as protected classes.

Section 3604(b) of the FHA now provides that it is unlawful—

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

As relevant to this case, it thus bars discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of . . . sex."

The amount of a monthly rent payment is, of course, one of the quintessential "terms" of "rental of a dwelling." A landlord who bases the amount of a rental payment on whether a tenant is willing to engage in sexual conduct thus

discriminates because of sex in the terms and conditions of rental housing in violation of Section 3604(b). And a landlord who conditions continued rental of the dwelling on the continuation of such sexual conduct violates Section 3604(b) again.

The District Court erroneously believed that quid-pro-quo sexual harassment is not sex discrimination, District Court Op. at 6–8. It reasoned that the FHA "uses the term 'discriminate'; nowhere does it use the term 'harassment,'" *id.* at 8. But it has long been established that sexual harassment is a form of sex discrimination under a variety of civil rights laws. The Supreme Court explicitly held that sexual harassment is barred by Title VII's materially identical statutory language, which bars discrimination in the "terms, conditions, or privileges of employment," more than three decades ago. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). It has held that this phrase "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks and citations omitted); *see also Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) ("Title VII's prohibition of sex discrimination clearly includes sexual harassment."). The District Court stated in a conclusory manner that Title VII caselaw was inapplicable, *see* District Court Op. at 8, but never

explained how the same statutory term can encompass sexual harassment under Title VII but not the FHA.

In fact, there is no basis for construing the same language more narrowly under the FHA, given the two statutes' comparably broad purposes, both intended "to eradicate discriminatory practices within a sector of our Nation's economy." *ICP*, 135 S. Ct. at 539. Courts have consistently applied Title VII discrimination analysis to analyze FHA discrimination claims, including those based on harassment. *See, e.g.*, *Shellhammer v. Lewallen*, 770 F.2d 167, 1985 WL 135005 at *1–3 (unpublished table decision) (per curiam) (citing *Henson v. Dundee*, 682 F.2d 897, 901–05 (11th Cir. 1982)) (importing Title VII framework to analyze FHA hostile environment claim); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment under the Fair Housing Act: The Forgotten Role of 3604(c)*, 2002 Wis. L. Rev. 771, 782 (stating that courts "rely on Title VII precedents in establishing the contours of sexual harassment law under the FHA."). The presumption should be that conduct that is sex discrimination under Title VII is sex discrimination under the FHA, absent a good reason to find otherwise—and here there is none.

For similar reasons, a landlord who harasses a tenant to engage in sexual activity also discriminates in "the terms, conditions, or privileges" of rental if such harassment is sufficiently severe and/or pervasive to create a hostile housing

environment.[1] As multiple circuits—including this Court in *Hunt*—have held, creating a hostile housing environment effectively changes the terms of rental. Thus, this Court has held that such conduct can violate Section 3604(f)(2), Section 3604(b)'s comparably worded equivalent for disability claims. *See Hunt*, 814 F.3d at 1224–25 (holding that the property manager's harassment of current tenants' disabled son, including forcing him to do maintenance work and calling the police to his unit, was actionable under § 3604(f)(1) and (2)).

Section 3604(c) of the FHA also makes it unlawful for a landlord (or anyone else) to, with respect to the sale of rental of a dwelling, "make, print, or publish . . . any . . . statement" that "indicates any preference, limitation, or discrimination based on . . . sex." A landlord who states that the amount of a rental payment turns on whether a female tenant is willing to engage in sexual activity—or threatens eviction or other adverse consequences for that reason—makes such a statement. By its plain language, Section 3604(c) does not require that the landlord carry out such a threat, only that he make, print, or publish it.

Finally, Section 3617 of the FHA bars a landlord from retaliating against a tenant for exercising FHA rights. Specifically, that provision makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or

[1] The District Court correctly held that the Complaint's allegations make it plausible that the harassment rose to this level.

enjoyment of, or on account of his having exercised or enjoyed . . . any right granted or protected by" Section 3604 and other provisions of the FHA.

