# 22-1209

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees

v.

TOWN OF CROMWELL, CONNECTICUT,

Defendant-Appellant

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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DAMON SMITH
General Counsel

JEANINE WORDEN
Associate General Counsel for Fair Housing
Department of Housing and Urban Development
451 7th St. SW
Washington, D.C. 20410

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
NOAH B. BOKAT-LINDELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**STATUTES:** **PAGE**

**STATUTES (continued)** **PAGE**



**REGULATIONS:**



**RULE:**



**LEGISLATIVE HISTORY:**

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## INTEREST OF THE UNITED STATES

This appeal concerns, among other issues, the availability of punitive damages against and the application of vicarious liability principles to municipalities under the Fair Housing Act (FHA). The United States has substantial enforcement responsibility under the FHA, including against municipalities. See 42 U.S.C. 3608-3612, 3614. Accordingly, the United States has a significant interest in the resolution of this appeal.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF THE ISSUES

Gilead Community Services, Inc., sought to open a group home for men with mental health-related disabilities in the Town of Cromwell, Connecticut. Numerous community members and Town officials actively opposed the home and took a number of actions to undermine its successful operation. Eventually, fearing for the safety of its residents, Gilead closed the home. It then sued the Town for disability discrimination under the Fair Housing Act (FHA) and Title II of the Americans with Disabilities Act (ADA). A jury unanimously found that the Town had violated both statutes, and it awarded Gilead compensatory and punitive damages. The Town appealed. The United States will address the following questions presented on appeal:

1. Whether the FHA, which provides without exception that "court[s] may award to the plaintiff actual and punitive damages," 42 U.S.C. 3613(c), authorizes punitive damages awards against municipalities.

2. Whether the FHA, which incorporates "traditional vicarious liability rules," *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003), allows plaintiffs to hold municipalities vicariously liable for their agents' actions.

## STATEMENT OF THE CASE

*1. Statutory Background*

a. Enacted in 1968, the FHA, 42 U.S.C. 3601 *et seq.*, declares the "policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Section 3604(c) of the FHA makes it unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on" several protected characteristics. 42 U.S.C. 3604(c). The FHA also makes it illegal "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of * * * any right granted or protected by" certain provisions, including Section 3604. 42 U.S.C. 3617.

Twenty years later, Congress passed the Fair Housing Amendments Act of 1988 (FHAA) to, among other things, prohibit disability-based discrimination in housing. See Pub. L. No. 100-430, 102 Stat. 1619. The FHAA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988) (FHAA House Report).[1] It "repudiate[d] the use

[1] This brief replaces the word "handicap" with "[disability]" wherever the former appears in cited sources.

of stereotypes and ignorance, and mandate[d] that persons with [disabilities] be considered as individuals." *Ibid.* The FHAA added disability as a protected class in the FHA, including to Section 3604(c), and inserted additional disability-focused provisions. Pub. L. No. 100-430, §§ 5(b), 6(a)-(c), 102 Stat. 1619-1622 (42 U.S.C. 3602(h), 3604(c)-(f), 3605-3606).

One such provision, Section 3604(f)(1), makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a [disability] of," among other persons, "a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." 42 U.S.C. 3604(f)(1). Neighboring Section 3604(f)(2) prohibits "discriminat[ing] 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 with such dwelling," on the same bases. 42 U.S.C. 3604(f)(2).

In passing the FHAA, Congress found that "state and local governments" sometimes used their "authority to protect safety and health, and to regulate use of land," to "restrict the ability of individuals with [disabilities] to live in communities." FHAA House Report 24. Congress therefore intended the FHA's new disability-based protections to "apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with [disabilities]." *Ibid.* Congress also sought to prohibit "the

application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities," recognizing that "[s]uch discrimination often results from * * * unfounded fears of difficulties about the problems that their tenancies may pose." *Ibid.*

Department of Housing and Urban Development (HUD) regulations implement these aspects of the FHA. They prohibit "[r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of * * * [disability]." 24 C.F.R. 100.70(d)(4). They also forbid "[e]nacting or implementing land-use rules, ordinances, procedures, building codes, permitting rules, policies, or requirements that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of * * * [disability]." 24 C.F.R. 100.70(d)(5).

