

<p>SUPREME COURT</p> <p>STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p> <hr/> <p>On Certiorari to the District Court, Adams County, District Court Case No. 2022CV30680 Opinion by Judge Teri Lynn Vasquez County Court, Adams County, 2022C503</p> <hr/> <p>Petitioner: Claire Miller v. Respondent: Jesse Amos</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28, C.A.R. 29, C.A.R. 32, and C.A.R. 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and C.A.R. 29(d). It contains 3,146 words.

Undersigned counsel certifies that this Brief complies with all the requirements as to typeface, font and line spacing, pursuant to C.A.R. 29 and C.A.R. 32.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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STATEMENT OF THE CASE

Amici adopt the Statement of the Case from the Petition for Writ of Certiorari of Claire E. Miller.

INTEREST OF AMICUS CURIAE

As the motion for leave further describes, Amici¹ are civil rights, legal aid, domestic violence, and sexual assault organizations committed to ending sexual harassment by property owners so tenants can feel safe in their homes. The district court's holding presents significant issues that jeopardize the safety and stability of renters experiencing sexual harassment. Amici can provide a national perspective on the significant implications of the decision. Amici can describe how preventing victims of sexual harassment from raising harassment as a defense in eviction court undermines the purpose of civil rights laws and greenlights evictions by property owners who engage in or sanction harassment.

ARGUMENT

I. THE FAIR HOUSING ACT WAS ENACTED TO PROVIDE COMPREHENSIVE RELIEF TO PROTECTED CLASSES

a. Discriminatory evictions were commonplace in the years leading up to the passage of the FHA and related state laws.

Prior to the passage of the Fair Housing Act (“FHA”) in 1968, discriminatory evictions and housing practices were common. Through redlining, discriminatory lending, and restrictive covenants, Black families in particular were

¹ Amici are National Alliance to End Sexual Violence, National Fair Housing Alliance, National Housing Law Project, National Network to End Domestic Violence, National Resource Center on Domestic Violence, National Women's Law Center, and the Shriver Center on Poverty Law.

systematically shut out of homeownership and pushed into segregated, rapidly deteriorating apartments or public housing.² Discrimination in housing admissions was likewise rampant; fair housing testing conducted before the passage of the FHA “routinely found the incidence of discrimination upwards of ninety percent.”³

Prior to 1968, discriminatory evictions also played an important and legally sanctioned role in maintaining and enforcing racially-restrictive covenants. In Levittown, New York, for example, where local officials sought to maintain segregation, white and Black renters who pushed to integrate a subdivision, were evicted or threatened with eviction.⁴

Black and Latinx Vietnam War veterans, whose families struggled to find housing during the war and who were routinely denied housing or evicted due to race after they came home, played a significant role in the passage of the FHA,

² See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017); see also Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30(Suppl 1) *Sociol. F.* (Randolph N J) 571, 571 (June 2015).

³ Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 *Harv. J. on Legis.* 247, 276 (2016).

⁴ American Friends Service Committee, *Discrimination in Housing: A Comparison Study*, 8, 11 (June 1957), <https://afsc.org/sites/default/files/documents/1957%20Discrimination%20in%20Housing%20-%20A%20Comparison%20Study%20Levittown%20NY%20and%20Levittown%20OPA.pdf>.

among many others.⁵ After stalling for years despite these efforts, President Johnson – spurred to action by the assassination of Dr. Martin Luther King Jr. – finally pressured Congress to pass it.⁶ Six years later, in 1974, sex was added as a protected class under the FHA.⁷ In 1988, the FHA was amended again to protect from discrimination families with children and persons with disabilities.⁸ Colorado courts look to the FHA as persuasive guidance in interpreting the Colorado Fair Housing Act because they "contain[] nearly identical language prohibiting discrimination." *Boulder Meadows v. Saville*, 2 P.3d 131, 136 (Colo. App. 2000).

b. The text, legislative history, and implementation of the FHA shows that Congress sought to prevent discriminatory evictions.