As its plain language indicates, a Section 3617 violation does not require a completed violation of an underlying FHA right, only interference with a person or other retaliation for exercising such a right.[2] The District Court erroneously believed that a Section 3617 claim requires a showing of "discriminatory conduct that is so severe or pervasive that it will have the effect of causing a protected person to abandon the exercise of his or housing rights." District Court Op. at 4 (quoting *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1144 (S.D. Fla. 2004)). The District Court found that the standard was met, *id.* at 5, but erred in applying it in the first place. The "severe or pervasive" standard for how serious harassment must be derives from Section 3604(b)'s textual requirement that discrimination must affect the "terms or conditions" of rental housing to be actionable. That language does not appear in Section 3617, and to require a completed Section 3604(b) violation to state a Section 3617 violation would make Section 3617—and its very different statutory language—superfluous. *Bloch*, 587 F.3d at 781.

[2] *See, e.g.*, *Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 112 (3d Cir. 2017) (citing *Hidden Village, LLC v. City of Lakewood*, 734 F.3d 519, 528 (6th Cir. 2013); *Bloch*, 587 F.3d at 782; *United States v. City of Hayward*, 36 F.3d 832, 836 (9th Cir. 1994)).

The question, instead, is whether a defendant's retaliatory conduct can be said to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" other FHA rights. 42 U.S.C. § 3617; *see, e.g., Sofarelli v. Pinellas Cty.*, 931 F.2d 718, 722 (11th Cir. 1991). Here, that underlying right is to enjoy rental housing free from a landlord conditioning continued rental on sexual conduct. On the facts alleged, Gaines engaged in retaliatory conduct that interfered with Fox's enjoyment of that right. *See Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010) (landlord violated Section 3617 through "numerous unwanted interactions of a sexual nature that interfered with Quigley's use and enjoyment of her home"). *See also* Equal Employment Opportunity Comm'n*, Questions and Answers: Enforcement Guidance on Retaliation and Related Issues,* https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues (stating "it is unlawful to retaliate against an applicant or employee for . . . resisting sexual advances").

Such conduct was unlawful under Section 3617 because it tends to discourage and interfere with exercise of fair housing rights, regardless of whether it caused Fox to fully abandon those rights or otherwise constituted harassment that rose to the level of a violation of Section 3604. *See Walker v. City of Lakewood*, 272 F.3d 1114, 1129 (9th Cir. 2001) (finding that "interference" under Section 3617 "has been broadly applied to reach all practices which have the effect of

interfering with the exercise of rights under the federal fair housing laws");
Philippeaux v. Apartment Inv. & Mgmt. Co., 598 F. App'x 640, 644 (11th Cir. 2015) (following *Walker* in unpublished opinion).

Indeed, Section 3617 bars landlords from retaliating against people other than those whose housing is directly affected, and so necessarily extends to actions that do not cause tenants to relinquish their housing. *See, e.g.*, *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1301 (11th Cir. 1998) (it was clearly established that Section 3617 bars housing authority from firing an employee in retaliation for her refusal to participate in discrimination). It also can be satisfied even where there are no underlying substantive violations of fair housing rights, so long as the plaintiff has a good faith basis for believing her rights were violated. *See, e.g., Philippeaux*, 598 F. App'x at 645.

This point does not matter for this case because, as the District Court found, the allegations of this complaint meet even a heightened standard of seriousness. However, for the benefit of future cases, this Court should not follow the District Court in stating that a Section 3617 claim requires a showing that cannot be derived from its text. For this case, it is enough to find that a landlord may not retaliate against a tenant for resisting sexual advances, just as an employer may not retaliate against an employee for resisting them. See EEOC, *Questions and Answers*.