The FHA allows any "aggrieved person" to sue for "an alleged discriminatory housing practice." 42 U.S.C. 3613(a)(1)(A). The Attorney General, too, may sue upon referral of a discriminatory housing practice from the HUD Secretary, 42 U.S.C. 3614(b), or when there is a pattern or practice of violations or "any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance," 42 U.S.C. 3614(a). If a plaintiff shows "that a discriminatory housing practice has occurred

or is about to occur, the court may award to the plaintiff actual and punitive damages." 42 U.S.C. 3613(c)(1); see 42 U.S.C. 3614(d)(1) (allowing courts in cases brought by the Attorney General to "award such other relief as the court deems appropriate, including monetary damages to persons aggrieved"). In the FHAA, Congress lifted the $1000 statutory cap the FHA had previously imposed on punitive damages awards. FHAA House Report 39-40; see FHAA, § 8(2), 102 Stat. 1633 (42 U.S.C. 3613(c)(1)).

b. In 1990, Congress enacted the ADA. Pub. L. No. 101-336, 104 Stat. 327. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The statute defines "public entity" to mean "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A)-(B).

"Due to the similarities between the statutes," this Court "interpret[s]" the FHA and ADA's substantive liability standards "in tandem" unless there are "material differences" in the statutes' texts. *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003), superseded by regulation on other grounds as recognized in *Mhany Mgmt., Inc.* v. *County of Nassau*, 819 F.3d 581

(2d Cir. 2016) (*Mhany*). Unlike the FHA, however, Title II of the ADA adopts the "remedies, procedures, and rights set forth in" the Rehabilitation Act of 1973, 42 U.S.C. 12133, which in turn adopts those of Title VI of the Civil Rights Act, see 29 U.S.C. 794a(a)(2). As a result, Title II does not authorize punitive damages. *Barnes* v. *Gorman*, 536 U.S. 181, 189-190 (2002).

*2. The Present Controversy*

a. i. Plaintiff Gilead Community Services, Inc., is a nonprofit organization that provides housing and community-based services to individuals with disabilities. Doc. 138, at 2.[2] In March 2015, Gilead purchased a house at 5 Reiman Drive in the Town of Cromwell, aiming to turn it into a group home for men with disabilities. Doc. 281, at 3. Concerned residents began protesting the group home within days of Gilead's purchase. Doc. 281, at 3-4.

At the recommendation of Town officials, Gilead held a public forum about the home in April 2015. Doc. 281, at 4. Attendance was so high that it filled the Town Hall's gymnasium to capacity. Doc. 138, at 5. At the forum, numerous high-ranking Town officials—including Mayor Vincent Faienza, Town Manager Anthony Salvatore, and members of the Town Council—voiced opposition to

[2] "Doc. _, at _" refers to the docket entry and page number of documents filed in the district court, *Gilead Cmty. Servs.* v. *Town of Cromwell*, No. 3:17-cv-627 (D. Conn.). "Tr. _" refers to the page number of the trial transcript. "Br. _" refers to pages of the Town's opening brief.

opening a group home. Doc. 281, at 4. So did a number of Town residents. Doc. 281, at 4. In particular, Town officials and residents expressed purported safety concerns about housing men with mental health disabilities at the home. Tr. 94-99. The next day, the Mayor issued a press release that asked Gilead to reconsider opening the home. Doc. 281, at 5.

ii. The Town also took several official steps to dissuade Gilead from operating the group home at 5 Reiman Drive. In May 2015, the Town petitioned the Connecticut Department of Public Health (DPH) to deny Gilead a license for the home. Doc. 281, at 5. The Town Manager filed the petition, which the Town Council voted to authorize and the Mayor supported. Doc. 281, at 6; Br. 11. When DPH confirmed that Gilead did not require a license, the Town Manager unsuccessfully moved for reconsideration. Doc. 281, at 6.

Next, in July 2015, the Town sent Gilead a cease-and-desist letter. Doc. 281, at 6. Though the Town Attorney had warned the Town Council that pursuing action against the home would present many "hurdles" and would be "far from certain" of legal success (Doc. 86-61, at D-004478; see Tr. 808), she, the Mayor, and the Town Manager worked with the Town's zoning enforcement officer, who issued the cease-and-desist letter. Doc. 138, at 7, 9-10; Tr. 425-430, 564-566, 569-570, 1109-1111. The letter stated that Gilead would incur a $150-per-day fine if it kept operating the home without obtaining new zoning permits. Doc. 281, at 6. A

week later, the Town withdrew its letter on the condition that Gilead limit its home to only two residents. Doc. 281, at 6.

A week after the Town withdrew its zoning letter, Gilead received a letter from the Town Assessor stating that the Town could not approve Gilead's application for a tax exemption without additional documentation. Doc. 281, at 6. Gilead provided the requested documents, but the Town Assessor still denied the application. Doc. 281, at 6.

Within the same month, Gilead also experienced two concerning interactions with the Cromwell Police Department. First, Gilead learned that the police had released to the media private health information that Gilead had shared about one of its residents. Doc. 281, at 7. Second, the police failed to investigate a vandalism incident against the home, closing the case 57 minutes after being called. Doc. 281, at 7.

