

IN THE SUPREME COURT OF OHIO

AKRON METROPOLITAN HOUSING
AUTHORITY, et al.

Appellants,

v.

OHIO CIVIL RIGHTS COMMISSION, et
al.

Appellees.

On Appeal from the Summit County Court
of Appeals, Ninth Appellate District

Court of Appeals Consolidated Case Nos.
23056 and 230

07-0254

BRIEF OF AMICI CURIAE THE COUNCIL OF LARGE PUBLIC HOUSING
AUTHORITIES, THE NATIONAL APARTMENT ASSOCIATION, THE NATIONAL
ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, THE NATIONAL
LEASED HOUSING ASSOCIATION, THE NATIONAL MULTI HOUSING COUNCIL, AND
THE PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION

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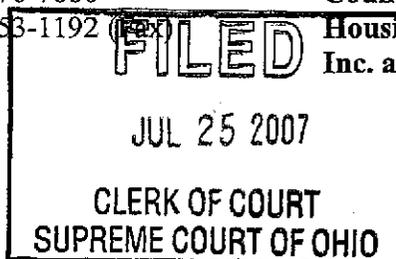


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STATEMENT OF INTEREST OF AMICI CURIAE

The nation's public housing agencies (PHAs) manage 1.2 million units of Public Housing, providing affordable homes to more than 2.6 million seniors, people with disabilities and low-income families. CLPHA is the Washington-based voice for 60 large PHAs, who administer affordable housing programs in virtually every major metropolitan area in the country. On any given day, CLPHA members serve more than one million households through the public housing and Section 8 rental assistance programs. CLPHA advocates for adequate public housing funding and policies that support local management and accountability, develops and analyzes policies that impact the public housing community, researches key public housing trends, and educates policy makers and the public about the critical role public housing plays in meeting affordable housing needs.

The National Apartment Association (NAA) is the largest national federation of state and local apartment associations, with 188 affiliates representing more than 51,000 professionals who own and manage more than 6.1 million apartments. NAA's mission is to serve the interests of multifamily housing owners, managers, developers and suppliers and maintain a high level of professionalism in the multifamily housing industry to better serve the rental housing needs of the public. NAA works to support an industry that offers safe, affordable multifamily housing to the public, equitably compensates its workforce, and provides investors with a fair and reasonable rate of return.

The National Association of Housing and Redevelopment Officials (NAHRO) is a professional membership organization comprised of 21,227 housing and community development agencies and officials throughout the United States who administer a variety

of affordable housing and community development programs at the local level. NAHRO advocates for the provision of adequate and affordable housing and strong, viable communities for all Americans—particularly those with low- and moderate-incomes. NAHRO members administer U.S. Department of Housing and Urban Development (HUD) programs such as Public Housing, Section 8, CDBG and HOME.

The National Leased Housing Association (NLHA) is a national organization dedicated to the provision and maintenance of affordable rental housing for all Americans. NLHA advocates for 550 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

The National Multi Housing Council (NMHC) is a national association that advocates on behalf of the apartment industry and the approximately 16 million American households who live in apartment homes. NMHC members are the principal officers of apartment firms and include owners, developers, managers and financiers. NMHC operates a joint legislative program with the NAA that targets issues such as housing policy, multifamily finance, environmental affairs, tax policy, fair housing, building codes, technology, human resources, and rent control. In addition, NMHC conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

The Public Housing Authorities Directors Association (PHADA) represents the professional administrators of approximately 1,900 housing authorities throughout the United States. PHADA works closely with members of Congress in efforts to develop sensible and effective public housing statutes and obtain adequate funding for low-

income housing programs. PHADA also serves as an advocate before HUD on a variety of regulations governing public housing nationwide.

Due to the importance of the questions raised in this case about landlord liability under the Fair Housing Act for the actions of tenants that affect other tenants and the potential impacts on affordable housing, Amici offer this brief in support of the Appellant. Appellant AMHA is a member of CLPHA, PHADA and NLHA, and AMHA's executive director sits on the Board of Directors of both CLPHA and PHADA. Otherwise, Amici have no relationship to any of the individuals involved in this litigation. This brief is submitted pursuant to S. Ct. R. VI, Sec. 6.

STATEMENT OF THE CASE AND FACTS

Amici Curiae hereby adopt the Statement of Case and Facts set forth in the Brief of the Appellant.

SUMMARY OF ARGUMENT

We urge the Court to overturn the lower court's decision and prevent a legally invalid expansion of liability under the Fair Housing Act and the Ohio Fair Housing Act (collectively, the "FHA"). The FHA appropriately holds liable those who discriminate against others. But neither the statute nor FHA jurisprudence supports liability for a non-discriminatory party, which is what the lower court's ruling would permit in this case. An examination of the legal framework underlying the kinds of FHA claims implicated in this case – "tolerance" or "failure to remedy" claims, interference claims under Section 3617, and hostile living environment claims – show that none are legally appropriate on the facts of this case, simply because there are neither allegations nor evidence that the landlord in this case took any discriminatory action. In addition, while employers may be

held liable for the discriminatory acts of their employees, that legal principle is distorted when blindly applied to landlords, because landlords and tenants almost always lack the reciprocal duties of care and control that are inherent in the employer-employee relationship and that give rise to employer liability for hostile work environments.

