No. 20-12620

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RITA FOX,

Plaintiff-Appellant

v.

LUCILLE F. GAINES, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the brief filed by plaintiff-appellant, the following persons may have an interest in the outcome of this case:

1. Dreiband, Eric S., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Lee, Jason, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
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The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Jason Lee
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Attorney

Date: September 30, 2020

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INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcement of the Fair Housing Act (FHA). The Secretary of Housing and Urban Development (HUD) is charged with the administration and enforcement of the FHA in administrative proceedings and the promulgation of regulations to implement the FHA. 42 U.S.C. 3608-3612. The Attorney General is responsible for all federal court enforcement of the FHA by the United States. 42 U.S.C. 3614. Both the HUD Secretary and the Attorney General have launched initiatives to combat sexual harassment in

housing. The Attorney General's Sexual Harassment in Housing Initiative, under which 19 cases have been filed by the United States since October 2017, necessarily rests on an interpretation that the FHA prohibits sexual harassment. This case raises an important question regarding whether a housing provider is liable for taking actions designed to terminate a tenancy because the tenant refused to continue providing sexual favors to the provider in return for assistance with her monthly rent. The resolution of this case therefore will affect the enforcement programs of both HUD and the Department of Justice. The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether a property manager's alleged actions designed to terminate a tenancy, taken in response to the tenant's refusal to continue providing sexual favors in return for assistance with her monthly rent, constitute discrimination "because of" sex, in violation of Section 3604(b) of the FHA, or "based on" sex, in violation of Section 3604(c).

STATEMENT OF THE CASE

1. Factual Background[1]

Plaintiff-appellant Rita Fox, a single mother, visited the Rose Bush Apartments in Jupiter, Florida in July 2014 to view a two-bedroom unit available for rent. Doc. 39, at 3, 5-6.[2] When Fox applied to rent the unit, defendant-appellee Dana Gaines (Gaines), the on-site property manager and resident of the complex, met her and "commented on Ms. Fox's looks." Doc. 39, at 3, 5. Fox informed Gaines that she had not yet made up her mind and was considering a different apartment. Doc. 39, at 5. Gaines responded that he had a list of individuals interested in the unit but would keep it available for Fox "if she would give him a kiss." Doc. 39, at 6.

Because of the apartment's size, location, and price, Fox decided to rent the unit and entered into a one-year lease starting in August 2014. Doc. 39, at 6. When Gaines met Fox at the apartment complex to deliver the keys to the unit, he reminded her about the kiss he had requested, and Fox obliged by kissing him. Doc. at 39, at 6.

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[1] This summary derives from Fox's well-pleaded factual allegations taken in the light most favorable to her. See *Hunt* v. *Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016).

[2] "Doc. __, at __" refers to documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.

Although Fox paid her first month's rent, last month's rent, and security deposit after moving in, Doc. 39, at 6, she soon encountered difficulty in paying her $800-per-month rent. Upon learning this, Gaines offered to "help [Fox] * * * with her [monthly] rental payment if she would help him" by "providing sexual favors." Doc. 39, at 7. Fox "eventually acquiesced" to this arrangement, and for four years, Gaines paid a portion of her rent "in exchange for sexual favors." Doc. 39, at 7. For most months during this time, Fox paid between $400 and $600 of her $800 monthly rent, and Gaines "made up the difference when Ms. Fox provided sexual favors." Doc. 39, at 7.

This arrangement was part of a "pervasive and persistent pattern of sexual harassment and discrimination" by Gaines. Doc. 39, at 6. For example, Gaines questioned Fox about her whereabouts. Doc. 39, at 7. He "demanded" that she not have male visitors at the complex. Doc. 39, at 7. At some point, Gaines installed surveillance cameras facing the complex and "monitored [Fox's] daily activity." Doc. 39, at 7. Hoping to stop this "controlling and harassing behavior," Fox terminated the arrangement with Gaines in March 2018 and ceased providing sexual favors in return for assistance with her rent. Doc. 39, at 7.

Almost immediately, Gaines began retaliating against Fox for her decision. In April 2018, he sent her a document titled "FINAL NOTICE!" that falsely accused her of violating the complex's rules. Doc. 39, at 8; Doc. 39-4.

Additionally, around this time, Gaines posted a "three-day notice to vacate" on the door of Fox's apartment. Doc. 39, at 8.