Fearing for the residents' safety and privacy, Gilead closed the group home on August 24, 2015. Doc. 281, at 7. The Mayor and Town Manager issued a press release "applaud[ing]" Gilead's decision to close the home. Doc. 281, at 8 (citation omitted).

b. In April 2017, Gilead and the Connecticut Fair Housing Center, Inc. (collectively, Gilead), sued the Town. Doc. 281, at 1. Gilead later filed an amended complaint alleging housing discrimination and retaliation under the FHA,

in violation of 42 U.S.C. 3604(c) and (f), 3617, and disability discrimination in violation of the ADA, 42 U.S.C. 12132. Doc. 57-1, at 4, 22-24.

The Town moved for summary judgment (Docs. 75, 76), which the court denied (Doc. 138, at 2). Among other things, the court rejected the Town's arguments that it could not be held vicariously liable for its employees' discriminatory acts under the FHA and that punitive damages could not be awarded against municipalities. Doc. 138, at 54-56, 60-73; see also Doc. 138, at 74 (focusing on the FHA claim but also denying summary judgment on the ADA claim without further analysis).

The case proceeded to a six-day trial. Doc. 281, at 2. The jury unanimously found the Town liable on Gilead's FHA and ADA claims and awarded Gilead $181,000 in compensatory damages and $5 million in punitive damages. Doc. 281, at 2.

After the verdict, the Town filed a renewed motion for judgment or motion for a new trial. Doc. 281, at 2. The Town re-raised its arguments that punitive damages and vicarious liability are not available against municipalities under the FHA. Doc. 281, at 22-24, 38. The district court again rejected these arguments. Doc. 281, at 25-28, 40-42. The Town timely appealed. Doc. 282.

## SUMMARY OF ARGUMENT

As relevant here, after finding the Town liable for violations of the FHA, the jury permissibly awarded compensatory and punitive damages to Gilead for Town officials' discriminatory actions. This Court has long recognized that the FHA applies to municipalities. See *Forest City Daly Hous., Inc.* v. *Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999) (stating that FHA and ADA "apply to municipal zoning decisions"); *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 573-574 (2d Cir. 2003) (same for FHAA and ADA), superseded by regulation on other grounds as recognized in *Mhany*, 819 F.3d 581. The text and history of the FHA—which is the Town's focus on appeal—confirm that it also authorizes punitive damages and vicarious liability against such defendants.

First, the FHA's text allows courts to award plaintiffs punitive damages. The statute makes no exception for municipalities, and both text and history make plain that municipalities can be sued under the FHA like any other actor. Congress's 1988 amendments to the FHA confirmed that municipalities are proper defendants and expanded punitive damages liability for all FHA defendants. The Town cannot carve out a municipal exception to the FHA's punitive damages provision merely by invoking Supreme Court decisions that interpreted statutes with fundamentally different language, remedial regimes, and legislative histories.

Second, under traditional tort rules, municipalities are vicariously liable for their employees' acts in violation of the FHA. The Supreme Court has already held, albeit in a case involving a private defendant, that corporations and employers can be held vicariously liable under the FHA for the acts of their agents and employees. *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). The same is true for municipalities. The FHA does not differentiate between public and private defendants, and its text and history counsel decidedly in favor of subjecting municipalities to vicarious liability.[3]

## ARGUMENT

## I

## THE FHA AUTHORIZED THE JURY'S PUNITIVE DAMAGES AWARD

### *A. Courts May Award Punitive Damages In FHA Cases, Including Those Brought Against Municipalities*

The FHA expressly authorizes courts to impose punitive damages, and it includes no exception for municipal defendants. Rather, the FHA's plain text, and

[3] The United States takes no position on any other issue in this case, including the applicable causation standard, which is not outcome-determinative here in light of the entirety of the trial record. See *Renz* v. *Grey Advert., Inc.*, 135 F.3d 217, 224 (2d Cir. 1997) (stating that jury-instruction errors are harmless if "a correct charge on the plaintiff's standard of proof * * * would not have made a difference to the verdict"). We note, however, that but-for causation "can be a sweeping standard" and events often have "multiple but-for causes." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). Thus, a defendant who would not have taken an action but for a person's disability would violate the FHA even "if other factors besides" disability "contributed to the decision." *Id.* at 1741.

other traditional indicators of Congress's understanding and intent, confirm that punitive damages can be awarded against municipalities under the FHA.