Thus, these three interlocking FHA provisions collectively bar landlords from engaging in quid-pro-quo transactions in which they coerce tenants to trade sexual activity for rent reductions or other housing benefits. Section 3604(b) bars the transaction itself, as well as harassment of a tenant for sexual conduct; Section 3604(c) bars statements to the effect that housing benefits are conditioned on sexual conduct; and Section 3617 bars retaliation against a tenant for exercising her right not to take part in a quid-pro-quo transaction or be exposed to such statements or harassment.

Even if there were textual ambiguity regarding these three provisions' application here—and there is not—it has been resolved by HUD, the agency given statutory authority to interpret and apply the FHA, 42 U.S.C. § 3608(a). HUD has consistently construed the FHA to bar landlords from sexual harassment that amounts to either a quid-pro-quo or a hostile housing environment, and it has codified that interpretation multiple times in regulations after notice-and-comment rulemaking. *See* 24 C.F.R. § 100.60(b)(5) (decades-old regulation prohibiting landlord from denying or limiting rental services "because a person failed or refused to provide sexual favors"); 81 Fed. Reg. 63,054 (Sept. 14, 2016) (publication of HUD's more comprehensive rule on harassment), *codified at* 24 C.F.R. § 100.600. Consistent with HUD's long-standing position, the Department of Justice, which has authority to bring civil FHA enforcement actions on behalf of

the United States, 42 U.S.C. § 3614, has vigorously enforced the FHA against landlords who engage in such conduct across administrations. *See* Brief for United States at 10–11, *Francis v. Kings Park Manor*, 944 F.3d 370 (2nd Cir. 2019) (No. 15-1823) (filed May 7, 2020). Retrieved from https://www.relmanlaw.com/media/cases/960_307%20-%20Amicus%20Brief%20of%20US%20DOJ%20in%20Support%20of%20Neither%20Party.pdf.[3] HUD's interpretation of the meaning of the FHA is entitled to "great weight," *Trafficante*, 409 U.S. at 210. This Court should construe the FHA consistent with the position of the agencies tasked with administering and enforcing it. *See, e.g.*, *West v. DJ Mortg., LLC*, 271 F. Supp. 3d 1336, 1351 (N.D. Ga. 2017) (relying on 24 C.F.R. § 100.600 in holding housing harassment actionable under 42 U.S.C. § 3604(b)).

Because the text is so clear, it is unsurprising that "the overwhelming weight of federal authority" is to the effect that "sexual-harassment based sex discrimination claims are actionable under the Fair Housing Act." *Noah*, 379 F. Supp. 3d at 1288–89 (collecting cases).[4] In particular, district courts in this Circuit

[3] As described in that brief, HUD has announced that it is revisiting a part of that rule not relevant here, which pertains to the circumstances under which a landlord is liable for failing to address a third party's harassing conduct. But the United States has never questioned whether the FHA bars a landlord's *own* harassing conduct.

[4] *See, e.g.*, *The Fair Hous. Council of San Diego, Joann Reed v. Penasquitos Casablanca Owner's Ass'n*, 381 F. App'x 674, 676 (9th Cir. 2010) (FHA reaches

have applied § 3604(b) and (f)(2) to protect residents subjected to sexual harassment and assault. *See West*, 271 F. Supp. 3d at 1351–55 (denying summary judgment on plaintiff's § 3604(b) claim for harassment; landlord groped her and made repeated unwanted sexual advances); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, *1, *4–*5 (M.D. Fla. May 2, 2005) (plaintiff stated claim under § 3604(b) with allegations including that landlord "made sexually suggestive remarks toward the Plaintiff," physically attacked her, "asked for the Plaintiff to touch his genitals," "demanded oral sex," and "exposed his genitals and ejaculated" when she refused). As *Richards* correctly observed, it would be "anomalous," "inconsistent with the spirit of the Fair Housing Act, contrary to the Act's 'broad and inclusive' language, and at odds with a 'generous construction' of its provisions" to hold otherwise. *Id.* at *3.[5]