On or around April 6, 2018, Fox paid $500 towards her rent and reached an oral agreement with Gaines to pay the remainder of what was due ($445) by April 14, 2018. Doc. 39, at 8. Even though Fox complied with their agreement and tendered the remainder of her balance on April 14, Gaines sent Fox a note complaining that she had failed to pay her rent by April 13—a day earlier than they had agreed—and stating that he had "no choice but to file an eviction on [her]." Doc. 39, at 8; Doc. 39-7. Gaines suggested he would do so in two days and advised Fox to "look for another place to live." Doc. 39-7. A week later, on April 22, 2018, Gaines served Fox with a "Termination for Failure to Pay Rent." Doc. 39, at 8; Doc. 39-8. Although the notice stated that Fox had paid her rent in full and had a "$0" balance on her account, it nonetheless demanded repossession of the apartment within four days. Doc. 39-8.

Gaines's efforts to force Fox to vacate her apartment escalated the next month. He filed a "Complaint for Eviction" in county court on May 1, 2018, though the document failed to list any instance in which Fox had failed to pay her rent and set forth no other basis for eviction. Doc. 39, at 9; Doc. 39-9. The following day, Fox and Gaines agreed that Fox would move out of the unit "on or before [m]idnight May 31st." Doc. 39, at 9; Doc. 39-10. Two days later, Gaines

voluntarily dismissed his eviction action with the caveat that if Fox did not vacate the unit "by May 31 2018 'midnite'" [sic], he would "reinstate eviction." Doc. 39-11 (emphasis in original). That evening, Gaines started an argument with Fox, "yelling at her," calling her a "prostitute," and using "other sexual demeaning names." Doc. 39, at 9.

Fox moved out of the unit on May 31, 2018, as planned, Doc. 39, at 9, but even this did not occur without incident. Fox had scheduled a walkthrough inspection of the apartment with Gaines for May 31. Doc. 39, at 9. Gaines "had police present" when Fox arrived for the walkthrough and attempted to have her arrested for trespassing. Doc. 39, at 9. Fox had to explain to the officers that she retained possession of the unit until midnight and was there for her scheduled walkthrough. Doc. 39, at 9.

2. Procedural History

On December 3, 2019, Fox filed suit in the Southern District of Florida against Dana Gaines and defendant-appellee Lucille Gaines, the owner of Rose Bush Apartments. Doc. 1. In her second amended complaint, Fox alleged three claims under the FHA and three claims under the Florida Fair Housing Act. Doc. 39, at 12-21. Regarding the FHA, Fox first asserted that Gaines had violated 42 U.S.C. 3617 by interfering with her rights under Sections 3604(b) and (c) of the FHA. Doc. 39, at 12-13. Second, Fox contended that Gaines had engaged in

unlawful sex discrimination when he retaliated against her and terminated her tenancy after she ended what she termed a "quid pro quo" sexual relationship, in violation of Section 3604(b). Doc. 39, at 13-14. Third, Fox argued that Gaines made or published a discriminatory statement by "fabricating" notices of violations and filing a "false" complaint for eviction, in violation of Section 3604(c). Doc. 39, at 15-16.[3]

Defendants moved to dismiss all of Fox's claims, and the district court granted the motion. Docs. 40-41, 51. Starting with Fox's claim under Section 3617, the court held that Fox's allegations sufficed to establish "severe, pervasive harassment." Doc. 51, at 5. The court then reasoned that Section 3617 requires a plaintiff to "identify a predicate right protected by the FHA * * * and then plead sufficient allegations that give rise to actual interference with that predicate right." Doc. 51, at 5. Here, Sections 3604(b) and (c) served as Fox's predicate rights. Doc. 51, at 5. For purposes of those sections, the court noted that Gaines allegedly "set different conditions and provisions of service" concerning Fox's late payments and failure to make full payments "as long as she was willing to engage in sexual relations with him." Doc. 51, at 9. The court further recognized that once Fox

[3] We do not address Fox's three FHA claims against Lucille Gaines relating to her alleged failure to "correct and end" the sexual harassment perpetrated by Dana Gaines. Doc. 39, at 12, 14-15.

ended the arrangement, Gaines "changed the terms and threatened to take multiple actions, including eviction." Doc. 51, at 9.