The FHA makes it unlawful to engage in a "[d]iscriminatory housing practice," which is defined to include any practice made unlawful by 42 U.S.C. 3604-3606 or 3617. 42 U.S.C. 3602(f). Those substantive prohibitions broadly provide that it "shall be unlawful" to make unavailable or otherwise discriminate in connection with the sale or rental of "all" dwellings not specifically exempted, 42 U.S.C. 3603(a)(2), 3604-3606, or to engage in unlawful retaliation or interference against any person for exercising their rights under the statute, 42 U.S.C. 3617. None of those prohibitions contain any limitations on who can be held liable. 42 U.S.C. 3603(a)(2), 3604-3606, 3617. The statute then provides that, "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual *and punitive damages*." 42 U.S.C. 3613(c)(1) (emphasis added). By its text, the FHA authorizes punitive damages against all defendants, private or municipal.

Other FHA provisions confirm that municipalities are among the defendants who can be held liable for engaging in a discriminatory housing practice. The statute allows any person who believes they have been injured by a discriminatory housing practice either to bring their own suit, 42 U.S.C. 3610(a)(1)-(2), or to file a complaint with HUD against any "person *or* other entity" who was responsible for

the alleged violation. 42 U.S.C. 3602(n)(1), 3610(a) (emphasis added); cf. *Bank of Am.* v. *City of Miami*, 137 S. Ct. 1296, 1304-1305 (2017) (holding that city was an "aggrieved person" with standing to sue under FHA).[4] Where FHA complaints "involve[] the legality of any State or *local zoning or other land use law or ordinance*," the statute directs that those complaints must be "refer[red]" from HUD "to the Attorney General" for possible litigation or enforcement of any conciliation agreement. 42 U.S.C. 3610(g)(2)(C) (emphasis added). These provisions expressly contemplate lawsuits against municipal defendants.

The statute also exempts from its coverage "any reasonable *local*, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1) (emphasis added). This exception would be unnecessary if the statute did not otherwise reach municipal actions—and the Supreme Court has read it narrowly to allow for greater municipal liability. See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732, 734-735 (1995) (holding that this provision did not exempt family-composition rules tied to municipal land-use restrictions). Following the statute's lead, HUD regulations

[4] The statute's definition of "[p]erson" includes all manner of "corporations" and labor organizations. See 42 U.S.C. 3602(d). Because municipalities have long been deemed corporations, see *Monell* v. *Department of Soc. Servs. of City of New York*, 436 U.S. 658, 687-689 (1978), the statutory definition of "person" already covers them. Regardless, the phrase "other entity" also would encompass municipalities.

implementing the FHA likewise apply it to municipalities. See 24 C.F.R. 100.70(d)(4)-(5).

Beyond the textual provisions noted above, ample additional evidence shows that Congress knew that municipalities could be subjected to liability under the FHA, and thus punitive damages awards, when it amended the FHA in 1988. By that time, appellate courts had either explicitly held that municipalities were proper defendants under the FHA or at least unhesitatingly applied the FHA to municipalities. See *United States* v. *City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981) (holding that the FHA reaches municipal defendants and citing cases from the Second, Third, Seventh, and Eighth Circuits); cf. *Keith* v. *Volpe*, 858 F.2d 467, 482 (9th Cir. 1988) (so holding days after FHAA's passage), cert. denied, 493 U.S. 813 (1989).

Congress presumptively adopted this reading of the FHA when it amended the law without excluding municipalities. See *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project*, 576 U.S. 519, 536 (2015) (stating that Congress's decision to maintain operative FHA language while amending it in the FHAA provided "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability"); *Mhany*, 819 F.3d at 616 (following the rule that, when "Congress amends an Act 'without altering the text ..., it implicitly adopt[s] [the Court's]

construction of the statute'" (citation omitted; alterations in original)). In enacting the FHAA, Congress incorporated the rule that the FHA reaches municipalities.

Indeed, the legislative history demonstrates that Congress recognized that "state or local land use and health and safety laws, regulations, practices or decisions" can "discriminate against individuals with [disabilities]," and intended its new "prohibition against discrimination against those with [disabilities]" to "apply to zoning decisions and practices," as well as to "land-use regulations, restrictive covenants, and conditional or special use permits." FHAA House Report 24; see also *id.* at 31 ("Reasonable [occupancy] limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, [disability] or familial status."). And Congress added the requirement that complaints filed with HUD involving local zoning and land-use laws must be referred to the Attorney General, indicating its clear understanding that such municipal decisions would fall under the FHA. *Id.* at 36. Statutory and regulatory text, along with statutory history, thus confirm that "[w]hen Congress amended § 3604(f) in 1988, it intended the section to reach * * * state or local governments." *Michigan Prot. & Advoc. Serv., Inc.* v. *Babin*, 18 F.3d 337, 344 (6th Cir. 1994).