Rather than upholding a new and untenable cause of action under the FHA, the Court should look to existing remedies under both the FHA and landlord-tenant law to redress tenant-on-tenant harassment. Tenants may avail themselves of traditional causes of action against landlords who fail to fulfill contractual and common law obligations and against neighbors who discriminate against and harass them. In addition, we urge the Court to consider the severe consequences of the lower court's ruling on the realms of federally-assisted and other rental housing. Public housing agencies are under severe administrative and financial burdens, and to impose additional obligations to police tenant behavior or the potential for damages under the FHA where the housing authority itself has not committed any discrimination would unjustly divert resources from the most pressing needs of current and future public housing residents. Moreover, a housing authority that feels compelled to increase evictions to avoid FHA liability would effectively be moving families into homelessness. Private landlords would also be subject to economic disincentives and additional administrative burdens.

In sum, *Amici* respectfully submit that the lower court misapplied the law in holding that landlords may be held liable under the FHA for cases of tenant-on-tenant harassment, and that the Court consider the impropriety of this novel cause of action on both public and private landlords.

ARGUMENT

Amici's First Proposition of Law:

BECAUSE THE DEFENDANT IN THIS CASE IS NOT ALLEGED TO HAVE TAKEN ANY DISCRIMINATORY ACTION, THE APPELLATE COURT ERRED IN FINDING THAT THIS DISPUTE IS ACTIONABLE UNDER THE FHA.

1. **Anti-discrimination laws prohibit individuals from taking certain actions because of race, color, religion, sex, familial status, or national origin. A defendant that takes no discriminatory action, therefore, cannot be held liable under these laws.**

The crux of the complaint in this case is that a landlord, the Akron Metropolitan Housing Authority (AMHA), failed to "properly investigate and address" the appellee's complaints of racial harassment perpetrated by another tenant. (Compl. ¶ 28.) Under the Court of Appeals' decision below, landlords that do not take "immediate and appropriate corrective action" following complaints of harassment would be in violation of the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, and the Ohio Fair Housing Act, OHIO REV. CODE §§ 4112, *et seq.*¹ (Ct. of Appeals decision at ¶ 19.) The Court of Appeals held that a cause of action may lie against landlords who fail to remedy discrimination by their tenants, even if the landlord himself has taken no discriminatory action. This holding is contrary to the essential meaning and purpose of the anti-discrimination laws. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The FHA makes it illegal "[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

¹ Because courts look to relevant federal statutes and precedents to interpret the Ohio Fair Housing Act, this brief will discuss this claim under both statutes simultaneously. *See Wooten v. Columbus*, 91 Ohio App. 3d 326, 334 (10th Dist. 1993). Unless otherwise noted we include both laws in references to "FHA."

national origin.” 42 U.S.C. § 3604(b) (emphasis added); *see also* 24 CFR § 100 (2007) (Fair Housing Act regulations promulgated by HUD); OHIO REV. CODE § 4112.02(H)(4) (2007). The United States Supreme Court, in interpreting an analogous employment discrimination statute, has held that the phrase “because of” means that a defendant is not liable when the actions complained of would have been taken in the absence of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-253 (1989) HUD's Chief Administrative Law Judge held that this principle also applies to the FHA. *See Denton*, FH-FL Rptr. ¶ 25014 (HUD ALJ, 1992); *Chevron v. NRDC*, 467 U.S. 837 (1984) (decision of an administrative agency charged with enforcing and interpreting a law requires strong deference by courts). Therefore, a defendant must have acted with discriminatory motive in order to be liable under the FHA.

As applied to this case, the allegation that AMHA did not take “immediate and appropriate corrective action” is simply not a fair housing claim without the additional claim that AMHA failed to take such action *because of* the race or color of the Appellee. It is enough that AMHA’s response to the complaint did not vary based on the race or color of the complainant and that it dealt with other similar complaints in the same manner. *See Bradley v. Carydale Enters.*, 730 F. Supp. 709, 716 (E.D. Va. 1989) (antidiscrimination claim properly brought where it was “based on the defendants’ failure to investigate and resolve her racial harassment complaints *in the same manner in which the defendants resolve other complaints....*”) (emphasis added). Because there are no claims or facts alleged by the Appellee that suggest that AMHA itself discriminated in any way, the trial court properly awarded summary judgment for AMHA.

2. **A “toleration” or “failure to remedy” claim under the FHA can succeed only if the defendant was racially motivated. However, this case presents neither**

allegations nor evidence of any racial motivation on AMHA's part.

In the words of the Court of Appeals, the Appellee's key claim is that "toleration [of the Kaisk's racist acts] by AMHA arguably interfered with Harper's right to enjoy her lease." (Ct. of Appeals decision at ¶ 13). In keeping with the principles described above, a "toleration" or "failure to remedy" claim must involve discriminatory acts by the defendant or its agents. *See Lawrence v. Courtyards at Deerwood Assoc. Inc.*, 318 F. Supp. 2d 1133, 1147 (S.D. Fla. 2004) ("[t]o prevail under [a failure to remedy] theory, the [Plaintiffs] would have to establish that race played some role in the conduct of these Defendants") (citing *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991)).

However, there is no evidence that AMHA discriminated in responding to the complaint; to the contrary, AMHA has provided uncontroverted evidence that it followed standard practice in response to Appellee's complaints. (Def.'s Mot. for Summ. J. p. 3 (citing Manuel Dep. p. 9-10, Porter Dep. p. 15).) Although Appellee is unhappy with AMHA's standard procedure for responding to tenant complaints, the FHA does not establish a statutory standard for what constitutes an appropriate response to complaints. It establishes only that a landlord's response cannot vary based on the protected class of the complainant. Without evidence or allegations of a racially discriminatory motive, the defendant cannot be found liable under the FHA.

3. A claim for "interference" can succeed only if the defendant was racially motivated. This case presents neither allegations nor evidence of any racial motivation on AMHA's part.

To the extent that the Court of Appeals also framed the Appellee's claim as one of interference under § 3617 of the FHA (Ct. of Appeals decision at ¶ 14), this claim must also fail because of the utter lack of discriminatory action by the interfering party. *See*

U.S. v. Weisz, 914 F. Supp. 1050, 1054-1055 (S.D.N.Y 1996) (finding that “to bring a claim within § 3617, a plaintiff must allege conduct *on the part of a defendant* which in some way or another implicates the concerns expressed by Congress in the FHA,” and dismissing a complaint because “[N]othing in the factual allegations at bar leads or directs the mind to an inference that [defendant], in her behavior toward the [plaintiffs], was motivated by the [plaintiffs’] religious faith.”)(emphasis added); *Walton v.*

Claybridge Homeowners Ass’n, Inc., No. 1:03-cv-69-LJM-WTL, 2004 U.S. Dist. LEXIS 946, at *15 (S.D. Ind. Jan. 22, 2004) (holding that a § 3617 claim must show that defendant’s interfering conduct was racially motivated). Once again, because there is no allegation or evidence of discriminatory conduct on the part of AMHA, the trial court erred in suggesting that an interference claim against AMHA may proceed. (Ct. of Common Pleas decision at p. 9-10.)

Amici’s Second Proposition of Law

THE COURT OF APPEALS IMPROPERLY APPLIED THE HOSTILE ENVIRONMENT TEST BY FAILING TO CONSIDER WHETHER THE DISCRIMINATORY ACTOR HAD AN AGENCY RELATIONSHIP WITH THE LANDLORD.

The hostile work environment test, as applied by the court below (*see* Ct. of Appeals decision at ¶¶ 17, 19 (stating test as adapted from *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000)) is legally inappropriate where the landlord is alleged merely to have failed to remedy a hostile living environment created by its tenants.² In applying the standard hostile work environment test to this case, the Court of

² The *Amici* emphasize that they do not seek to invalidate all hostile living environment claims or argue that such claims should not be recognized. The *Amici* fully recognize that landlords who harass a tenant in a discriminatory manner or who act discriminatorily in interfering with rights afforded under the FHA, may be held accountable under the FHA. But both of these situations involve discriminatory acts taken *by the landlord* or its agents, which is not the case here. *See, e.g., Dicenso v. Cisneros*, 96 F.3d 1004 (7th Cir.

Appeals reasoned that “tenant versus tenant harassment is analogous to co-worker harassment in the workplace,” and concluded that, just as an employer is liable for co-worker harassment, a landlord should be liable for acts of tenant-on-tenant harassment (Ct. of Appeals decision at ¶ 16). However, this argument overlooks the fundamental fact that the landlord-tenant relationship is legally different from the employer-employee relationship.

An employer may be held liable for the harassing environment only if the harassing employee’s actions are legally attributable to the employer. *See Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 72 (1986). The United States Supreme Court ruled in *Meritor* that the D.C. Circuit “erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.” *Id.* Instead, the Court found that “Congress wanted courts to look to agency principles for guidance in this area.” *Id.* In other words, rather than assuming that an employer is always liable when an employee harasses another employee, *Meritor* clearly establishes that a third party’s liability for harassment depends on the nature of the agency relationship between the harasser and the third party. *Id.*; *see also* David G. Thatcher, *Tenth Circuit Survey: Real Property Survey*, 71 *Denv. U.L. Rev.* 1041, 1054-55 (1994); *Spicer v. Va. Dep’t of Corrections*, 66 F. 3d 705, 710 (4th Cir. 1995) (en banc) (harassment must be “imputable on some factual basis to the employer”).³

1996) (owner/manager of building accused of creating hostile living environment); *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003) (property managers and their children accused of causing hostile living environment); *Smith v. Mission Assocs.*, 225 F. Supp. 2d 1293 (D. Kan. 2002) (leasing supervisor and on-site property manager accused of orchestrating and directing creating hostile environment); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993) (landlord accused of creating hostile environment); *Williams v Poretzky Mgmt.*, 955 F. Supp. 490 (D. Md. 1996) (repairman employed by landlord accused of creating hostile environment)

³ *Meyer v. Holly*, 537 U.S. 280 (2003) holds that traditional agency principles also apply under the FHA to determine third-party liability.

Since *Meritor* holds that employer liability is dependent on the nature of the agency relationship with the harassing employee, *Meritor* should prevent landlord liability for the actions of its tenants regardless of the nature of their relationship⁴. In addition, the Court of Appeals erred in assuming that landlords and employers should be equally liable for hostile environments caused by third parties because the nature of agency relationships between employers and employees and landlords and tenants are dramatically different. The core elements of an agency relationship are entirely absent from of landlord-tenant relationships: each party must agree to owe the other fiduciary duties, and both parties must consent that one person will act on the other person's behalf, subject to that person's control and with his consent. *See generally Restatement (Third) of Agency* (2006). In the landlord-tenant context, a lease or common law tenancy does not make the tenant an agent, because the tenant owes no fiduciary duties to the landlord and does not act on the landlord's behalf. Tenants may have *contractual* obligations not to disturb their neighbors' peaceful enjoyment, and a landlord may have common law obligations to its tenants, such as under a warranty of habitability, but these obligations do not create duties of care, loyalty and obedience which would indicate a greater fiduciary relationship, or other indications of intent or acceptance of agency.

In addition, employers inherently possess control over employees who serve them and over the work environment that they provide for those employees. As a result, employees are both obligated and able to control the behavior of their employees toward other employees. Therefore, the bad act of an employee within the scope of employment, or the bad act of an employee that is not directly within the scope of employment, but

⁴ Even though it is conceivable that tenants may become agents of the landlord, this type of relationship is always in addition the baseline landlord-tenant relationship and not automatically created.

about which the employer knew or should have known, are properly imputed to the employer. Moreover, the employer may use a host of remedies to alter or correct the employee's behavior, such as suspension, discipline, and demotion.

Landlords, on the other hand, have significantly less control over their tenants' conduct. So long as tenants pay their rent and otherwise abide by the terms of the lease, tenants can conduct any lawful activities they wish on their premises, for or against the interests of the landlord, and will not be accountable to the landlord for those activities. Additionally, landlords do not have the ability to shape or alter tenants' behavior beyond threatening and carrying out evictions. The lack of reciprocal care and duty and the lack of control between the parties result in the understanding that landlords, unlike employers, are generally not responsible for the acts of their tenants. *See, e.g., Lawrence v. Courtyards at Deerwood Assoc. Inc.*, 318 F. Supp. 2d 1133, 1148-49 (S.D. Fla. 2004) (finding employment cases imputing liability to an employer for employee acts unpersuasive in a homeowners association context); *Siino v. Reices*, 628 N.Y.S.2d 757, 758 (1995) (landlord does not have a duty to control the conduct of one tenant nor a duty to protect another tenant from racial slurs by a fellow tenant); *Scarnati v. Owners of Georgetown in Columbus*, No. 96APE01-52, 1996 Ohio App. LEXIS 2538, at *12-13 (Ohio Ct. App. June 18, 1996) (landlord not responsible for breach of quiet enjoyment committed by other residents); *Bradley v. Carydale Enters.*, 730 F.Supp. 709, 720 (E.D. Va. 1989) (landlord is not the keeper of his tenants); *Darnell v. Columbus Show Case Co.*, 58 S.E. 631, 632 (Ga. 1907) (proprietor is not liable to a tenant for negligence of another tenant on the premises, so long as the latter acted without the consent or authority of the proprietor).

The Court of Appeals' hostile living environment test presumes that all landlords have an agency relationship with their tenants, even though the United States Supreme Court has refused to allow courts to make that same presumption with respect to employers. The lower court's ruling is not a proper application of the hostile living environment standard, because it is precisely the situation that *Meritor* will not allow.

Amici's Third Proposition of Law

THE COURT OF APPEALS ERRED IN ASSUMING LANDLORDS HAVE AFFIRMATIVE DUTIES TO EITHER PROVIDE A HARASSMENT-FREE ENVIRONMENT OR TO POLICE THE BEHAVIOR OF OTHER TENANTS.

Appellees claim that the landlord had an affirmative obligation to provide a harassment-free living situation and that by tolerating the actions of the harasser it failed to meet this obligation.⁵ The underlying assumption is that a landlord always has a duty to affirmatively remedy a hostile environment under the FHA. (*See* Compl. at ¶¶ 24-25.) But once again, a principle applicable in a hostile work environment context – that an employer automatically is obligated to remedy harassment among its employees – does not translate logically to a hostile living environment. Two cases addressing “toleration” claims make it clear that the first step is to determine whether a duty in fact exists. One case holds that a homeowners’ association must have an underlying duty to stop the harassment before it could be found to have illegally “tolerated” a hostile living environment. *See Lawrence*, 318 F. Supp. 2d at 1145. (finding no such duty on the part of the association, and refusing to simply “bootstrap the failure to meet an alleged duty

⁵ (“A housing provider has an obligation to ensure that the environment in housing that the provider rents or leases is not racially hostile. When a tenant informs a housing provider that individuals who are also tenants of that housing provider are creating a racially hostile environment, the housing provider has an obligation to investigate that claim and take action designed to eliminate the racially hostile environment.”). *See* Compl. at ¶¶ 24-25

into a violation of the FHA.”) Similarly, the court in *Reeves* first asked “whether there is a basis for holding [a condominium association] liable for its alleged failure to take action reasonably calculated to resolve [harassment] complaints.” *Reeves v. Carrollsburg Condo. Unit Owners Assn’n*, No.96-2495, 1997 U.S. Dist. LEXIS 21762, at *25 (D. D.C. Dec. 18, 1997) (finding that the association did have such a duty, as well as a range of remedies available to it).

Regardless of whether defendant is a homeowners’ association, a condominium association, a rental landlord, or a PHA a defendant must be found to have a duty to remedy harassment before it can be found liable for failing to fulfill it. It cannot simply be presumed that in contracting to provide a tenant with a housing unit, a landlord is also contracting with the tenant to provide a housing unit free of any unwelcome or invidious conduct by others. In addition, even if such a duty existed, it must be explained why that duty would fall within the ambit of the FHA. Neither *Lawrence* nor *Reeves* addresses this issue. The fact that the housing problem to be remedied is harassment by another person does not in itself mean that the claim falls within the ambit of the FHA.⁶

Furthermore, there is no basis to presume that a rental landlord always has a higher level of duty to remedy offensive behavior than a homeowners’ or condominium association. In fact, a landlord is more likely to have *less* of a duty to police residents’ behavior than an association would. Homeowner associations are legal entities created in part to affirmatively regulate resident behavior, usually in the interest of maintaining a certain “identity” for the community or consistent property values. Associations often record legal documents – covenants against the land – that contain resident codes of

⁶ To the contrary, some discriminatory action on the part of the defendant is required to bring an FHA claim. See *supra* Amici’s First Proposition of Law.

conduct, to which residents voluntarily agree before moving in, and associations are usually governed by residents chosen by a vote of the residents. Associations also often retain special powers to enforce those covenants, such as the power to collect fees and fines.

In contrast, landlords of rental apartments very rarely, if ever, put themselves in the position of controlling residents' behavior to such a degree, or reserve for themselves the variety of enforcement powers that associations commonly do. And although the right to evict is often assumed to provide the landlord with significantly more control than an association would have, the power to evict is not automatically a viable or appropriate panacea for policing tenant behavior. *See infra* Amici's Fifth Proposition of Law. In addition, a public housing authority landlord, as opposed to a private landlord, does not automatically have an increased obligation to police tenant behavior; in fact, as a government actor, a public housing authority usually has additional restrictions and must be wary of violating resident's constitutional rights, such as due process.

In summary, in a case alleging a failure of a duty to provide a harassment-free living situation, *Lawrence* and *Reeves* indicate that the first step must be to determine whether such a duty exists. *Lawrence*, 318 F. Supp. 2d at 1145; *Reeves*, 1997 U.S. Dist. LEXIS 21762, at *25. A rental landlord – including a public housing landlord – cannot simply be presumed to have such a duty. Furthermore, even if such a duty exists, it is far from clear why the failure to fulfill that duty would constitute a claim under the FHA. In this case Appellees have not demonstrated why AMHA had any such duty or, as seen (*supra*). Amici's 1st Proposition of Law why the FHA should be implicated, thus the Appellants motion for Summary Judgment was properly granted.

Amici's Fourth Proposition of Law:

A CAUSE OF ACTION FOR HOSTILE HOUSING ENVIRONMENT CLAIMS UNDER THE FHA IS UNNECESSARY BECAUSE ADEQUATE REMEDIES ARE AVAILABLE UNDER OTHER PROVISIONS OF THE FHA IN OHIO'S LANDLORD-TENANT LAW AND UNDER TORT LAW

We must agree with the dissent to the Court of Appeals decision that other adequate remedies at law are available to address harassment by bad neighbors. (Ct. of Appeals decision, Dissent at ¶26.) At this point, we urge the Court to agree with the Amici that adequate remedies at law currently exist, obviating any need to expand the scope of the FHA and hold landlords liable for actions of tenants without racial animus on the part of the landlord.

First, if the Court should decide that liability under the FHA is warranted in cases such as this, the most appropriate claim would be against the tenant who creates the hostile environment. Indeed, the FHA provides for just this type of remedy. Section 3617 of the FHA, makes it unlawful:

“to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” 42 U.S.C. § 3617.

Under § 3617, a tenant can bring a claim against another tenant for interference. *Bryant v. Polston*, No. IP 00-1064-C-T/G, 2000 U.S. Dist. LEXIS 16368, at *13-14 (S.D. Ind. Nov. 2, 2000). Specifically, “a claim based upon coercive, threatening, intimidating, or violent conduct motivated by unlawful discrimination may state a claim under *Section 3617* absent a violation of *Sections 3603, 3604, 3605 or 3606.*” *Id.* at *9. Such a claim would appropriately hold the discriminating party liable, rather than a third party.

Second, since at its core this is a housing issue, the Court should look to the remedies already in place under Ohio's landlord-tenant statutes. Under Ohio law, if the landlord fails to fulfill any obligation under the lease, and the tenant gives the landlord notice of this defect, then the landlord must remedy the defect within thirty days or the tenant may withhold the rent in an escrow account, or file a motion to compel the landlord to honor the lease. OHIO REV. CODE § 5321.07 (2007). Thus, the tenant, with the help of the courts, can require the landlord to vindicate any of the tenant's rights under the lease without any need for an additional cause of action under the FHA.

Moreover, if the explicit contractual terms of the lease do not provide adequate relief to a tenant suffering in a hostile environment created by another tenant, the tenant may take action against the landlord for breach of the covenant of quiet enjoyment.

Wetzell v. Richcreek, 53 Ohio St. 62 (1895); *Dworkin v. Paley*, 93 Ohio App.3d 383, 386 (8th Dist. 1994). The covenant for quiet enjoyment protects a tenant's right to the peaceful and undisturbed enjoyment and possession of the leasehold and is implied in every Ohio lease. See *Dworkin*, 93 Ohio App.3d at 386; *Glyco v. Schultz*, 35 Ohio Misc. 25, 33 (1972). The covenant is breached by the landlord when the landlord obstructs, interferes with or takes away the beneficial use of the leasehold from the tenant. See *Howard v. Simon*, 18 Ohio App. 3d 14, 16 (8th Dist. 1984). Essentially, this is the claim that the Appellee now seeks to establish under the purview of the FHA, but the Appellee could have claimed that the landlord, by failing to establish adequate processes to address harassment by neighbors, deprived her of quiet enjoyment of her housing unit. If successful, the landlord would have been required to remedy the issue within thirty days.⁷

⁷ It is also worth noting that in a public housing context, grievance procedures are also incorporated as specific obligations of the landlord. Thus, if the landlord breached quiet enjoyment or any other lease term,

OHIO REV. CODE § 5321.07. If plaintiff had chosen to avail herself of this remedy against the defendant, she would not have needed additional claims under the FHA to achieve redress for the harm done by her neighbors.

Finally, plaintiffs also can find relief in common law tort remedies against the harassing neighbors. Under nuisance law one neighbor may sue another neighbor for intentionally interfering with the enjoyment of his land. If plaintiffs bring nuisance claims, the court would look at the facts and determine if the harassment was such that it caused an inconvenience or interference that materially affected plaintiffs' comfort and enjoyment of the land. *See O'Neil v. Atwell*, 73 Ohio App.3d 631, 636 (11th Dist. 1991). If nuisance was at issue, offended neighbors could have access to remedies including damages and injunctions forbidding the neighbor from engaging further in the nuisance activity.

Alternatively, under tort principles, if the harassment was done in public and was particularly offensive, aggrieved tenants could seek relief under defamation or intentional or negligent infliction of emotional distress actions. Defamation is available when the plaintiff can show that a defendant's statements are false, defaming, public, injurious and intentional. *See, e.g., State ex rel. Sellers v. Gerken*, 72 Ohio St. 3d 115, 117 (1995). Intentional infliction of emotional distress can be found when a defendant's conduct is extreme and outrageous and causes severe emotional distress to the plaintiff. *See Yeager v. Local Union 20*, 6 Ohio St 3d 369, 374 (1983). Negligent infliction of emotional distress claims can be brought when the plaintiff alleges serious emotional injury which is both severe and debilitating. *See Paugh v. Hanks*, 6 Ohio St. 3d 72, 78 (1983). All of

the tenant would be entitled to both informal discussions with AMHA and a formal grievance hearing in order to resolve the dispute. If AMHA deprived the tenant of access to these grievance procedures, the tenant could also compel AMHA to comply with its own processes.

these tort options could provide adequate remedies to tenants subjected to hostile environments by other tenants. Therefore, because adequate remedies already exist at law, there is no need for the Court to sustain the new cause of action created by the Court of Appeals.

Amici's Fifth Proposition of Law:

UPHOLDING THE COURT OF APPEALS DECISION WILL LEAD TO UNINTENDED CONSEQUENCES, JEOPARDIZING THE MISSION OF PROVIDING PUBLIC HOUSING AND OTHER ASSISTED HOUSING, AND IMPACTING PRIVATE LANDLORDS.

1. **Imposing liability on landlords for hostile housing environments created by tenants will place additional financial and administrative burdens on housing authorities by creating an additional unfunded expense and severe financial strain, and will frustrate the purpose of providing safe and decent housing to low-income citizens.**

There are approximately 3,300 public housing agencies ("PHAs") across the nation, operating roughly 1.2 million public housing units. This important affordable housing resource is home to more than 2.6 million low-income seniors, people with disabilities, and other low-income families. The authority and obligations of these PHAs are highly regulated by the U.S. Housing Act of 1937 (the "1937 Act") and regulations issued by the U.S. Department of Housing and Urban Development ("HUD"). 42 U.S.C. §§ 1437 *et seq.* (2000) The core mission of these PHAs, set forth in the 1937 Act and the attendant regulatory scheme, is to provide decent and safe dwellings for low-income families. 42 U.S.C. § 1437.

If the Court of Appeals decision were to stand, then there could be serious negative consequences for PHAs,⁸ which would be required to monitor and police tenant behavior to an unprecedented and unreasonable degree in order to assure that no “hostile living environment” existed anywhere in their projects that could result in liability under this potential cause of action. This would impose obligations on PHAs that are inconsistent with the regulatory and funding structure Congress has established for the federal public housing program and would create severe administrative and financial burdens on PHAs.

The imposition of such unfunded mandates on PHAs is especially problematic in light of current federal budget cuts for the public housing program. Federal appropriations for the public housing Operating Fund have been cut dramatically in recent years, to the point where they now cover only about 84% of acknowledged needs.⁹ As a result, PHAs are struggling to carry out their basic housing mission. Forcing them to undertake intensive interventions in disputes between tenants without being compensated will require PHAs to cut back in other areas, such as maintenance and security, harming all residents of the PHA’s properties.

Further, there are potentially severe consequences for PHAs that are forced to divert their resources and do not successfully maintain their properties or carry out the other basic housing obligations required by the 1937 Act. These include potential

⁸ Other owners and managers of government-assisted and private housing would also be susceptible to significant hardships if the court of appeals decision were to be upheld. Those consequences are discussed later in this section.

⁹ For more information on proration and funding shortages for public housing see the HUD website at <http://www.hud.gov/offices/pih/programs/ph/am/of/prorationexplanation07-2.pdf>

determinations by HUD that the PHA has breached its Annual Contributions Contract¹⁰ with HUD or a HUD determination that a PHA has a failing score under the Public Housing Assessment System. 24 C.F.R. § 902 (2007). These outcomes could result in a HUD takeover of the PHA and could also ultimately lead to a loss of public housing units available to serve low-income families in Ohio.

Exacerbating this problem is HUD's recent imposition on PHAs of a regulatory regime known as "asset management", which further circumscribes the role of PHAs with respect to their management of public housing projects and significantly reduces the scope of PHA activities for which HUD will provide funding. Under these requirements, HUD's goal is to compensate PHAs only to a level of management activity equivalent to that typically undertaken by private owners in certain other assisted housing programs.¹¹ *See* 24 C.F.R. § 990, Subpart H (2007). This funding crisis would make it much more difficult for a PHA, for example, to retain specialized staff to intervene in and mediate disputes between tenants, whatever the underlying causes or motivations.

In addition to the financial burden on PHA operations that the Court of Appeals decision would have by requiring additional staff and administrative functions, the decision opens the door to substantial judgments for money damages that PHAs have virtually no ability to pay. HUD funds PHAs to operate and maintain public housing according to formulas that do not take into account the possibility of paying for such judgments. *See* 42 U.S.C. §§ 1437g(d)(1), (e)(1) (2000). Further, HUD has publicly

¹⁰ The Annual Contributions Contract ("ACC") is the basic agreement between a PHA and HUD under which HUD provides federal housing subsidies and the PHA agrees to abide by program rules. 42 U.S.C. § 1437c (2000).

¹¹ While this may at first blush seem unrelated to the issue in front of the Court, the practical result so far has been that asset management has resulted in less funding for PHAs to carry out the same functions as private owners.

taken the position that PHAs may not legally use federal funds to pay judgments for damages. *See generally*, Heather Knight, *Housing agency to challenge appointment of Agnos, Attorney Doubts HUD will release funds to ex-mayor*, S.F. CHRON., Mar. 22, 2007.

The fact that PHAs are currently operating under difficult circumstances with enormous funding pressures is by no means an excuse for PHAs to avoid any obligations they do have under fair housing laws. However, the administrative strain caused by these severe financial and regulatory burdens puts PHAs in a position where any additional unfunded obligations, or significant monetary judgments, such as those that may result under the Court of Appeals' new cause of action, will lead to serious declines in housing quality or even the loss of public housing units for low-income families. In cases such as this, where numerous remedies exist outside of the Fair Housing Act, and where it has not been alleged that the PHA acted with any discriminatory intent, the benefit of imposing this additional source of liability is outweighed by the burden imposed on other low-income public housing residents or applicants through the decline in the number and quality of public housing units.

2. **Upholding the Court of Appeals decision forces PHAs to choose between complying with the HUD regulations and preventing "hostile environments" under the FHA, leading to increased evictions and homelessness.**

The Court of Appeals decision asserts that PHAs have substantial control over public housing tenants. (Ct. of Appeals decision ¶ 18.) *Amici* respectfully disagree. PHAs' authority over residents, including admissions and evictions, is highly restricted and does not include the authority or funding for a PHA to regulate a tenant's behavior short of pursuing eviction.

The 1937 Act and applicable regulations extensively address the processes PHAs must follow when admitting residents. 42 U.S.C §§ 1437d(c)(4)(A), (r) (2000) (governing admissions preferences and waiting lists, respectively); 24 C.F.R. § 966 (2007). PHAs have very little discretion in admitting families to public housing units and must utilize waiting lists that are operated and maintained in compliance with fair housing and civil rights requirements. 42 U.S.C, § 1437d(r). Generally, these provisions require PHAs, as public housing units become available, to admit families from the waiting list in the order in which they applied for housing. *See generally*, HUD Public Housing Occupancy Guidebook.

The 1937 Act also contains extensive requirements on provisions that must or may not be included in a public housing lease and which set a high standard for any eviction action. In particular, the statute requires the lease to “require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause.” 42 USC § 1437d(l)(7) (2000). Further, PHAs do not have an unfettered right to pursue eviction of tenants even for violations of the lease, since public housing is deemed an entitlement which carries with it the burden of due process before it can be taken from a resident. *See Gorsuch Homes, Inc. v. Wooten*, 73 Ohio App.3d 426, 432 (2nd Dist. 1992). These due process requirements are implemented through a detailed grievance process that every PHA must have. 42 USC § 1437d(k) (2000); 24 C.F.R. § 966 (2007)

Thus, since PHAs’ authority with respect to admissions, occupancy, and eviction processes is so restricted, they would have few options for heading off a hostile living

environment claim by preventing or addressing the behavior of an offensive tenant.¹² If that behavior did not rise to the standard required for eviction under the 1937 Act, or if the PHA sought to resolve the situation in a manner short of the extreme step of eviction, thereby terminating housing assistance for the family, then one of the possible tools available to the PHA is an “involuntary transfer” of a household from its current unit to another public housing unit in the same project or a different project.¹³

However, that option also has drawbacks. Even if the PHA is able to navigate the procedural requirements applicable to such an action (such as the tenant’s right to a grievance hearing) a legitimate question for the PHA is whether it would open itself to an additional fair housing claim from the new neighbors by transferring into a nearby unit a household that has one or members with known racist views. The PHA would have little ability to prevent the racist household member from engaging in behavior that ends up replicating the situation from which they were relocated. It is also important to keep in mind that a PHA, under the same fair housing laws, may not, for example, choose to move a white family into a unit next to other white families just to avoid the possibility of additional racial confrontations.

Given these concerns, a PHA might rationally decide to pursue eviction and somehow find enough evidence to meet the standards under their grievance procedures, even though normally such behavior would not be cause for eviction, rather than risk a claim that it has essentially imposed racial harassment on yet another family. For

¹² There is also the possibility that a PHA, or other property owner, could run afoul of a tenant’s First Amendment rights by attempting to regulate the tenant’s racist speech. *See Lawrence v. Courtyards at Deerwood Ass’n, Inc.*, 318 F. Supp.2d 1133, 1142 (S.D. Fla. 2004).

¹³ It should be noted that many PHAs will not even have the option of transfer, as all public housing units are occupied and waiting lists are long. *See e.g.* Ronald R. Volkmer, *Low-Income Housing and the Charitable Exemption*, 34 Creighton L. Rev. 47, 69 (December, 2000).

instance, in the case at hand, the PHA investigated the claims of both families, but did not find enough grounds to pursue eviction against either family, and as a result both families were able to keep their housing. However, if faced with the potential liability for a “hostile living environment” created by the families, the PHA may have been forced to pursue eviction against one or both families in order to prevent further liability.

Thus, the likely result of recognizing a “hostile living environment” cause of action in this case is that PHAs will be dissuaded from using even the modest amount of discretion they have over admissions and evictions to mediate racially motivated disputes between tenants. On the contrary, they will have every incentive to immediately pursue the most extreme remedy – eviction of one or both families – in order to avoid a potentially catastrophic damage award that undermines the PHA’s housing mission and threatens the viability of the public housing units for all other current and future residents.

The result of these increased evictions from public housing would be an increase in homelessness. By definition, families living in public housing have limited financial resources and housing choices and public housing is usually considered housing of last resort. Often, eviction from public housing means immediate homelessness. *See generally Turner v. Chicago Hous. Auth.*, 760 F.Supp. 1299, 1301 (N.D. Ill. 1991); *U.S. v. Leasehold Interest in 121 Nostrand Ave.*, 760 F.Supp.1015, 1032 (E.D.N.Y. 1991). We believe the court must weigh those consequences in considering this case.

- 3. The Court of Appeals decision is likely to flow over into private landlord-tenant law, thereby federalizing a traditionally local area of law, and creating disincentives for private landlords.**

While this case arises in the context of the federal public housing program, the cause of action which the Court of Appeals would recognize would be available not only to tenants in other federal housing assistance programs, but also to landlord-tenant relationships that are entirely private in nature. As Judge Slaby states in the dissent from the Court of Appeals decision:

“The majority’s decision opens the door to judicially legislate against “bad neighbors” within the context of public housing. I believe that it is then inevitable that feuding tenants in private housing would seek similar remedies.” (Ct. of Appeals decision ¶ 26.)

We agree with the dissent and believe that the majority opinion has the potential to federalize and fill court dockets with a broad range of disputes between neighbors which, though offensive and unfortunate, are still common in everyday life. As discussed *supra* in Amici’s First Proposition of Law, where the landlord has not engaged in discriminatory conduct, there is no claim under the Fair Housing Act. In such cases, the question of whether or not a landlord has an obligation to intervene is a matter to be decided in the sphere of state landlord-tenant law, as discussed *supra* in Amici’s Fourth Proposition of Law.

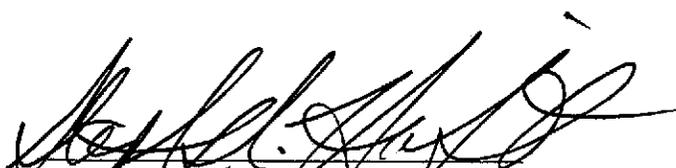
To impose on private property owners an obligation to intervene in disputes between tenants involving racial harassment is misguided on several fronts. First, such owners do not have the expertise or resources to undertake what is essentially a social services function. Second, it is likely to be an economic disincentive for individuals, companies, and other investors to engage in the business of renting residential real estate, reducing the supply of available units and harming low-income families. Third, it could make it more difficult and risky for property owners to take affirmative steps to operate racially integrated housing. This would be especially ironic and unfortunate, since it

would undercut the basic purpose of the Fair Housing Act to promote open, integrated residential housing patterns. *See Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2nd Cir. 1973).

CONCLUSION

Given the errors made by the Court of Appeals and the consequences such a decision will have on public and private rental housing, we urge the Court to overturn the lower court's decision.

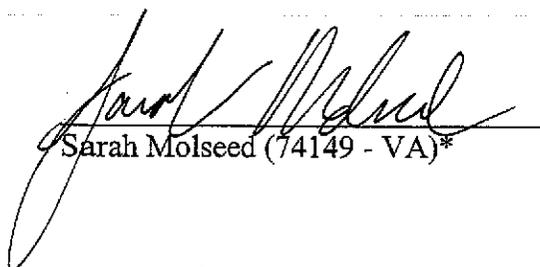
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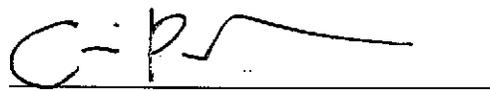
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CERTIFICATE OF SERVICE

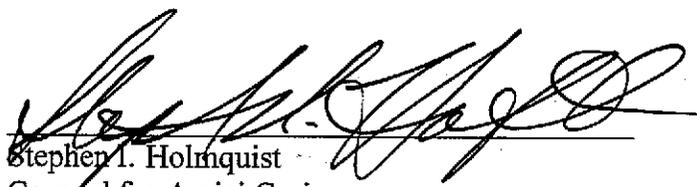
This is to certify that a true and accurate copy of the foregoing document has been sent by Federal Express this 23rd day of July, 2007, to:

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