The district court held, however, that the alleged conduct by Gaines did not violate Sections 3604(b) or (c). In the court's view, retaliatory action by a property manager against a tenant for ending a sexual arrangement is not discrimination because of sex. Doc. 51, at 6. The court set forth its view that the FHA's prohibitions on sex discrimination in Sections 3604(b) and (c) do not encompass sexual harassment. Doc. 51, at 6-9. The court pointed out that Section 3604(b) "uses the term 'discriminate'" and not "the term 'harassment.'" Doc. 51, at 8. The court reasoned therefore that the conduct alleged by Fox fell outside the statutory text insofar as it pertained to "retaliation for ending a physical, sexual relationship" and not "retaliation against Fox * * * *because* she is a female." Doc. 51, at 6 (emphasis in original). The court acknowledged that its interpretation of the FHA conflicted with the consensus of other federal courts, which recognize sexual harassment as cognizable sex discrimination, but the court stood behind its reading of "the law as written." Doc. 51, at 7.

The district court also acknowledged that its interpretation was expressly contrary to 24 C.F.R. 100.600(a)(1), a HUD regulation that defines quid-pro-quo sexual harassment for purposes of the FHA and states that such harassment may violate the statute. See Doc. 51, at 7-8. However, the court concluded that the

regulation binds only federally subsidized housing authorities and "executive entities in carrying out their administrative processes—not a court of law." Doc. 51, at 8.

Accordingly, the district court dismissed Fox's claims under Sections 3604(b) and (c) for failure to allege any conduct violating the FHA. Doc. 51, at 9. It also dismissed Fox's Section 3617 claim for lack of any allegation that Gaines had interfered with a predicate right under the statute. Doc. 51, at 9. Fox timely appealed. Doc. 52, at 1.

SUMMARY OF ARGUMENT

The district court concluded that the FHA's prohibitions on sex discrimination categorically do not encompass sexual harassment or the alleged retaliatory actions by Gaines. This was error. The plain text of Sections 3604(b) and (c) forbids a property manager from imposing less favorable terms of tenancy or from making, printing, or publishing notices that indicate less favorable treatment, where those terms or notices would not have been imposed or issued but for the tenant's sex.

Sexual harassment can violate both provisions. For example, quid-pro-quo sexual harassment, where a property manager conditions certain rental terms on the tenant's performance of sexual favors, violates Section 3604(b) where the sex of the tenant is a but-for cause of the manager's actions. And hostile-environment

sexual harassment, where a property manager engages in severe or pervasive harassment that interferes with a tenant's use or enjoyment of her housing, also violates Section 3604(b)—for example, by conditioning the amount of rent a tenant pays each month on the granting of sexual favors, or by retaliating against the tenant for refusing to continue engaging in such a quid-pro-quo sexual arrangement, where the manager would not have taken those actions but for the tenant's sex. Where this conduct includes making or publishing a notice or statement that indicates discrimination "based on * * * sex," such action may violate Section 3604(c).[4]

Where the property manager would not have engaged in such conduct but for the tenant's sex, unlawful sex discrimination has occurred. Courts relied on exactly this textual analysis in concluding that Title VII's analogous language bars sexual harassment as a form of sex discrimination. The same logic applies with equal force here under the FHA.

In addition to being inconsistent with the FHA's text, the district court's interpretation conflicts with the majority rule in the courts. All five courts of appeals that have considered the issue—the Sixth, Seventh, Eighth, Ninth, and

[4] The United States takes no position regarding whether Fox sufficiently alleged a violation of Section 3604(c) but submits that the district court's dismissal of this claim and Fox's Section 3617 claim should be vacated for the reasons set forth in Part C, *infra*.

Tenth Circuits—have held in precedential and non-precedential decisions that sexual harassment can violate the FHA's prohibitions on sex discrimination. While this Court has not yet resolved the issue, every district court in this circuit that has addressed it (other than the district court here) has confirmed such a reading of the statute. HUD's regulations, which the district court erroneously discounted, further support this conclusion.

For these reasons, the district court's decision should be vacated and the case remanded for further proceedings.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING FOX'S CLAIMS ON THE GROUND THAT THE FHA DOES NOT PROHIBIT SEXUAL HARASSMENT

A. The Plain Text Of The FHA Prohibits Sexual Harassment

In prohibiting sex discrimination, the FHA protects a tenant from being subjected to less favorable treatment because of the tenant's sex. The district court erred in failing to recognize that such discrimination may take the form of quid-pro-quo or hostile-environment sexual harassment.