Congress also expanded punitive damages liability in 1988—without exempting municipal defendants. The FHA always had allowed for punitive damages against all defendants, but it had initially imposed a $1000 cap on punitive damages awards. Pub. L. No. 90-284, Tit. VIII, § 812(c), 82 Stat. 88 (1968). The FHAA eliminated that cap. Pub. L. No. 100-430, sec. 8, § 813(c)(1), 102 Stat. 1633 (1988) (42 U.S.C. 3613(c)(1)). Congress took this action because it was convinced "that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law." FHAA House Report 39-40. Congress made no exception for municipalities despite recognizing that they, too, engage in violations of the Act. The FHAA thus confirmed that all defendants—including municipalities—are subject to appropriate punitive damages awards.

*B. The Town's Cited Cases Do Not Alter The Analysis*

1. The Town argues (Br. 41) that *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), and *Barnes* v. *Gorman*, 536 U.S. 181 (2002), exempt municipalities from punitive damages. Not so. Both cases hinge on the specifics of the statutes at issue, not on any universal exemption. And the relevant aspects of those statutes differ fundamentally from the FHA.

a. *Fact Concerts* was a constitutional case brought under 42 U.S.C. 1983, and concerned only whether "a municipality may be held liable for punitive

damages *under § 1983*." 453 U.S. at 249, 252 (emphasis added). Applying a common-law presumption that punitive damages are not available against municipalities, *id.* at 259-260, the Court found "no evidence that" in passing Section 1983 "Congress intended to disturb the settled common-law immunity," *id.* at 266.

Because "the general language of § 1983" said nothing about punitive damages, *Fact Concerts*, 453 U.S. at 258, the Court examined "the legislative debates" to determine whether "the 42d Congress intended" to authorize punitive damages awards against municipalities, *id.* at 263-264; see *Ciraolo* v. *City of New York*, 216 F.3d 236, 239 (2d Cir.) (describing the Court as "turn[ing] to the legislative history of § 1983 to see if any such intent [to abolish the common-law immunity] could be divined"), cert. denied, 531 U.S. 993 (2000). But "the limited legislative history relevant to this issue" suggested, if anything, that Congress intended to *maintain* municipal immunity from punitive damages. *Fact Concerts*, 453 U.S. at 264.

At most, then, *Fact Concerts* requires proof either in text or in legislative history that a statute authorizes punitive damages against municipalities. See *Ciraolo*, 216 F.3d at 239 ("[The Court] considered, first, the extent of municipal immunity at common law and the legislative history relevant to § 1983."). Such proof abounds here. Unlike Section 1983, "[t]he FHA expressly provides for the

recovery of punitive damages." *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005). And "neither history nor text points to exclusion of municipalities from the class of [defendants] covered by the" FHA. *Cook Cnty.* v. *United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (holding that False Claims Act's generally-applicable treble damages provision applies to municipalities).

Here, both text and legislative history illustrate Congress's intent to subject municipalities to the FHA, and confirm that it made no exception to the damages to which they could be subject for violations. See pp. 13-17, *supra*. Statutes that include municipalities as defendants and do not exempt municipalities from their punitive damages provisions meet the *Fact Concerts* test. See, *e.g.*, *Truesdell* v. *Thomas*, 889 F.3d 719, 724-725 (11th Cir. 2018) (holding that Driver's Privacy Protection Act authorizes punitive damages against municipal agencies because it "defines 'person' as 'an individual, organization or entity'" without exempting municipalities, subjects any "person" to liability, and "specifically permits punitive and liquidated damages" (citations omitted)); *Cross* v. *New York City Transit Auth.*, 417 F.3d 241, 256-257 (2d Cir. 2005) (holding that ADEA authorizes liquidated damages against municipalities). And Congress's professed desire to "impos[e] an effective deterrent on violators," FHAA House Report 40, confirms that allowing punitive damages against municipalities will "further the purposes of

the Fair Housing Act," whose provisions "are to be given broad and liberal construction," *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 388 (2d Cir.) (citation omitted), cert. denied, 513 U.S. 876 (1994).[5]

b. *Barnes*, for its part, concerned Title II of the ADA and the Rehabilitation Act. 536 U.S. at 189-190. The Court held that those statutes do not provide for punitive damages against municipalities based on their particular remedial schemes, which, unlike the FHA, borrow from and incorporate Title VI of the Civil Rights Act. 536 U.S. at 189. The Court determined that Title VI, as a Spending Clause statute, authorizes only those remedies about which a contracting party would be on notice, and that "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Id.* at 187.