Congress understood the broad array of discrimination permeating the housing market, which divided the nation into “two societies.”⁹ Congress intended

⁵ U.S. Dept. of Hous. and Urban Dev., *History of Fair Housing*, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history; see also History.com, *Fair Housing Act* (Jan. 28, 2021), <https://www.history.com/topics/black-history/fair-housing-act>.

⁶ Zasloff, *supra* note 2 at 248; see also, Claudia Aranda and Diane K. Levy, *How the Fair Housing Act’s role in combating discrimination will continue to evolve* (May 2, 2018) <https://www.urban.org/urban-wire/how-fair-housing-acts-role-combating-discrimination-will-continue-evolve>

⁷ Hous. and Cmty. Dev. Act of 1974, Pub. L. No. 93-383, 42 U.S.C. § 5301.

⁸ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 42 U.S.C. § 3601

⁹ *Report of the National Advisory Commission on Civil Disorders* (1968), https://www.hud.gov/sites/dfiles/FHEO/documents/kerner_commission_full_report.pdf.

for the FHA to root out discrimination both before and during a tenancy, and courts have long found that the FHA extends to post-acquisition conduct.¹⁰

The FHA includes “at least one provision . . . [that] deals expressly with problems that arise after home ownership has been secured,” barring discrimination in “real estate-related transactions,” including, “the making or purchasing of loans ... for ... improving, repairing, or maintaining a dwelling.” *United States v. Koch* at 977, quoting 42 U.S.C. § 3605(b). The initial bill draft showed a “[concern] with the need to prevent discrimination that might arise during a person's occupancy of a dwelling. . .” stating that “[i]t is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States.” *Id.* Although the phrasing later changed,¹¹ the original wording of “‘post-possession’ problems, such as harassment or expulsion,” informed Congress’ debates on the FHA. *Id.* Congress was “‘committed to the principle of living together,’ and ‘sought to promote integrated

¹⁰ See *United States v. Koch*, 352 F.Supp.2d 970, 977 (D.Neb.2004); *Richards v. Bono*, 2005 WL 1065141, *3–4 (M.D.Fla.2005); *Landesman v. Keys Condo. Owners Ass'n*, 2004 WL 2370638, *2 (N.D.Cal. Oct.19, 2004); *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009); *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009); *Georgia State Conf. of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627 (11th Cir. 2019).

¹¹ 42 U.S.C. § 3601.

neighborhoods where residents of different races would live together in ‘harmony.’” *Id.* at 978, *quoting* 114 Cong. Rec. 2275-76, 2279.

The FHA has been implemented to cover post-acquisition conduct. For example, the U.S. Department of Housing and Urban Development (“HUD”) promulgated regulations that prohibit “[evicting] tenants because of their” protected class status or that of their guests or “subjecting a person to harassment” because of their protected class status that “causes the person to vacate a dwelling. . . .” 24 C.F.R. § 100.60(b)(5),(7). Similarly, the Department of Justice (DOJ) has filed amicus briefs “setting forth the United States’ view that [the FHA] prohibits post-acquisition discrimination.”¹²

It is axiomatic then that a tenant who can challenge their eviction as a violation of the FHA (and analogous state or local fair housing laws), can also raise that same claim as a valid defense to an eviction, as many states have found.¹³ Especially in eviction court – where timelines are tight and outcomes can be

¹² Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees and Urging Reversal on whether Sections 3604(b) and (f)(2) of the Fair Housing Act apply to post-acquisition discrimination at 2, *Paulk v. Georgia Dep’t of Transp.*, No. 16-13406-D (Sep. 6, 2016); *See also* Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims, *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (No. 06-3376).

¹³ Petition for Writ of Certiorari at 18-19, *Miller v. Amos*, No 2022SC936 (Adams County Dist. Ct. Feb. 10, 2023) .

devastating – a tenant must be able to use these critical protections within this judicial system.

This concept is vital because eviction as a tool for discrimination persists today. Evictions continue to be disproportionately weaponized against Black women and survivors of gender-based violence.¹⁴ Ms. Miller’s eviction for rebuffing unlawful sexual harassment is no different, and an eviction court’s unwillingness to hear her defense only compounds her harm and that of other victims of discrimination.

II. SEXUAL HARRASSMENT HARMS TENANTS WHO MUST CHOOSE BETWEEN RESISTING AND RISKING EVICTION OR STAYING HOUSED.

In the landlord-tenant relationship, “an inherent power imbalance exists [...] because landlords can exercise coercive power over their tenants.” *Judd v. Weinstein*, 967 F.3d 952, 957 (9th Cir. 2020). At the heart of that relationship is the tenant’s basic need for a safe and secure home in a rental market where demand for affordable housing far exceeds supply.¹⁵ Through “the ability to access women’s

¹⁴ Corianne Payton Scally, *The Fair Housing Act is critical to ensuring evictions aren’t driven by discrimination* (April 23, 2018), <https://www.urban.org/urban-wire/fair-housing-act-critical-ensuring-evictions-arent-driven-discrimination>.

¹⁵ Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 Ariz. L. Rev. 17, 32 (1998).

homes day or night and the power to evict tenants who reject their sexual advances,” landlords who harass can easily disrupt that safety and security.¹⁶

This coercive power also derives from the legal rights governing tenancies. Landlords can weaponize not only an abstract power to evict, but an immediate power to evict within a legal system that permits summary proceedings, fails to guarantee adequate representation for tenants, and sets a low threshold for displacing tenants from their home.¹⁷ *See, e.g., HUD Secretary, on behalf of Patricia Y. Jorgenson v. Zbyslaw Kobut*, 1995 WL 225277, at *11 (Apr. 17, 1995) (finding that where “Complainant was not a problem tenant and was current in her rent,” the fact that Respondent served an eviction notice on her within four days of her rejection of his advance” was “compelling evidence that Complainant’s rejection of Respondent’s advance caused the eviction”)

This coercive power helps explain why “sexual harassment at home is almost entirely a landlord-tenant phenomenon.”¹⁸ The threat of eviction, whether explicit or implicit, is a powerful tool that landlords can deploy to keep the tenant quiet about the sexual harassment. *See, e.g., West v. DJ Mortg., LLC*, 164 F. Supp.

¹⁶ Griff Tester, *An Intersection Analysis of Sexual Harassment in Housing*, 22 *Gender & Soc’y* 349 (June 2008).

¹⁷ *See* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, *Yale L. J. & Feminism* 227, 269 (2016) (“A landlord’s access to his female tenants and their families is structural, not a result of deviancy.”).

¹⁸ *See* Adams, *supra* note 14 at 30..

3d 1393 (N.D. Ga. 2016) (property manager first threatened tenant with eviction after she rejected his harassment and ultimately evicted tenant due to nonpayment). Moving out is often not possible, especially if there are no affordable alternatives. An eviction threat can also motivate tenants to quickly move out in order to avoid an eviction record, which could become a barrier to future housing. *See, e.g., Paulsen v. Great Bridge Attleboro Ltd. P'ship*, No. CV 21-10121-NMG, 2021 WL 3475725 (D. Mass. Aug. 5, 2021) (landlord sexually harassed tenant and threatened eviction, but tenant moved before the eviction suit was filed).¹⁹

Gender, race, familial status, and economic status compound the harm that a tenant being sexually harassed may experience.²⁰ Women are more likely to rent because they tend to earn less income and possess less wealth.²¹ They are also more likely to live in poverty and require rental assistance.²² Women, especially Black women, are also more likely to experience discriminatory housing barriers, making it more difficult to secure other housing if they are being sexually

¹⁹ *See also* Yvette N. A. Pappoe, *The Scarlet Letter “E”: How Tenant Screening Policies Exacerbate Housing Inequity for Evicted Black Women*, (August 1, 2022), B. U. L. Rev., Forthcoming, available at <https://ssrn.com/abstract=4186278>.

²⁰ *See* Tester, *supra* note 15 at 351, (finding that “housing-related sexual harassment often takes place at the intersections of multiple inequities, most notably gender, race, and social class”).

²¹ *See* Adams, *supra* note 14 at 36-38.

²² *Id.*

harassed.²³ For example, they are more likely to face familial status discrimination,²⁴ or if they receive Section 8, source of income discrimination.²⁵

When the Supreme Court recognized sexual harassment as unlawful in employment, the door opened to other settings.²⁶ Courts have since used the Title VII sexual harassment standards in FHA housing cases,²⁷ even though sexual harassment can be more pervasive and harmful in housing, where tenants have no escape from landlords who wielded massive power over them.²⁸

The seriousness of these harms compelled the federal government to act. In 2016, HUD promulgated a rule to address the problem of sexual harassment in housing, recognizing the discriminatory problem that sexual harassment posed renters. 24 C.F.R. § 100.60. *See also* 24 C.F.R. § 100.65(b)(5) (providing that

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 73 (1986) (recognizing sexual harassment as a violation of Title VII and expressly holding that such claims are actionable under Title VII).

²⁷ *See, e.g., Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Shellhammer v. Lewallen*, 1 Fair Hous.-Fair Lending Rep. 15,472 (W.D. Ohio 1983, *aff'd*, 770 F.2d 167 (6th Cir. 1985); *Glover v. Jones*, 522 F. Supp. 2d 496, 503 (W.D.N.Y. 2007); *Beliveau v. Caras*, 873 F. Supp. 1393, 1396 (C.D. Cal. 1995).

²⁸ “When sexual harassment occurs at work, at that moment or at the end of the workday, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In contrast, when the harassment occurs in a woman's home, it is a complete invasion in her life.” Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing* 1987 Wis. L. Rev. 1061, 1072 (1987).

“denying housing-related services because of a tenant’s refusal to provide sexual favors” is an example of discriminatory conduct under the FHA).²⁹

In 2017, the DOJ launched the Sexual Harassment in Housing Initiative to investigate and enforce the civil rights of tenants experiencing sexual harassment.³⁰ Out of seventeen cases that were settled, eleven involved a landlord who either threatened to evict, initiated eviction proceedings, or ultimately evicted tenants who resisted sexual harassment.³¹ In one case, the landlord sexually harassed tenants over a fifteen-year period, targeting individuals whose economic status made them vulnerable, such as homelessness, financial difficulties, and Section 8

²⁹ Even before the regulations, HUD issued guidance on sexual harassment. U.S. Dept of Hous. & Urban Dev., *Questions and Answers on Sexual Harassment under the Fair Housing Act* (November 17, 2008) (“It is also important that the owner or manager and his or her employees do not retaliate against the person making the complaint. Retaliation includes, but is not limited to, denying housing, increasing rent, withholding maintenance or similar services, harassing, suing, and evicting, because a person exercised her legal rights under the Fair Housing Act.”). <https://www.hud.gov/sites/documents/QANDASEXUALHARASSMENT.PDF>.

³⁰ U.S. Dep’t of Justice, *Sexual Harassment in Housing Initiative – About Us*, (updated Nov. 7, 2018), <https://www.justice.gov/crt/sexual-harassment-housing-initiative-about-us>.

³¹ U.S. Dep’t of Justice, *Sexual Harassment in Housing Initiative – Some Recent Cases* (updated Jan. 11, 2022), <https://www.justice.gov/crt/sexual-harassment-housing-initiative-recent-cases>.

Voucher participation.³² DOJ settlements often required the landlord to dismiss pending eviction actions or vacate eviction judgments against tenants.³³

Unfortunately, DOJ action or affirmative litigation is not available or will come too late for the vast majority of tenants who experience sexual harassment. Even for those able to do so, vacating an eviction order after the fact is cold comfort to those who lost their housing unjustly. To keep a sexual harasser from exploiting the eviction process to further harm victims, tenants must have the ability to assert an affirmative defense in an eviction proceeding. If this Court forecloses this right, the power to harm, and even render homeless victims of sexual harassment will be legally weaponized.

III. EVICTION HEARINGS ARE LESS THAN FULLY MEANINGFUL IF FAIR HOUSING DEFENSES ARE NOT RECOGNIZED

Colorado’s eviction procedure, the Forcible Entry & Detainer (FED) law, is “designed not only to provide landlords with an expeditious method of regaining possession of their premises but also to ensure that tenants not be ejected without due process of law.” *Miles v. Fleming*, 214 P.3d 1054, 1056 (Colo. 2009), *citing Butler v. Farner*, 704 P.2d 853 (Colo.1985). To prevail, a landlord must generally

³² *Id.*

³³ Consent Decree, *United States of America v. Joseph Centanni*, No. 2:20-cv-10053-JXN-AME (D.N.J., Dec. 17, 2021), available at <https://www.justice.gov/crt/case-document/file/1461211/download>.

demonstrate only that it has the present right of possession and has complied with FED procedures. *See Miles* at 1057. But a tenant may raise any legal or equitable defense. *See Adcock v. Lieber*, 51 Colo. 373, 376; 117 P. 993 (1911) (“The language is broad and comprehensive, and does not preclude a defendant from setting up an equitable defense, but rather invites him to do so.”), *see also* C.R.S. § 13-40-113(1). Thus, while Colorado does not require cause to terminate a tenancy or not renew a lease, *see* C.R.S. § 13-40-107(1), (4), a landlord still cannot act contrary to statute or in a way that offends principle of equity. *See, e.g., Boulder Meadows* at 138 (tenant defeated FED suit based on counterclaim alleging disability discrimination). Successfully advancing such an affirmative defense to a FED suit remains challenging for tenants, who bear the burden of detecting and proving unlawful grounds for eviction. *See, e.g., American Bar Association, Resolution #612, ABA Ten Guidelines for Residential Eviction Laws*, p. 9 (Feb. 2022) (“Allowing eviction without cause invites abuse, enabling a discriminatory, retaliatory, or otherwise illegitimate motive for ending a tenancy to be easily concealed behind a ‘no cause’ eviction.”). But if and when such a defense is established, “[t]he inequity which would result from allowing [a] plaintiff to maintain the forcible entry and detainer action in the present fact setting is clear.” *White v. Widger*, 144 Colo. 566, 574, 358 P.2d 592, 597 (1960).

Indeed, “an evolving respect for a tenant's personality and property interests in her home”³⁴ has already led four states³⁵ and a number of local governments to restrict or do away entirely with no-cause eviction³⁶--a legacy of feudal doctrines prioritizing the landlord's superior estate.³⁷ While Colorado has not moved away from no cause eviction, its express directive that tenants can raise “every defense which then exists,” C.R.S. § 13-40-113(1), differentiates the FED procedure from the most archaic regimes, where defenses to eviction such as uninhabitable conditions or retaliation “for reporting building code violations or for exercising constitutional rights . . .” are not permitted. *Lindsey v. Normet*, 405 U.S. 56, 69 (1972). To interpret the FED Act as excluding affirmative defenses based on fair housing laws would be an arbitrary and retrograde step, and for victims of housing discrimination a FED trial under such a rule would fall short of affording a meaningful opportunity to be heard. *See Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003) (due process fundamentally requires “the opportunity to be heard ‘at a

³⁴ *See* Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 928 (1989).

³⁵ Those four states are New Hampshire, R.S. § 540:1-a, Washington, RCW § 59.18.650; New Jersey, N.J. Rev. Stat. § 2A:18-61.1; and California, Cal. Civil Code § 1946.2. Oregon also prohibits no-cause lease termination after the first year of the tenancy. *See* Ore. Rev. Stat. § 90.427.

³⁶ *See* Julieta Cuéllar, “Effect of ‘Just Cause’ Eviction Ordinances on Eviction in Four California Cities,” Princeton J. of Public & Intern’l Affairs (May 21, 2019), <https://jpia.princeton.edu/news/effect-just-cause-eviction-ordinances-eviction-four-california-cities>.

³⁷ *See* Manheim at 928.

meaningful time and in a meaningful manner.”), *quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant Ms. Miller’s petition for certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2023, a true and correct copy of the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS was filed with the Court and served via Colorado Courts E-Filing and similarly served upon all counsel of record.

/s/ Laura B. Wolf

*In accordance with C.R.C.P. 121 § 1-26(7)-(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.