1. The FHA Bars Discrimination Because Of Sex

Enacted as part of the Civil Rights Act of 1968, the FHA "broadly prohibits discrimination in housing throughout the Nation." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 93 (1979). The statute aims "to provide, within

constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Given this "broad remedial purpose," the FHA "is written in decidedly far-reaching terms" and "prohibits a wide range of conduct." *Georgia State Conference of the NAACP* v. *City of LaGrange*, 940 F.3d 627, 631-632 (11th Cir. 2019) (quoting *City of Miami* v. *Wells Fargo & Co.*, 923 F.3d 1260, 1278 (11th Cir. 2019)); see also *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 390 (2d Cir.) (referring to the FHA's "broad legislative plan to eliminate all traces of discrimination within the housing field" (quoting *Marr* v. *Rife*, 503 F.2d 735, 740 (6th Cir. 1974))), cert. denied, 513 U.S. 876 (1994).

The FHA specifically prohibits discrimination on the basis of sex, including in three provisions relevant here. In 42 U.S.C. 3604(b), the FHA bars "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling * * * because of * * * sex." Section 3604(c) prohibits a person from "mak[ing], print[ing], or publish[ing] * * * any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any * * * discrimination based on * * * sex." And Section 3617 makes it unlawful to "interfere with any person in the exercise or enjoyment of * * * any right granted or protected by" specific sections of the FHA, including Section 3604.

2. Quid-Pro-Quo And Hostile-Environment Sexual Harassment Can Violate The FHA's Prohibitions On Sex Discrimination

Ostensibly focusing on the "plain language" of Sections 3604(b) and (c), the district court concluded that these provisions do not encompass claims of sexual harassment. The court suggested that, to state a viable claim of sex discrimination under the FHA based on retaliatory conduct, Fox needed to have alleged "that [Gaines] retaliat[ed] against [her] * * * *because* she is female." Doc. 51, at 6, 9 (emphasis in original). This, the court held, Fox failed to do. In its view, Fox simply had alleged "retaliat[ion]" by Gaines "because she no longer wanted to engage in a sexual relationship [with him]." Doc. 51, at 6. Such an allegation, the court found, does not constitute "discrimination 'on the basis of sex.'" Doc. 51, at 6.

The district court erred in its textual analysis and failed to appreciate the full scope of the FHA's language. The proscriptions on discrimination because of, and based on, sex in Sections 3604(b) and (c) protect individuals from being subjected to less favorable treatment because of their sex. The "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment." *Jackson* v. *Birmingham Bd. of Educ*., 544 U.S. 167, 174 (2005) (citations omitted). And references to discrimination "because of * * * sex" and "based on * * * sex" in Sections 3604(b) and (c), respectively, incorporate a but-for causal relationship. See *Burrage* v. *United States*, 571 U.S. 204, 212-213

(2014) (noting that the terms "because" and "based on" indicate but-for causation). Accordingly, Section 3604(b) precludes the imposition of less favorable terms, conditions, or privileges of sale or rental of a dwelling where the less favorable terms, conditions, or privileges would not have applied but for the purchaser or renter's sex. And Section 3604(c) bars a person from making, printing, or publishing a notice, statement, or advertisement with respect to the sale or rental of a dwelling where the notice, statement, or advertisement, *inter alia*, indicates less favorable treatment that would not occur but for the purchaser or renter's sex.

The plain text of these provisions logically proscribes forms of sex discrimination commonly referred to as sexual harassment, such as quid-pro-quo and hostile-environment sexual harassment, where the plaintiff's sex is a but-for cause of the harassment. Quid-pro-quo sexual harassment occurs when "housing benefits are explicitly or implicitly conditioned on sexual favors" because of the plaintiff's sex. *Quigley* v. *Winter*, 598 F.3d 938, 947 (8th Cir. 2010) (quoting *Honce* v. *Vigil*, 1 F.3d 1085, 1089 (10th Cir. 1993)). Hostile-environment sexual harassment occurs when severe or pervasive harassment because of sex interferes with, or deprives a person of, use or enjoyment of a dwelling. *Ibid.*

Both forms of sexual harassment violate Section 3604, and both are alleged here. For example, a property manager can, as here, engage in quid-pro-quo sexual harassment *and* create a hostile housing environment by conditioning certain terms

of tenancy regarding rent payments on a tenant's performance of sexual acts if the tenant's sex is a but-for cause. The same is true if the property manager changes the terms of, and takes actions designed to end, the tenancy—for example, by issuing notices to vacate and commencing eviction proceedings—in response to the tenant's refusal to continue in such a quid-pro-quo sexual arrangement. The FHA thus does not operate as "a general civility code" that bars all forms of offensive, sex-related conduct. Cf. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Rather, the statute's prohibitions on sex discrimination protect a tenant from being singled out for less favorable terms and treatment that she would *not* have suffered but for her sex.