The FHA, however, does not rely upon Title VI's remedies, or those of any other Spending Clause statute. See 42 U.S.C. 3613(c). Nor did Congress rely on its Spending Clause powers to enact the FHA and FHAA. See, *e.g.*, *City of Parma*, 661 F.2d at 573 (holding that the Thirteenth Amendment authorizes the FHA); *Groome Res. Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 216 (5th Cir. 2000) (holding that the Commerce Clause authorizes the FHA's reasonable

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[5] The Court therefore need not reach *Fact Concerts*'s exception for "extreme situation[s] where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." 453 U.S. at 267 n.29; see *Ciraolo*, 216 F.3d at 241 (interpreting this exception); cf. Br. 43-45.

accommodations provision); FHAA House Report 24 & n.63 (citing *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 435 (1985), a Fourteenth Amendment decision, to justify disability protections). *Barnes* therefore is irrelevant on this question.

2. The Town also cites several district court cases that refused to award punitive damages against municipalities under the FHA. See Br. 41-43; but see Doc. 138, at 64 & n.21 (citing cases that have held that the FHA authorizes punitive damages against municipalities). They, too, are unpersuasive. None engage in any serious analysis of the FHA's text, and none explore any of its legislative history. Instead, they simply find that the FHA cannot overcome the *Fact Concerts* presumption against municipal punitive damages, with little or no further explanation. See *Lundregan* v. *Housing Opportunities Comm'n*, No. CV PJM-19-1369, 2020 WL 2218928, at *4 (D. Md. May 7, 2020); *Jennings* v. *Housing Auth. of Balt. City*, No. CV WDQ-13-2164, 2014 WL 346641, at *9 (D. Md. Jan. 29, 2014); *Brooker* v. *Altoona Hous. Auth.*, No. 3:11-CV-95, 2013 WL 2896814, at *27 (W.D. Pa. June 12, 2013); *Inland Mediation Bd.* v. *City of Pomona*, 158 F. Supp. 2d 1120, 1158 (C.D. Cal. 2001); *Samaritan Inns* v. *District of Columbia*, No. 93 CV 2600 RMU, 1995 WL 405710, at *31 (D.D.C. June 30, 1995), aff'd in part, rev'd in part, 114 F.3d 1227 (D.C. Cir. 1997); cf. *Housing*

*Invs., Inc.* v. *City of Clanton*, 68 F. Supp. 2d 1287, 1296 (M.D. Ala. 1999) (holding city was immune from punitive damages, but in discussion of Section 1983).

To the extent some of these cases suggest that the FHA would have to expressly single out municipalities for punitive damages liability, see, *e.g.*, *Brooker*, 2013 WL 2896814, at *27, they both over-read *Fact Concerts* and under-read the FHA's text. The Court in *Fact Concerts* combed Section 1983's legislative history for indications of intent to allow for punitive damages, even without *any* mention of punitive damages in the statute's text. 453 U.S. at 264. The FHA, meanwhile, expressly allows suits against municipalities and universally authorizes punitive damages. Courts "cannot read an implicit exception for municipal agencies into the express provision of the Act that permits punitive damages." *Truesdell*, 889 F.3d at 725. Accordingly, this Court should reject the Town's argument and affirm that punitive damages are available against municipalities under the FHA.

## II

## THE TOWN CAN BE HELD VICARIOUSLY LIABLE FOR ITS OFFICIALS' ACTS IN VIOLATION OF THE FHA

### *A. The FHA Holds Municipalities Liable For Their Employees' Violations*

The Town also asserts that it cannot be held liable under the FHA based on vicarious liability or *respondeat superior* liability. Br. 49-52. But the FHA follows traditional tort rules, which presumptively allow for such liability, and

nothing in the Act suggests an intent to exempt municipalities from its general liability rules.[6]

The Town is responsible under the FHA for its officials' actions. "[I]t is well established that the [FHA] provides for vicarious liability." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Applying "traditional vicarious liability rules," the FHA makes "principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Ibid.*; see *Mitchell* v. *Shane*, 350 F.3d 39, 50 (2d Cir. 2003). The district court's jury instructions adhered to the standards articulated in *Meyer* (Doc. 233, at 15-16), and the Town does not claim otherwise.

Instead, the Town asserts (Br. 49-52) that the limits *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), imposed on municipal liability under Section 1983 apply to the FHA. The Town is wrong. "[W]hen Congress creates 'a species of tort liability,' as it did in enacting the FHA, Congress 'legislates against a legal background of ordinary tort-related ... liability rules' which it presumptively 'intends its legislation to incorporate.'" *Francis* v. *Kings Park Manor, Inc.*, 992 F.3d 67, 76 (2d Cir. 2021) (en banc) (citations and

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[6] The Town admitted (see Br. 51) that officers, employees, and agents of the Town committed the acts at issue within the scope of their authority. Therefore, the only question in this case is whether a theory of municipal vicarious liability is available under the FHA.

footnote omitted; alteration in original). And "[t]he general rule regarding actions under civil rights statutes is that *respondeat superior* applies," including against municipalities. *United States* v. *Town of Colorado City*, 935 F.3d 804, 808 (9th Cir. 2019) (citation omitted).