"sexual harassment"); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 363-64 (8th Cir. 2003) (reversing dismissal of resident's § 3604(f)(2) claim based on a hostile housing environment theory); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997) (affirming HUD ALJ order holding landlord liable under § 3604(b) for sexual harassment of tenant); *Honce v. Vigil*, 1 F.3d 1085, 1089-90 (10th Cir. 1993) (recognizing quid pro quo harassment and hostile housing environment theories under § 3604(b)); *Shellhammer*,770 F.2d at 167 (affirming 1 Fair Hous.-Lend. Rptr. ¶ 15,472 (N.D. Ohio 1983)).

[5] In the Title VII context, courts have similarly rejected attempts by defendants to defeat sexual harassment complaints based on arguments that the actions were not taken because of the employee's sex. *See, e.g.*, *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 302-03 (4th Cir. 2019) (concluding that employee's sexual harassment claims could move forward when she asserted a hostile environment resulting from rumors that she had slept with her boss to obtain a promotion).

The District Court failed to grapple with any of this. Instead, its ruling was based largely on the fact that this Court has not squarely ruled that conditioning rental terms on sexual conduct by a tenant is barred by Section 3604(b) or any provision of the FHA. But that is only because the proposition should be so clear that this Court, until now, has not needed to rule on it. For example, in *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261 (11th Cir. 2002), this Court reinstated one part of a jury verdict for a plaintiff after finding sufficient evidence she had suffered discrimination based on familial status. The *other* part of the same jury verdict—that she suffered discriminated based on sex when "she was ultimately evicted from her apartment, at least in part, because she would not have sex with Defendant Davis"—was left intact by the trial court, and the defendant did not challenge it on appeal. *Id.* at 1263.

The District Court's finding that Ms. Fox did not state a claim for retaliation under Section 3617, meanwhile, was based entirely on the premise that the landlord's insistence on sexual favors did not implicate Ms. Fox's rights under Section 3604(b) or 3604(c), and so he could not have retaliated against her for refusing. The premise of that reasoning is incorrect, as explained above. Because a tenant has the underlying right under the FHA not to be subjected to quid-pro-quo propositions, she can bring a retaliation claim when she is punished for refusing. *See, e.g.*, *Noah*, 379 F. Supp. 3d at 1290 (retaliation claim stated where landlord

offered tenant money "to be his girlfriend" and threatened that, if tenant refused, she "wouldn't be allowed to renew her lease when it expired"). Moreover, retaliation claims are properly brought even where there is no underlying violation of fair housing rights, so long as the plaintiff has a good faith basis to believe she is engaging in protected conduct, as Ms. Fox did here.

II. That Ms. Fox Acquiesced for a Time in the Quid-Pro-Quo Harassment and Hostile Housing Environment Did Not Negate Its Discriminatory Nature.

The District Court failed to grapple with the quid-pro-quo nature of Gaines's conduct in this case, characterizing Ms. Fox's assertions as that she engaged in and then "end[ed] a physical, sexual relationship" with her landlord. District Court Op. at 6.; *see also id.* at 4. The District Court's characterization severely misconstrues Ms. Fox's allegations. Ms. Fox does not allege that she engaged in a consensual, romantic relationship with Gaines. Rather, Ms. Fox alleges that she was desperate to secure housing for herself and her children, and that Gaines took advantage of her financial circumstances—and his position of power over her as her landlord—to extort sexual acts from her.

This distinction is critical. The inherent power imbalance between a landlord and his tenant—and the conditioning of housing benefits on sexual activity—vitiates the District Court's assumption that Ms. Fox was involved in a consensual, romantic relationship with Gaines simply because she first acquiesced to his

relentless sexual advances. As recognized by federal agencies and courts, the relevant inquiry in sexual harassment cases is whether the victim indicated by her conduct that the sexual advances were unwelcome, not whether her actual participation in any sexual act was in some sense voluntary. *Meritor Savings Bank, FSB*, 477 U.S. at 68. A victim's seeming acquiescence or submission to unwelcome sexual advances, then, does not negate the discriminatory nature of quid-pro-quo harassment or hostile housing environments. This is particularly true where the alleged harasser holds power or authority over the victim, her economic well-being, and the terms and conditions of her housing. And that the victim acquiesced for a time to unwelcome advances certainly does not negate her right to stop doing so without facing retaliation.