In the Title VII context, courts relied on exactly this textual analysis in concluding that sexual harassment, including quid-pro-quo and hostile-environment sexual harassment, violates that statute's prohibition on discrimination "because of * * * sex," 42 U.S.C. 2000e-2(a)(1)—language that parallels Section 3604(b). The D.C. Circuit's influential decision in *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977),[5] is illustrative. The case involved an administrative assistant in the Environmental Protection Agency who was repeatedly told by her supervisor that "indulgence in a sexual affair [with him]

[5] As described by the Fifth Circuit, *Barnes* "heralded" the "first generation" of "sexual harassment law." *Butler* v. *Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 267 (5th Cir. 1998).

would enhance her employment status." *Id.* at 989. When she refused his advances, the supervisor "campaigned against her continued employment * * * and succeeded eventually in liquidating her position." *Ibid.*

The D.C. Circuit concluded the employee "plainly" had set forth a prima facie case of sex discrimination. *Barnes*, 561 F.2d at 989. This was not because her supervisor had demanded "sexual activity." *Id.* at 989 n.49. Rather, the supervisor's alleged conduct violated "the statute as written" because "retention of [the employee's] job was conditioned upon submission to * * * an exaction[,] which the supervisor would not have sought from any male." *Id.* at 989. In this way, the employee's "gender, just as much as her cooperation, was an indispensable factor in the job-retention condition" imposed upon her. *Id.* at 992. Put succinctly, "but for her gender[,] she would not have been importuned." *Id.* at 989 n.49. The D.C. Circuit thus easily concluded that the employee stated a viable claim of discrimination "because of * * * sex." *Id.* at 994.

This Court and others concurred in the D.C. Circuit's analysis of discrimination "because of * * * sex." For example, in *Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982), this Court echoed *Barnes*, noting that, "[i]n the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion." *Id.* at 904. Thus, for purposes of establishing discrimination

because of sex, it becomes "a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment." *Ibid.*; see also *Horn* v. *Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985) ("But for Horn's womanhood, Haas would not have demanded sex as a condition of employment.").

Given the strength of this textual analysis, by the time the issue reached the Supreme Court in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), every circuit court that had considered the issue, including this Court, concurred in the conclusion that sexual harassment can constitute sex discrimination under Title VII. See *id.* at 66 (noting the "uniform[ity]" of lower courts); see also *Horn*, 755 F.2d at 604 n.5 (collecting cases). The Court agreed, noting that, "[w]ithout question," sexual harassment could constitute sex discrimination under Title VII. *Meritor*, 477 U.S. at 64. Indeed, the Supreme Court endorsed this Court's observation in *Henson* that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.* at 67 (quoting *Henson*, 682 F.2d at 902).

This analysis of Title VII is germane for purposes of construing the FHA, given the two statutes' similarities in text and purpose. Title VII bars discrimination "with respect to * * * [the] terms, conditions, or privileges of

employment, because of * * * sex." 42 U.S.C. 2000e-2(a)(1). Section 3604(b) does the same with regard to discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling * * * because of * * * sex." And, as noted above, other parts of the FHA use similar language and employ an identical but-for causal requirement.[6]

3. The District Court Erred In Dismissing Fox's Operative Complaint

The district court found sexual harassment to be conceptually distinct from sex discrimination and, on this basis, concluded that Fox failed to allege any conduct that violated the FHA. The court noted that Sections 3604(b) and (c) address discrimination because of "sex." Doc. 51, at 6. But the court reasoned that, "even under our society's expanding understanding of the term 'sex,' there is no reasonable, discernible way of understanding [sex] as including retaliation for ending a physical, sexual relationship." Doc. 51, at 6 (citation omitted).

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[6] As many courts point out, sexual harassment in housing can be more difficult for victims than sexual harassment in the workplace. Whereas employees subjected to sexual harassment at work may be able to retreat to the relative safety of their homes, individuals subjected to sexual harassment in violation of the FHA may lack a similar refuge because the harassing conduct occurs at home. See, *e.g.*, *Revock* v. *Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 113 (3d Cir. 2017) ("Harassment that intrudes upon the 'well-being, tranquility, and privacy of the home' is considered particularly invasive." (quoting *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988))); *Quigley*, 598 F.3d at 947 (deeming the alleged sexual harassment "even more egregious" where the tenant was "subjected * * * [to] unwanted interactions in her own home, a place where [she] was entitled to feel safe and secure and need not flee").

The district court's analysis erred in focusing on whether the term "sex" encompasses the type of harassment allegedly perpetuated by Gaines. The relevant question instead is whether Fox's sex was a *but-for cause* of Gaines's discriminatory actions. A but-for causal relationship can be "easy" to find where there are "explicit or implicit proposals of sexual activity" because "it is reasonable to assume those proposals would not have been made to someone of the same sex," although "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 523 U.S. at 80; see also *Henson*, 682 F.2d at 904. Other evidence, like use of "sex-specific and derogatory terms," also may evince discriminatory intent. *Ibid.* Here, Fox alleged both harassing conduct motivated by sexual desire *and* the use of sex-specific derogatory terms. See, *e.g.*, Doc. 39, at 8-9 (alleging that Gaines issued notices to vacate in response to her refusal to continue in their sexual arrangement and used the term "prostitute" to describe her).

Moreover, courts have rejected the proposition that retaliation in response to a person's refusal to engage in sexual activity implicates no discrimination based on sex. For example, in *King* v. *Board of Regents of University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990), an assistant professor at a state university brought suit under Title VII and the Equal Protection Clause, alleging sexual harassment by an assistant dean. *Id.* at 534. The plaintiff alleged the assistant

dean had made "suggestive innuendos," "rub[bed] up against her, place[d] objects between her legs * * * and comment[ed] upon various parts of her body." *Id.* at 534-535. At a department Christmas party, he followed the plaintiff into the bathroom, told her he "had to have her," and "forcibly kissed and fondled her" despite her protests. *Id.* at 535. After the plaintiff confronted the assistant dean about his actions, "he refrained from touching her" for the next year. *Ibid.* However, "shortly before [her] contract renewal hearing," the assistant dean made the "quite serious" false accusation that she had put the school's photocopying equipment to "personal use[s]." *Ibid.* Following trial, a jury found via special verdict, as relevant here, that the assistant dean had subjected the plaintiff to sexual harassment. *Id.* at 536.

The Seventh Circuit affirmed the verdict. *King*, 898 F.2d at 540. In doing so, the court of appeals dismissed the assistant dean's contention that "his actions were merely the result of his desire for [the plaintiff] as an individual and, therefore, were not sex-based harassment," deeming the argument "profoundly flawed." *Id.* at 538. To characterize the assistant dean's actions as harassment of "an individual to whom he was attracted," as opposed to "[the plaintiff] as a woman," simply "misse[d] the point" because "[h]is actions were based on her gender." *Id.* at 539; see also *Green* v. *Administrators of Tulane Educ. Fund*, 284 F.3d 642, 651, 657 (5th Cir. 2002) (affirming the jury's finding of sexual

harassment where the defendant began to harass the plaintiff after their sexual relationship ended and the defendant's actions "were causally related to [the plaintiff's] gender"), overruled on other grounds by *Burlington N. & Santa Fe Ry. Co*. v. *White*, 548 U.S. 53 (2006); *Barnes*, 561 F.2d at 990 (rejecting the district court's distinction between discrimination because of sex and discrimination because the employee "refused to engage in a sexual affair with her supervisor" that "would never have been solicited" "[b]ut for her womanhood").

This reasoning applies equally here. Gaines allegedly adopted a set of "conditions and provisions of service concerning [Fox's] late payments and failure to make full payments as long as she was willing to engage in sexual relations with him." Doc. 51, at 9. When Fox withdrew from that unwelcome arrangement, Gaines did not merely stop contributing to Fox's rent but "changed the terms [of her tenancy] and threatened to take multiple actions, including eviction." Doc. 51, at 9. Fox alleged that Gaines took those actions "because of [her] sex (female)." Doc. 39, at 13. Construing these and other allegations in the light most favorable to Fox, see *Hunt* v. *Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016), one can plausibly conclude that Gaines would not have engaged in such conduct but for Fox's sex. Cf. *Henson*, 682 F.2d at 904 ("In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the

supervisor did not treat male employees in a similar fashion."). The district court failed to address this aspect of Fox's allegations.

B. Case Law And HUD Regulations Interpret The FHA To Prohibit Sexual Harassment

The district court's unduly narrow interpretation of the FHA is not only incompatible with the plain text of the statute, but it also conflicts with the widely held consensus of federal courts, including five courts of appeals. These courts interpret the FHA to prohibit quid-pro-quo and hostile-environment sexual harassment where sex is a but-for cause—a reading consistent with the established construction of analogous language in Title VII and consonant with HUD's regulations implementing the FHA.