The Supreme Court's ruling in *Monell* "remains the exception to the general rule," *Town of Colorado City*, 935 F.3d at 808, and it does not extend to the FHA. In *Monell*, the Court held that, "*unlike ordinary tort litigation*, the doctrine of *respondeat superior* was inapplicable" to Section 1983 suits absent an official policy. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 122 (1992) (emphasis added). The Court based its holding on the particular "language" of Section 1983, as "read against the background of" its "legislative history." *Monell*, 436 U.S. at 691. By contrast, neither the FHA's language nor its legislative history suggests that Congress intended to depart from ordinary tort-law principles. See *Meyer*, 537 U.S. at 285. Rather, "an action brought for compensation by a victim of housing discrimination is, in effect, a tort action" like any other. *Ibid.*; see also *Curtis* v. *Loether*, 415 U.S. 189, 195-196 (1974) (noting that an action for damages under the FHA "sounds basically in tort" and that "actual and punitive damages" are "the traditional form of relief offered in the courts of law").

The FHA lacks the textual indicators that drove the Court's decision in *Monell*. Section 1983 imposes "liability on one who 'subjects [a person], or causes

[that person] to be subjected,' to a deprivation of federal rights." *Board of Cnty. Comm'rs of Bryan Cnty.* v. *Brown*, 520 U.S. 397, 403 (1997) (citation omitted; alterations in original). The Court held that this language authorized municipal liability where the municipality "'causes' an employee to violate another's constitutional rights," but not "where such causation was absent." *Monell*, 436 U.S. at 692.

The FHA, however, "focuses on prohibited acts." *Meyer*, 537 U.S. at 285. The statute states simply that "it shall be unlawful * * * [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a [disability]," 42 U.S.C. 3604(f)(2), or to "interfere with any person in the exercise or enjoyment of" her statutory rights, 42 U.S.C. 3617. "The lack of [a] causal phrase" like Section 1983's "suggests that Congress did not intend to limit local governments' liability to situations when 'the action that is alleged to be unconstitutional implements or executes'" a municipal policy. *Town of Colorado City*, 935 F.3d at 809 (citation omitted).[7]

[7] Though promulgated after the events here, an FHA regulation on vicarious liability confirms this reading of the statute. The regulation provides that "[a] person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law." 24 C.F.R. 100.7(b). The word "[p]erson" is defined to include "corporations." 24 C.F.R. 100.20. And municipalities have long been considered

Nor does the FHA's legislative history counsel against vicarious liability for municipalities. When debating Section 1983, Congress expressed great "doubt [about] its constitutional power to impose [civil] liability in order to oblige municipalities to control the conduct of *others*." *Board of Cnty. Comm'rs of Bryan Cnty.*, 520 U.S. at 403 (citation omitted). The *Monell* Court reasoned that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with th[at] obligation." 436 U.S. at 693.

By contrast, when Congress enacted the FHA nearly a century later, it showed no hesitation about imposing municipal liability. *United States* v. *City of Black Jack*, 508 F.2d 1179, 1183 (8th Cir. 1974) (explaining that the FHA contains "no similar legislative history" to Section 1983's), cert. denied, 422 U.S. 1042 (1975). And when Congress added disability discrimination protections to the FHA, it sought to reach "the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities." FHAA House Report 24. Such enforcement efforts often are undertaken by individual municipal employees.

The Town's attempt to extend *Monell* to the FHA also lacks support in the case law. While no circuit court appears to have squarely addressed the issue,

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to be corporations. See *Monell*, 436 U.S. at 687-689. Though this rule did not become final until 2016, it simply codified vicarious liability standards as they already existed. 81 Fed. Reg. 63,054, 63,072 (Sept. 14, 2016).

lower courts have held that *Monell*'s limits on municipal vicarious liability do not apply to FHA claims. See, *e.g.*, *Mehta* v. *Village of Bolingbrook*, 196 F. Supp. 3d 855, 870 (N.D. Ill. 2016); *United States* v. *City of Hayward*, 805 F. Supp. 810, 813 (N.D. Cal. 1992), aff'd in part, rev'd in part on other grounds, 36 F.3d 832 (9th Cir. 1994); *People Helpers, Inc.* v. *City of Richmond*, 789 F. Supp. 725, 733 (E.D. Va. 1992); see also *United States* v. *Incorporated Vill. of Island Park*, 888 F. Supp. 419, 444 (E.D.N.Y. 1995) (stating that municipality was liable for its agents' actions under the FHA because "[t]he applicability of respondeat superior to violations of the Fair Housing Act has been widely recognized").