In the employment context, federal agencies and courts have underscored the inherent power asymmetry between an employer and an employee as central to determining whether quid-pro-quo harassment took place. As the U.S. Equal Employment Opportunity Commission (EEOC) has explained, while it may be unfair but not necessarily discriminatory to favor a true romantic partner, it *is* discriminatory to coerce an employee into submitting to a sexual "relationship" by leveraging an employer's power and authority. Equal Employment Opportunity Comm'n Enforcement Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, 29 C.F.R. § 1604, *1–*2 (1990), 1990 WL 1104702 ("EEOC

Guidance"). *See also* 29 C.F.R. § 1604.11(a). The coercive nature of these transactional "relationships" is especially clear when the alleged harasser conditions a job benefit, such as increased pay or a promotion, on the employee's performance of sexual conduct. EEOC Guidance at *2 (citing *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199–1201 (D. Del. 1983)). Indeed, the EEOC's guidance has recognized that requiring sexual activity in exchange for favorable treatment in the workplace is inherently coercive and discriminatory on the basis of sex—regardless of whether the victim submits or rejects those demands. *See id.* at *1–2, 2 n.7 ("The employer would also be liable for 'quid pro quo' harassment with regard to the individual who was coerced into *submitting* to the advances.") (emphasis added).

In accordance with the EEOC's regulations and guidance, courts have consistently found that a victim's seeming acquiescence or submission to sexual demands does not negate the discriminatory nature of such harassment. Notably, in *Meritor Savings Bank*, the Supreme Court has recognized that "the fact that sex-related conduct was 'voluntary,' in the sense that the [victim] was not forced to participate against her will, is not a defense to" sexual harassment claims brought under Title VII. 477 U.S. at 68. Instead, courts must determine, based on the relevant facts, whether the alleged sexual advances or requests for sexual activity were unwelcome. *Id.* Similarly, this Court has held that the key inquiry in Title VII

sexual harassment cases is whether the conduct at issue was "unwelcome in the sense that the [victim] did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (citations omitted). *Henson* also recognized the inherent power imbalance between an employer and an employee, noting that quid-pro-quo harassment occurs when an employer or supervisor "relies upon his apparent or actual authority to extort sexual consideration from an employee." *Id.* at 910.

These same principles apply in the housing context. As in employer-employee relationships, there is a clear power imbalance between a landlord and his tenant due to the landlord's undisputed control over the terms and conditions of the tenant's housing. A landlord has the ability, sometimes at his whim, to raise or reduce rental fees and costs, impose conditions or restrictions on a tenant's housing and related benefits, provide or deny repairs, access a tenant's home, and even evict or decline to renew a tenant's lease. Moreover, women—and especially Black women and other women of color—are "vulnerable to sexual harassment in housing, especially rental housing, at every stage in the transaction, from accessing housing to repairs to eviction." Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 Yale J.L. & Feminism 227, 233 (2016); *see also* Rigel C. Oliveri, *Sexual Harassment of Low-Income*

Women in Housing: Pilot Study Results, 83 Mo. L. Rev. 597, 636–39 (2018). The inherent power asymmetry between landlords and tenants contributes to the heightened vulnerability of tenants to ongoing sexual harassment, including quid-pro-quo and hostile housing environment harassment, and the related likelihood that tenants may submit to quid-pro-quo harassment to avoid jeopardizing their housing.

Given the power imbalance in control over the terms and conditions of housing, a landlord's unwelcome sexual advances do not become less discriminatory simply because the tenant acquiesces to them or receives some benefit from the transaction. HUD's regulations on harassment, which largely mirror the language set forth in the EEOC's regulations and guidance, reflect this understanding. In its regulations, HUD explicitly provides: "An unwelcome request or demand may constitute quid pro quo harassment *even if a person acquiesces* in the unwelcome request or demand." 24 C.F.R. § 100.600 (emphasis added). Moreover, in the preamble to its regulation regarding quid-pro-quo and hostile environment harassment prohibited by the FHA, HUD explained:

> [I]f a housing provider regularly or routinely confers housing benefits based upon the granting of sexual favors, such conduct may constitute quid pro quo harassment or hostile environment harassment against others who do not welcome such conduct, regardless of whether any objectionable conduct is directed at them and *regardless of whether the individuals who received favorable treatment willingly granted the sexual favors*.

Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act ("HUD Quid Pro Quo Rule"), 81 Fed. Reg. 63,054-01, 63,061 & n.24 (Sept. 14, 2016) (citing EEOC Guidance, 29 C.F.R. § 1604) (emphasis added). That is because, in housing as in employment, an environment where sexual activity is required for favorable treatment is inherently discriminatory. *See id.*

If anything, "offers" of favorable treatment in exchange for sexual activity can be particularly invasive and threatening for tenants, as "[o]ne's home is a place of privacy, security, and refuge (or should be)." *Id.* at 63,055. As a result, "harassment that occurs in or around one's home can be far more intrusive, violative and threatening than harassment in the more public environment of one's work place." *Id.* Given this heightened threat, people experiencing sexual harassment in their homes may be especially fearful of and eager to avoid the consequences of rejecting unwelcome sexual advances, demands for sexual activity, and other harassment—particularly when such harassment is committed by those who control or have power over the terms and conditions of their housing. *Id.* at 63,060–61.

Here, Ms. Fox's submission under duress to Gaines's quid-pro-quo requests for sexual conduct does not negate his illegal sexual harassment of a tenant. According to her Complaint, she acquiesced to repeated sexual advances by her

landlord in return for the ability to maintain housing for herself and her family, and endured extreme retaliation when she ultimately attempted to end the quid-pro-quo harassment. At every stage of her rental transaction with Gaines, Ms. Fox encountered her landlord's demands for sexual activity and sexual advances. When Ms. Fox toured the apartment for the first time, Gaines made unwelcome comments about Ms. Fox's appearance and asserted that "he would keep the unit available for her if she would give him a kiss." Doc. 39 ¶¶ 23–24. The sexual harassment continued when Ms. Fox first entered into a lease agreement to rent the apartment and submitted to her landlord's request for a kiss when he delivered the apartment key. *Id.* ¶¶ 29–30. As her landlord's sexual advances grew in frequency and severity over several months, Ms. Fox eventually acquiesced to Gaines's repeated demands in exchange for reduced rent to maintain housing for herself and her family. *Id.* ¶¶ 33–38.

None of this amounts to a romantic "relationship"; rather, it is exactly the sort of quid-pro-quo sexual harassment and hostile housing environment that the FHA bars. Ms. Fox's submission to the ongoing and relentless harassment does nothing to negate the fact that Gaines' coercive conduct constituted illegal sex discrimination under the FHA, given Gaines's power and authority over the terms and conditions of her housing.

CONCLUSION

This Court should reverse the District Court's dismissal of the Complaint and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the applicable type volume limitations in Rule 29(a)(5). This brief contains 6,484 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system (Microsoft Word) used to prepare this brief. This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using font size 14 Times New Roman.

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on September 30, 2020, I electronically filed the Brief of Amici Curiae the National Fair Housing Alliance, the National Women's Law Center, the American Civil Liberties Union, and Other Civil Rights Groups in support of Plaintiff/Appellant using the Court's CM/ECF system, which will automatically send electronic copies to the following counsel of record:

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