1. Case Law Strongly Supports Interpreting The FHA To Prohibit Sexual Harassment

The district court's erroneous textual analysis led it to adopt an interpretation at odds with what it acknowledged is the "overwhelming weight of federal authority," which recognizes that sexual harassment can violate the FHA as unlawful sex discrimination. Doc. 51, at 6 (quoting *Noah* v. *Assor*, 379 F. Supp. 3d 1284, 1288 (S.D. Fla. 2019)). Indeed, the courts of appeals for the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have accepted the viability of such claims in precedential and non-precedential decisions. See, *e.g.*, *Shellhammer* v. *Lewallen*, 770 F.2d 167 (6th Cir. 1985); *Krueger* v. *Cuomo*, 115 F.3d 487, 491 (7th

Cir. 1997); *Quigley*, 598 F.3d at 946; *Hall* v. *Meadowood Ltd. P'ship*, 7 F. App'x 687, 689 (9th Cir. 2001); *Honce*, 1 F.3d at 1089. Many of these and other cases specifically acknowledge claims of quid-pro-quo and hostile-environment sexual harassment under the FHA. See, *e.g.*, *Quigley*, 598 F.3d at 946-947; *Honce*, 1 F.3d at 1089-1090.

The district court declined to follow this line of authority, concluding that, in the absence of "binding case law" from this Court, it was "not at liberty to rewrite the FHA to fit a case." Doc. 51, at 7. The district court, however, was not writing on a blank slate. This Court has held that sexual harassment constitutes sex discrimination in violation of Title VII where the plaintiff's sex is a but-for cause. See *Henson*, 682 F.2d at 901, 903. And it has suggested (though without deciding) that it would recognize a claim of sex discrimination based on sexual harassment under the FHA. District courts in this circuit have gone further in holding that such claims are viable.

In *Tagliaferri* v. *Winter Park Housing Authority*, a non-precedential opinion, this Court considered claims of sexual harassment and interference with fair housing rights under the FHA. 486 F. App'x 771 (2012), cert. denied, 568 U.S. 1215 (2013). Two renters claimed their lease had not been renewed and their access to areas and community events in their apartment complex had been limited because of "their previous sexual relationships with [a] maintenance man." *Id.* at

774. They further alleged the maintenance man had refused repairs, photographed them, aimed a video camera at their bedroom window, and interrupted their conversations with other men. *Ibid.*

Although this Court declined to decide whether the FHA prohibits sexual harassment, it assumed such conduct is cognizable under the statute and analyzed the proffered allegations under Title VII standards. See *Tagliaferri*, 486 F. App'x at 774 (citing *Mendoza* v. *Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc)). Applying those standards, this Court held that the plaintiffs' allegations failed to establish viable claims of either quid-pro-quo sexual harassment, because the purported discriminatory treatment was insufficiently tethered to the alleged sexual advances, or hostile-environment sexual harassment, because the alleged conduct was "neither severe nor pervasive." *Ibid.*[7] Accordingly, this Court affirmed the district court's dismissal of the plaintiffs' claims. *Id.* at 773-774.

Since *Tagliaferri*, district courts in this circuit (except for the court here) uniformly have concluded that sexual harassment can violate the FHA. See, *e.g.*, *Noah*, 379 F. Supp. 3d at 1288; *West* v. *DJ Mortg., LLC*, 164 F. Supp. 3d 1393, 1398-1400 (N.D. Ga. 2016); *Hamilton* v. *Lanier*, No. 4:15-cv-012, 2016 WL 4771091, at *2-3 (S.D. Ga. Sept. 12, 2016); *Butler* v. *Carrero*, No. 1:12-cv-2743,

[7] In contrast, here, the district court found that Fox "sufficiently pled 'severe, pervasive harassment'" for purposes of her Section 3617 claim. Doc. 51, at 5.

2013 WL 5200539, at *7-8 (N.D. Ga. Sept. 13, 2013). These decisions accord with the consistent view of other federal courts that the FHA's prohibitions on sex discrimination encompass sexual harassment. Addressing one of those decisions, *Noah* v. *Assor*, the district court rejected key cases cited in that opinion because of their reliance on Title VII authority. Doc. 51, at 8; see also *DiCenso* v. *Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (noting that "courts that have found harassment to create an actionable form of housing discrimination * * * incorporated Title VII doctrines into their analyses"). This rejection was unwarranted given Title VII's similarities to the FHA and, importantly, the district court's inability to articulate any salient difference between the two statutes' proscriptions on sex discrimination.

2. HUD Regulations Further Support Interpreting The FHA To Prohibit Sexual Harassment

HUD regulations also recognize that quid-pro-quo and hostile-environment sexual harassment can violate the FHA as unlawful sex discrimination. See, *e.g.*, 24 C.F.R. 100.60(b)(6)-(7); 24 C.F.R. 100.65(b)(5)-(6); 24 C.F.R. 100.600. In particular, 24 C.F.R. 100.600(a) defines quid-pro-quo and hostile-environment sexual harassment for purposes of the FHA and states that such conduct may violate Section 3604. In attempting to further distinguish *Noah*, which relied on Section 100.600(a), the district court stated that the HUD Secretary had enacted the regulation under 42 U.S.C. 3535(d), which grants him authority to "make such

rules and regulations as may be necessary to carry out *his* functions, powers, and duties." Doc. 51, at 7-8 (emphasis in original). The court thus reasoned that Section 100.600 binds only federally subsidized housing authorities and Executive Branch entities. Doc. 51, at 7-8.[8]

The district court misconstrued HUD's authority to issue this regulation and consequently misapprehended the regulation's applicability. Contrary to the court's suggestion, HUD promulgated Section 100.600 pursuant to its authority under 42 U.S.C. 3608(a) and 3614a. See 81 Fed. Reg. 63,055 (Sept. 14, 2016). These provisions vest HUD with the authority to administer the FHA and the power to adopt rules implementing the statute. See 42 U.S.C. 3608(a); 42 U.S.C. 3614a. HUD's regulatory authority thus extends beyond federally subsidized housing authorities and Executive Branch entities. See, *e.g.*, 42 U.S.C. 3603(a) (applying Section 3604's prohibitions on discrimination to all dwellings, subject to certain limited exemptions).

C. The District Court Erred In Dismissing Fox's FHA Claims

Relying on a flawed interpretation of the FHA, the district court dismissed Fox's FHA claims for failure to allege any discrimination because of sex. The

[8] Gaines's alleged discriminatory conduct continued through at least May 2018, Doc. 39, at 9—more than a year and a half after HUD adopted Section 100.600 in 2016. See 81 Fed. Reg. 63,075 (Sept. 14, 2016).

court's decision should be vacated and Fox's claims remanded for further proceedings.

First, Fox alleged a violation of Section 3604(b). That provision bars, *inter alia*, discrimination in the terms, conditions, or privileges of rental of a dwelling because of sex. Fox alleged such discrimination under quid-pro-quo and hostile-environment theories of sexual harassment. Gaines allegedly conditioned certain terms of Fox's tenancy on her participation in an unwelcome sexual arrangement and, as the district court acknowledged, he changed those terms once she refused his advances. Doc. 51, at 9. Gaines did not merely cease contributing to Fox's rent but allegedly engaged in severe or pervasive harassment with the aim of terminating Fox's tenancy, serving multiple notices to vacate and filing a complaint for eviction, all in retaliation for Fox's refusal to continue in their quid-pro-quo sexual arrangement. See Doc. 51, at 4-5, 9. Fox alleged that Gaines took these actions "because of [her] sex." Doc. 39, at 13. The district court thus erred in dismissing Fox's complaint with prejudice. Therefore, the Court should vacate and remand this claim for further proceedings.

The district court treated Fox's claims under Sections 3604(b) and (c) analogously, dismissing them based on the same erroneous reading of the FHA; accordingly, remand of Fox's Section 3604(c) claim also is warranted. Section 3604(c) makes it unlawful, *inter alia*, to "make, print, or publish * * * any

notice, statement, or advertisement" with respect to the rental of a dwelling that indicates any discrimination based on sex. The district court did not analyze Fox's Section 3604(c) claim separately from her Section 3604(b) claim. Rather, the court generally suggested that Fox's Section 3604(c) claim failed to allege cognizable sex discrimination for the same reasons as her Section 3604(b) claim. See, *e.g.*, Doc. 51, at 6 ("The plain language of neither [Section] 3604(b) nor [Section] 3604(c) identifies Dana's behavior as prohibited."). Because dismissal of both claims rested on the same legal error, this Court should remand Fox's Section 3604(c) claim as well.

For similar reasons, Fox's Section 3617 claim also should be remanded. Section 3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of * * * any right granted or protected by [S]ection 3603, 3604, 3605, or 3606 of [the FHA]." The district court dismissed Fox's Section 3617 claim because, in its view, she had failed to allege any interference with her rights under Section 3604. Doc. 51, at 5, 9. As explained above, this conclusion was incorrect.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's decision and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,485 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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s/ Jason Lee
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Date: September 30, 2020