This Court already has upheld findings of vicarious FHA liability against municipalities based solely on its employees' actions. For instance, in *Tsombanidis* v. *West Haven Fire Department*, this Court affirmed a district court's finding of intentional discrimination against a city under the FHA based on, among other things, "the history of hostility of neighborhood residents to [a group home] and their pressure on the Mayor and other city officials," as well as the actions of "one of two Property Maintenance Code Officials for the City," who "expressed his personal dissatisfaction with [the group home] and ordered Tsombanidis to evict the residents without any authority in the City Code." 352 F.3d at 580. And in *Regional Economic Community Action Program, Inc.* v. *City of Middletown*, this Court sent disparate treatment and retaliation claims against Middletown to a jury

based on statements and actions by city officials, including the mayor and the assistant corporation counsel. 294 F.3d 35, 43-44, 50, 53-54 (2d Cir. 2002); see also *United States* v. *City of Hayward*, 36 F.3d 832, 838 (9th Cir. 1994) ("Because the City of Hayward appointed the arbitrator pursuant to an ordinance mandating arbitration, the City is liable for the arbitrator's interpretation and enforcement of its rent control ordinance."). The FHA encompasses this familiar form of liability.

*B. The Town Would Be Liable Even Under* Monell

Even under the more restrictive rule *Monell* imposes in Section 1983 cases, the Town would remain liable here for its policymakers' course of conduct.

The Town contends (Br. 48, 51) that the Mayor's and Town Manager's actions cannot be considered to reflect any Town policy, because the Town acts only "through its Town Council." But these arguments ignore Section 1983 jurisprudence. While *Monell* requires a municipal policy decision to authorize municipal liability, "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986).

Nor did Gilead need to prove that municipal officials developed a broader policy "to discriminate against persons with disabilities." Br. 52. Even "a course of action tailored to a particular situation" may "represent[] an act of official government 'policy'" when "properly made by that government's authorized

decisionmakers." *Pembaur*, 475 U.S. at 481. Thus, plaintiffs may bring Section 1983 actions "based on a single decision attributable to a municipality" so long as they can "prove[] fault and causation" from that decision. *Board of Cnty. Comm'rs of Bryan Cnty.*, 520 U.S. at 404-405. Even under *Monell*, then, liability attaches whenever "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483.

Town officials took such a course here. The Town admits (Br. 11, 48) that the Town Council took at least one action against Gilead: authorizing the petition to DPH seeking to deny Gilead a license. The Council also "supported" the rest of the Town's efforts to drive out Gilead's group home. Tr. 585.

And the Town would be hard-pressed to deny that the Mayor and Town Manager are responsible for establishing final policy regarding the decisions they made. The Town Manager was "the chief executive and administrative officer of the Town," responsible for "[d]irect[ing] and supervis[ing] the administration of all departments, offices and agencies of the Town." Town of Cromwell Charter, Art. III, § 3.04. This included the Police Department and the offices of the Town Assessor and Town Attorney. *Id.* Art. IV, §§ 4.06, 4.13, 4.14. And the Mayor was both the head and a voting member of the Town Council, the "chief elected official and head of the Town government." *Id.* Art. II, § 2.02(b).

Beyond issuing their own statements and filing the petition with the State, testimony at trial confirmed that the Mayor and Town Manager ordered other Town officials to act against Gilead. See p. 8, *supra*. These decisions, considered alone or together, constitute a "course of action" regarding the Reiman Drive home by those "responsible for establishing final policy" on the issue. *Pembaur*, 475 U.S. at 483.[8]

[8] This Court need not decide whether municipalities can be held vicariously liable for money damages under Title II of the ADA. By failing to even mention vicarious liability under the ADA in its opening brief, let alone make any separate argument under that statute (Br. 49-52), the Town has forfeited any ADA-related argument. See, *e.g.*, *In re Sears Holdings Corp.*, 51 F.4th 53, 65 (2d Cir. 2022). Nor would the resolution of any such question affect the outcome of this case, given that the FHA provides an independent basis for imposing liability. See Doc. 233, at 16 (instructing jury to treat ADA liability as derivative of FHA liability).

## CONCLUSION

This Court should affirm on the issues addressed herein.

Respectfully submitted,

DAMON SMITH
General Counsel

JEANINE WORDEN
Associate General Counsel for Fair Housing
Department of Housing and Urban Development
451 7th St. SW
Washington, D.C. 20410

KRISTEN CLARKE
Assistant Attorney General

s/ Noah B. Bokat-Lindell
ERIN H. FLYNN
NOAH B. BOKAT-LINDELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

## CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6829 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

Date: December 20, 2022

## CERTIFICATE OF SERVICE

I certify that on December 20, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney