Nos. 08-55069, 08-55072, 08-55151

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANN REED, *et al.*,

Plaintiffs-Appellants/Cross-Appellees

v.

PENASQUITOS CASABLANCA OWNER'S ASSOCIATION,

Defendant-Appellee/Cross-Appellant

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES SEEKING TO VACATE PORTIONS OF THE DISTRICT COURT'S ORDER AND REMAND

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ISSUES PRESENTED

1. Whether plaintiff Joann Reed's children and grandchild are eligible for compensatory damages under the Fair Housing Act (FHA).

2. Whether inaction in the face of complaints can constitute reckless behavior supporting an award of punitive damages under the FHA.

INTEREST OF THE UNITED STATES

The Department of Justice and the Department of Housing and Urban Development (HUD) share responsibility for enforcing the FHA. See 42 U.S.C. 3610, 3612. Under 42 U.S.C. 3612(o), "the Attorney General shall commence and maintain[] a civil action" when authorized to do so by the Secretary of HUD. The United States may also sue under the Act where there is "a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA]" or when "any group of persons has been denied any of the rights granted by [the FHA]." 42 U.S.C. 3614(a). The Attorney General may intervene in private parties' actions where they are "of general public importance." 42 U.S.C. 3613(e). The government may seek the same monetary relief on behalf of an aggrieved person that such person could obtain in a private action, including "actual and punitive damages." 42 U.S.C. 3613(c); see also 42 U.S.C. 3614; 42 U.S.C. 3612(o)(3). Accordingly, the United States has a substantial interest in the proper resolution of questions concerning the scope of the FHA and the availability of damages.

STATEMENT OF THE CASE

1. The Peñasquitos Casablanca Owner's Association

The Peñasquitos Casablanca Owner's Association (PCOA or the Association) operates 500 condominiums. Homeowners are automatically

members of the Association, which is governed by a volunteer Board of Directors (the Board) and a president. AER 30.[1]

The Association hires and supervises employees, enforces rules, levies fines, and collects dues. 2FER 127; AER 29, 69. It may foreclose on those who fall behind in payments and may revoke privileges for rules violations. AER 23-24, 29, 34. The Association maintains common areas and some parts of the condominiums' infrastructure. AER 33, 36, 43. Association agents may enter condominiums to inspect or repair them. AER 16. The PCOA does not own any of the units and has no policies regarding rentals, beyond requiring that owners register tenants and that lease terms be longer than one month. AER 17, 27, 30, 124. The PCOA's bylaws provide that it will set operating policies, delegate its powers, and "supervise all officers, agents, and employees of the Association." AER 10, 71, 76.

In January 2004, the PCOA hired Kent McDonald as a "property patrol" person, commonly referred to as a security guard. 2FER 127; AER 179-180. The PCOA did not perform a background check on McDonald. AER 78-79. He was

[1] "1ER _" and "2ER _" refer to pages in plaintiff Reed's Excerpts of Record, Volumes 1 and 2. "1FER _" and "2FER _" refer to pages in plaintiff Fair Housing Council of San Diego's Excerpts of Record, Volumes 1 and 2. "AER _" refers to pages in the United States' Excerpts of Record.

recommended as the brother-in-law of a current guard and received favorable references. AER 77, 186. The PCOA did not discover prior to hiring McDonald that he was on parole for spousal rape. 2FER 128; AER 130.

McDonald wore a uniform and was authorized to monitor traffic, report suspicious activity to the police, contact residents at their dwellings, and issue violation notices. 2FER 128; AER 72-74, 80-82, 119-120, 133, 179-185. Guards such as McDonald were also authorized to revoke residents' clubhouse reservations and cancel social events because of rules violations. AER 28. The PCOA's manager, Tim Howard, supervised McDonald and also handled residents' complaints. AER 70, 75, 83.

2. McDonald Harasses Reed

In January 2003, plaintiff Joann Reed rented a Casablanca condominium unit owned by Andrew Bianchi for herself, her two children, and her grandson. 2FER 126-128.

McDonald soon began to come, uninvited, to Reed's unit to ask various favors. AER 135. On one occasion, he came into Reed's apartment unannounced, laid down on her couch, and watched a movie. AER 166. Reed, who was home with her five-year old grandson, repeatedly asked him to leave, saying "[j]ust because you're a security guard doesn't mean you can come in here." AER 166.

On April 1, 2004, McDonald gave Reed a ride in exchange for $20. AER 139, 163-165. In Casablanca's parking lot, McDonald grabbed Reed's leg, told her he was going to "fuck [her]" and "make [her] fuck him," and tried to kiss her. AER 139. She pushed him back and yelled. Reed's grandson, Antwan Ramsey, shouted at McDonald and then ran into the house. AER 140. Antwan still remembers the incident, and now sleeps with a nightlight and wets the bed. AER 140.

Reed testified that both her sons had confrontations with McDonald in the condominium doorway. Reed said McDonald once pushed twelve-year-old Milton Rodgers, Reed's son, up against the door and lifted him off his feet. AER 142, 144, 162. Milton is more aggressive now, Reed testified, because he felt he could not defend himself or his mother. AER 160.

Reed also testified that, on another occasion, McDonald grabbed her after she answered the front door. Reed's eleven-year-old son, Jamel Rodgers, approached and tried to push McDonald away. AER 144-145, 162. After the encounter, Jamel "was throwing up all that week" and suffered a seizure. AER 144, 159. Once, while Reed was not present, her children saw McDonald trying to get into her bedroom window. AER 138. Reed testified that her children now fear for her safety and are overly protective of her. AER 160. In addition, she

explained, they fear black men, and "don't want to be around their own race of people." AER 159-160.

In another instance, McDonald again entered Reed's unit through an unlocked door and refused Reed's requests to leave. AER 141, 166. He grabbed her breast, tearing a button off her shirt. AER 46, 141. McDonald then grabbed Reed's buttocks. AER 46, 141, 168. He grabbed his crotch, squatted up and down, and said, "I haven't had sex in a long time." AER 46, 141, 143. He forcibly hugged Reed, lifting her into the air and kissing her cheek. AER 46, 168. Reed testified that "he did all that to me in front of my kids and my grandson." AER 141-142.

3. Reed Complains To The Board

On the morning of May 19, 2004, the PCOA's manager, Tim Howard, received an anonymous phone call reporting that a "security man named Mac" "[s]hows up at doors unannounced" and "goes into women's homes and touches them in inappropriate places." AER 31, 85, 132. That afternoon, Reed and neighbor Tina Harris went to the manager's office. Howard affirmed in his deposition that they told him McDonald was "engaging in sexual harassment." AER 84. Reed testified that she gave Howard her name and her unit number and told him "what happened to me and my kids." AER 148. According to Reed,

Harris also identified her unit and told Howard that McDonald had come to her apartment at 3 a.m., offering to pay to have sex with her thirteen- or fourteen-year-old daughter.[2] AER 148. Howard told the women that he would talk to the Board and call them back. AER 149. Reed said one reason she did not immediately seek a restraining order against McDonald was that she was waiting for Howard's response. AER 152.

Later that afternoon, Bianchi called Howard and reported that McDonald had apparently harassed his tenant. He asked Howard to call back after the Board had dealt with the matter. AER 32. Howard's phone log from May 19, 2004 shows that Bianchi gave his tenant's name, Joann Reed, and her unit number, 103. AER 32. In his deposition, Bianchi explained that Reed had talked to him about the harassment, and he explained that, as an individual owner, he did not have authority over McDonald. AER 127.

At the Board's regular meeting that evening, Howard reported the complaints. AER 33, 88-89. The meeting minutes do not indicate whether Howard mentioned Bianchi's phone call identifying Reed as the complainant, but Howard believes he did so. AER 33, 87. The Board asked Howard to speak with McDonald, but took no other action. AER 86-90, 91-94; 2FER 129. They were

[2] Harris did not testify at trial.

concerned that a wrongful termination of McDonald would harm the Association. AER 125a. After the meeting, Howard told McDonald to "make a wide berth" around Reed's building. AER 100.

The next morning, a San Diego police detective and other officers came to the PCOA's office to question McDonald. AER 95-96. In an email, Howard advised the Board that the police investigation "takes all the burden of investigation off us and puts it with the police." AER 51. Board member Ed Burke replied that the Board should convene to discuss the matter. He warned that "[t]his is a vulnerability to the association." AER 51. Another board member, Bill Barber, suggested McDonald be put on leave. AER 51.

On May 21, Howard emailed the Board again, explaining that he had been able to "piece together" the fact that the woman who filed the police report was Joann Reed in unit 103. AER 50. Burke emailed back to repeat his concern that the Board should meet to talk about the matter. He pointed out that the police investigation "changes what the board knows." AER 50. Board President Mike Wright thought McDonald should work his usual shift. Wright wrote, "[McDonald] is at this time Innocent until proven guilty." AER 50.

Also on May 21, Jeff Rafferty, who managed Harris' apartment, wrote to the Association to relay his tenant's complaints about the McDonald. AER 35, 97.

McDonald's harassment continued after Reed's initial complaint. On May 29, Reed called the office twice to complain about McDonald. AER 36, 98-99. Howard explained that he did nothing in response because he was "not sure what action she was requesting." He testified that McDonald was "supposed to be out on the property continuously. That's his job." AER 98.

4. Reed Obtains Restraining Orders

On June 7, 2004, Reed secured a temporary restraining order from the state court. AER 37-40, 128. In the petition, she stated that McDonald had sexually harassed her in front of her children, looked into her window, entered uninvited, and "offer[ed] money for sex." AER 37-38. Reed testified that she stopped by the PCOA office on the way home from court and gave Howard a copy of the order. AER 153; see also AER 62. Police officers served the order and the petition on McDonald at the PCOA office on June 8. AER 37-41, 101-102. In his deposition, Howard initially denied receiving the order from Reed on June 7. He stated that he became aware of the order in late June but did not receive it until July. AER 101-102. He then stated alternately that McDonald never mentioned the order, that McDonald must have been the one who first told him about it, that perhaps Reed first told him of it, and that he remembered discussing it with McDonald. AER 103, 110-111. Howard did not inform Reed that he had advised McDonald

not to go near her residence, but he "recognized the fact that she had a right to have him arrested if he was." AER 120.

Reed testified that, after obtaining the restraining order, she saw McDonald around her house "even more." AER 153. From inside her unit, Reed sometimes saw McDonald standing nearby looking in the family's windows. AER 153. Reed said that McDonald would wait outside her unit and follow her and her children in the PCOA golf cart. AER 45, 153, 156. He followed her babysitter, Nasser Rachedi, when he left their condo. Rachedi stated that McDonald was "staking out" Reed's unit, parking outside and watching the front door "for hours." AER 173.

According to Rachedi, Reed "was scared for her children's lives and her life." Rachedi testified that Reed would get upset with her boys for going outside. AER 170-171. The family gave up outdoor activities like swimming, walking, and going for ice cream. At one point, Reed and her children slept in the closet because it had no windows. AER 145-146, 172. Rachedi testified that McDonald came to Reed's door to tell Reed that he could fine her or "get her kicked out of the apartment complex." AER 169. McDonald accused Reed of parking violations. AER 169-170. He once came to Reed's unit with a member of her church to complain about the restraining order and ask her to seek rescission of the

order. AER 170. During nearly all his visits to Reed's unit, McDonald was wearing his Casablanca uniform. AER 133-134.

At the Board's monthly meeting on June 16, Howard said there was "ongoing friction" between Reed and McDonald, and he recommended that the Association fire McDonald because the restraining order impaired his ability to do his job. AER 104-119. The Board agreed to monitor the situation but took no action. AER 42-43. The Board saw the police as "the ones with the tools and experience to investigate a crime such as that." AER 125.

Reed obtained a permanent restraining order against McDonald on June 24, 2004. In the declaration accompanying the order, Reed affirmed that McDonald entered uninvited, touched her breast, buttocks, and shirt, hugged her, kissed her, grabbed his penis, and stated that he had not had sex in a long time. AER 46. Reed left a voicemail message notifying Howard of the order. AER 45-48, 118-119. Howard called Reed but hung up without leaving a message because of her unusually lengthy answering machine greeting. AER 119. Reed testified that she came to Howard's office a day or two later to deliver a copy of the order but that Howard told her the sheriff's office had already given him a copy. AER 154, 169; see also AER 62.

Reed continued to encounter McDonald. AER 153-156, 178. Once, while

grocery shopping, Reed saw McDonald in his Casablanca uniform. He approached and threatened her, shouting, "Bitch, I'm gonna kill your ass." AER 157.

On July 6, Reed again called the PCOA office to complain about McDonald. She later submitted a note reporting that McDonald "continues to violate my restraining order of 100 yards." AER 49, 156, 177, 187-188. Reed and Rachedi went to the PCOA office and told Howard that McDonald was still "conduct[ing] * * * security guard business" and "looking for an excuse just to knock at [her] door." AER 174-175.

At its July 21 meeting, the Board reviewed the permanent restraining order and petition and agreed to fire McDonald, due to "the ongoing criminal investigation he was involved with." AER 121-123. In part because of his treatment of Reed, California authorities arrested McDonald and revoked his parole on September 8, 2004. 2FER 129. Reed moved out of the condo in November or December 2004. AER 55, 126.

5. Proceedings Below

Reed, her children Jamel Rodgers and Milton Rodgers, her grandson Antwan Ramsey, and the Fair Housing Council of San Diego sued the PCOA in federal court in the Southern District of California, alleging violations of FHA 42

U.S.C. 3604(b) and 3617. 2FER 131; AER 199. They also brought several state claims. 2FER 131-133.

The PCOA moved to dismiss for lack of subject matter jurisdiction, arguing that plaintiffs' FHA claim was "immaterial," and that a "complete remedy" existed under state law. AER 53, 57. The PCOA also contended that there was no authority for holding "a homeowners' association liable for sexual harassment in housing" because it did not rent units. AER 66-67, 205.

The court denied defendant's motion to dismiss. AER 59-60. Although it found "little question" that McDonald "sexually battered Ms. Reed," the court was concerned with the claim against the PCOA because the Association had no control over rentals. AER 197. The court agreed to let Reed's claims proceed, however, holding that HUD recognized claims such as Reed's and stating "I'm to give deference to [HUD's] interpretation of the statute inasmuch as they're [the] primary enforcement agency." AER 196-197. The court said that HUD interpreted the FHA to cover "an act of discrimination [that] affects the condition of tenancy," and that because McDonald "made life miserable for Ms. Reed for a period of time," McDonald's behavior "did condition her enjoyment of the premises." AER 197; 1ER 46.

After the trial, the court declined to submit the children's claims to the jury. 2ER 68. The court appears to have rested its holding on two alternative grounds. The court first held that the boys could not recover because they were not the primary targets of McDonald's harassment. It declined to "find [the children] have standing on a sexual harassment claim" where "somehow their rights are residual and flow through the harassment that Ms. Reed suffered." 1ER 60.

The court also ruled that it did not "see any evidence" that "the boys were ever affected by [McDonald]" and stated that they did not observe sexual behavior. 1ER 48. Counsel argued that each of the boys had a direct confrontation with McDonald of some sort. 1ER 52-53. When counsel reminded the court of the incident Antwan saw in McDonald's car, the court assumed that because he was very young, he "probably had no concept of what's going on other than people are upset."[3] 1ER 57. The court acknowledged that Jamel was involved with a "physical assault" or "some pushing and scuffling" with McDonald but concluded that neither of Reed's sons had seen "anything that could be fairly characterized as sexual harassment," and that any harm to them was speculative. 1ER 59, 50.

[3] The court also stated that this happened off Casablanca's property. 1ER 48-49. Reed testified that the harassment began when they stopped at a gas station but "got real bad when it got in front of my house." AER 165.

The court also refused to send plaintiffs' punitive damages claim to the jury, ruling that there was insufficient evidence to allow any reasonable trier of fact to find that the Board recklessly disregarded Reed's rights. The court could not find "anything affirmatively that [the Board] did," and stated that "failure to act, if it's found by the jury, doesn't amount to recklessness." 1ER 81-82. The PCOA's slow response and failure to curtail McDonald's actions, the court found, could prove only negligence, not recklessness. 1ER 71-71.

The jury found that the PCOA violated California law and the FHA. It awarded Reed a total of $47,000, including $10,000 in compensatory damages under the FHA and California law, $12,000 in statutory civil penalties under California's Unruh Civil Rights Act, Cal. Civ. Code § 51.9, and $25,000 in statutory civil penalties under other state statutes. 1ER 15. The Fair Housing Council received $500 in compensatory damages. 1ER 15. The district court denied the injunctive relief requested by plaintiffs, in part because Reed and McDonald were no longer at Casablanca.

SUMMARY OF ARGUMENT

The district court erred in ruling that the children could not recover under the FHA because the extent of their harm was speculative and because they were not the direct targets of McDonald's discriminatory behavior. The FHA permits

any person harmed by violations of the statute to sue. Standing is premised on whether the plaintiff suffered harm caused by prohibited discrimination. The boys are eligible for compensatory relief in this case because, if the jury believes their allegations, McDonald stalked them, looked in their windows, and assaulted them, thus harassing the boys because of their association with Reed. The boys may also recover if they were harmed only indirectly by instances of harassment that their mother alone endured. McDonald's threatening actions were motivated by Reed's gender, and contrary to the court's reasoning, it makes no difference that the behavior directed at the boys was not explicitly sexual.

In addition, the court misconstrued the law in holding that inaction could not constitute the reckless disregard for Reed's rights that is required to support a punitive damages claim. Under the FHA, as under other civil rights statutes, the defendant's failure to act in the face of allegations of discrimination may, in some instances, establish eligibility for punitive damages.

ARGUMENT

I

REED'S CHILDREN'S REQUEST FOR COMPENSATORY RELIEF SHOULD BE REMANDED FOR RECONSIDERATION UNDER PROPER LEGAL STANDARDS

A. Anyone Harmed By A Fair Housing Act Violation Is Eligible For Compensatory Damages

The district court wrongly held that indirect victims of sexual harassment cannot recover under the FHA. AER 189-192. The FHA states that "[a]n aggrieved person" may seek redress in the federal courts, and defines an aggrieved person as "any person who * * * claims to have been injured by a discriminatory housing practice." 42 U.S.C. 3613; 42 U.S.C. 3602(I). The Supreme Court has held that the FHA grants standing to a broad class of individuals injured by discrimination. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). The Court in *Gladstone Realtors* explained the statute was "phrased in the passive voice * * * avoiding the need for a direct reference to the potential plaintiff." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 102-103 (1979). The Court found nothing in the statute to suggest a restrictive standing requirement, as the language "on its face contains no particular statutory restrictions on potential plaintiffs." *Id.*

Thus, the FHA requires only a showing of cognizable harm tied to an act of discrimination against someone. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982). "[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." *Gladstone Realtors*, 441 U.S. at 103 n.9. The FHA "serves an important role in protecting not only those against whom a discrimination is directed," but those harmed by FHA violations where discriminatory treatment of another "affects the very quality of their daily lives." *Trafficante*, 409 U.S. at 211. Accordingly, the Supreme Court has afforded standing to a white tenant who claimed discrimination against non-white apartment seekers and to black and white residents claiming that members of the opposite race were steered away from their respective communities. *Gladstone Realtors*, 441 U.S. at 91; *Trafficante*, 409 U.S. at 205.

This Court has properly applied the Supreme Court's decisions. In *Harris* v. *Itzhaki*, a minority tenant claimed she was harmed by her landlords' racial discrimination against minority testers at her building, who posed as apartment seekers in order to confirm reports of discriminatory practices. 183 F.3d 1043 (9th Cir. 1999). She complained that the discrimination against prospective tenants harmed her because she was denied the opportunity to live in a community free of

racial discrimination. *Id.* at 1050. This Court reversed the district court's dismissal of her claim, holding that "any person harmed by discrimination, *whether or not the target of the discrimination*, can sue to recover for his or her own injury." *Id*. "Unlike actions brought under other provisions of civil rights law," the court explained, "under the FHA the plaintiff need not allege that he or she was a victim of discrimination." *Id*. at 1049-1050 (citing *Gladstone Realtors*, 441 U.S. at 115).

In the same vein, this Court has held that fair housing organizations have standing to sue for diversion of resources and frustration of their mission based on violations of others' rights. *Fair Housing of Marin* v. *Combs*, 285 F.3d 899, 905 (9th Cir.), cert. denied, 537 U.S. 1018 (2002); see also *Havens Realty*, 455 U.S. at 363. Indeed, the lower court here properly recognized standing for the Fair Housing Council of San Diego, an indirect victim, while denying it to Reed's children. It makes no difference here that the Council alleged a drain on finances and personnel while the boys alleged nonmonetary harms — all claimed to be harmed by McDonald's harassment of Reed. *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995).

In this case, the district court erred in holding that, as a matter of law, harassment McDonald directed at Reed could not be considered in the children's

FHA claim. 1ER 59-60. McDonald's harassment of Reed, even apart from his altercations with the children, had the potential to affect "the very quality of their daily lives" by creating a hostile living environment. *Trafficante*, 409 U.S. at 211. "The central issue at this stage of the proceedings is not who possesses the legal rights protected * * * but whether [plaintiffs] were genuinely injured by conduct that violates *someone's* [FHA] rights * * * ." *Gladstone Realtors*, 441 U.S. at 103 n.9.

Indeed, the harm McDonald inflicted directly on the boys when they interceded on Reed's behalf strengthens their case for compensatory relief. HUD's regulations recognize that victims, such as Reed's children and grandchild, can recover for harassment unrelated to their own gender, provided they were harmed by acts motivated by harassment tied to Reed's gender. Regulations interpreting 42 U.S.C. 3617 state that the Act reaches "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the * * * sex * * * of such persons, or of visitors or associates of such persons." 24 C.F.R. 100.400(c)(2); see also 42 U.S.C. 3602; 42 U.S.C. 3613. A landlord violates the FHA, for example, if he evicts white tenants for having entertained black guests, *Woods-Drake* v. *Lundy*, 667 F.2d 1198 (5th Cir. 1982), or evicts a couple because the wife did not submit to the landlord's sexual demands. *Shellhammer* v.

Lewallen, 770 F.2d 167 (6th Cir. 1985) (Table). A rejected white apartment seeker with a bi-racial child may recover where the landlord "did not want a black child" at the complex and "did not want [her] black ex-husband 'hanging around.'" *United States* v. *Big D Enters*., 184 F.3d 924, 930 (8th Cir. 1999), cert. denied, 529 U.S. 1018 (2000). In these two cases, the plaintiffs, white residents, were not the discriminator's primary targets. The landlords in these cases mainly wished to exclude blacks as residents and visitors. The white residents were harmed by these FHA violations, however, even though the defendants' conduct was not motivated by the plaintiffs' (white) race. See also *Hodge* v. *Seiler*, 558 F.2d 284, 288 (5th Cir. 1977) (holding that a white woman was entitled to damages where she and her husband were denied housing because of his race).

Courts evaluating harassment claims under similar civil rights statutes have recognized that harassment of others, such as coworkers or teammates, can contribute to a plaintiff's claim of a hostile environment. This is especially true where the victim experiences a hostile confrontation with the harasser as did Reed's children and grandchild. In a Title VII claim, the Fourth Circuit held that harassment of coworkers is important to consider in a hostile environment claim, because "whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor." *Spriggs* v.

Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir. 2001). Evaluation of a hostile environment claim must encompass the "general work atmosphere * * * as well as evidence of specific hostility directed toward the plaintiff." *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). In this case, the boys experienced a gender-motivated hostile environment; that environment was caused by the acts of discrimination aimed at their mother, which included their own confrontations with McDonald and their fear that McDonald was targeting their mother and grandmother. AER 144.

B. The Court Erred In Holding That It Could Not Consider Harm To Reed's Children Because The Harassment Was Not Explicitly Sexual

The court also held that the children's direct confrontations with McDonald were not cognizable under the FHA because McDonald's interactions with them were not *explicitly* sexual. This holding is wrong. It is not necessary for the boys to prove that they witnessed McDonald's *sexual* behavior, suffered sexual advances, or perceived the sexual motivation behind his actions in order to recover for harm that McDonald's actions, tied to his harassment of their mother and grandmother inflicted upon them. As the Tenth Circuit held in an FHA case, "offensive acts need not be purely sexual" to contribute to a hostile environment claim. *Honce* v. *Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993). This Court has held

under Title VII that gender-motivated abuse qualifies as sexual harassment even where the abuse itself is not overtly sexual in nature.[4] "[A] pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate Title VII." *EEOC* v. *National Educ. Ass'n*, 422 F.3d 840, 845 (9th Cir. 2005). An "abusive bully" who asserts dominance over women violates the law no less than a harasser motivated by "sexual frustration, desire, or simply a motive to exclude or expel women from the workplace." *Ibid.*; see also *Oncale* v. *Sundowner Offshore Servs*., 523 U.S. 75, 80 (1998); *Kortan* v. *California Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir. 2000).

Reed's children alleged that McDonald's stalking, peeping, uninvited entries, and aggressive confrontations caused them fear and anxiety and kept them from using recreational areas, common areas, and even their own bedrooms. McDonald's behavior in these incidents may not have been overtly sexual, or the children may not have perceived the sexual nature of his actions, but those actions clearly were relevant to finding whether the boys were harmed by McDonald's

[4] Because both Title VII and the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination," courts have readily applied Title VII principles to housing discrimination cases brought under Title VIII. *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), aff'd, 488 U.S. 15 (1988); see also *Community House, Inc.* v. *City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007); *Gamble* v. *City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997).

gender-motivated discriminatory conduct aimed at Reed. *Craig* v. *M & O Agencies, Inc*., 496 F.3d 1047, 1055 (9th Cir. 2007).

Accordingly, the district court erred in dismissing the boys' claims on the grounds they did not see or understand "anything that could be fairly characterized as sexual harassment" or "probably had no concept" that the behavior was sexual. 1ER 59, 57.

The children's allegations, if proven, could show that the discriminatory harassment McDonald directed at Reed, along with the direct altercations McDonald had with the children while he was harassing Reed, could entitle the children to compensatory relief. This Court should remand and instruct the lower court to reconsider the children's claims for compensatory relief under the proper legal standards.

II

THE COURT ERRED IN REFUSING TO SEND REED'S PUNITIVE DAMAGES CLAIMS TO THE JURY

In civil rights cases, punitive damages may be awarded if a defendant's conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536 (1999) (internal quotations

omitted); see also *United States* v. *Space Hunters, Inc*., 429 F.3d 416, 427-428 (2d Cir. 2005) (applying *Kolstad* to the FHA); *Badami* v. *Flood*, 214 F.3d 994, 997-998 (8th Cir. 2000) (same); *Alexander* v. *Riga*, 208 F.3d 419, 430-32 (3d Cir. 2000) (same), cert. denied, 531 U.S. 1069 (2001). "[I]f the conduct upon which liability is founded evidences reckless or callous disregard for the plaintiff's rights or if the conduct springs from evil motive or intent, punitive damages are within the discretion of the jury." *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993). Recklessness can be shown under the FHA where an apartment manager repeatedly refuses to deal with African Americans and misrepresents unit availability, *Miller* v. *Apartments & Homes of N.J.*, 646 F.2d 101 (3d Cir. 1981), or evicts tenants for having black guests. *Woods-Drake*, 667 F.2d at 1198. Recklessness does not require egregious conduct. *Badami*, 214 F.3d at 997.

Punitive damages are an important part of the enforcement of civil rights laws such as the FHA, as "society has a strong interest in punishing the tortfeasor, and exemplary damages are most likely to deter others from undertaking similar actions." *Ngo* v. *Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998).

The district court misstated the law when evaluating the "recklessness" standard applicable to Reed's punitive damages claim. The court held that

inaction cannot amount to recklessness. The court stated that "[t]he purpose behind these punitive damages is to punish for something almost akin to intentional conduct," and concluded that "failure to act, if it's found by the jury, doesn't amount to recklessness." 1ER 81. "No reasonable jury could find that the board acted with something that is almost intending harm to Ms. Reed," the court held. 1ER 82. The court based its decision, at least in part, on plaintiffs' failure to identify "anything affirmatively that [the Board] did" to condone McDonald's conduct. 1ER 82.

To the contrary, inaction can constitute recklessness in some circumstances. In *Marr* v. *Rife*, for example, the Sixth Circuit held that punitive damages were permissible if the defendant "was, by action *or knowledgeable inaction*, involved in the wrongdoing." 503 F.2d 735, 745 (1974) (emphasis added); see also *Miller*, 646 F.2d at 110. Similarly, the Second Circuit held that an apartment owner could be liable for his manager's discrimination if "the employer himself [is] shown to have acted or failed to act to prevent known or wilfully disregarded actions of his employee." *Fort* v. *White*, 530 F.2d 1113, 1117 (2d Cir. 1976) (internal quotations omitted).

This rule is consistent with law decided under other civil rights statutes. Under Title VII, this Court has upheld punitive damages where a supervisor who

was aware of racial harassment and "entrusted to act on complaints of harassment failed to do so, and failed with malice or reckless disregard to the plaintiff's federally protected rights." *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 810 (9th Cir. 2001), cert. denied, 535 U.S. 1018 (2002). The court stated that punitive damages turned on "the actions (or, rather, the inaction)" of the plaintiff's supervisor. *Ibid*. The Seventh Circuit has stated that punitive damages are appropriate where an employer "knew about the harassment, knew who the perpetrator was, and decided not to lift a finger." *Timm* v. *Progressive Steel Treating*, *Inc.*, 137 F.3d 1008, 1009 (1998) (approving punitive damages in the absence of a compensatory award). In *Timm*, as here, defendants unsuccessfully argued that no action was warranted without a "formal" complaint. *Ibid*.

Under 42 U.S.C. 1983, inaction can also be reckless. The First Circuit, reviewing a case of supervisory inaction in the face of civil rights violations, stated that "indifference" can "rise[ ] to the level of being deliberate, reckless or callous." *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989); see also *Woods* v. *Graphic Communications*, 925 F.2d 1195, 1198 (9th Cir. 1991) (upholding punitive damages eligibility under 42 U.S.C. 1981 where the defendant's racial discrimination included "systematic[] fail[ure] to file a formal grievance or take any effective action" and the district court "found that this

failure to act was intentional"). Jury instructions addressing the recklessness of "[a]n act or failure to act" are routine. See *Zellner* v. *Summerlin*, 494 F.3d 344, 362 (2d Cir. 2007) (42 U.S.C. 1983); *Arrieta-Colon* v. *Wal-Mart P.R., Inc*., 434 F.3d 75, 90 (1st Cir. 2006) (Americans with Disabilities Act); *Dang* v. *Cross*, 422 F.3d 800, 805 (9th Cir. 2005) (42 U.S.C. 1983).

Inaction can prove eligibility for punitive damages because such relief turns on the defendant's mental state, rather than its actions. In describing the necessary prerequisite to punitive damages, the Supreme Court in *Kolstad* explained that a defendant's behavior may provide *evidence* of recklessness, but the inquiry "ultimately focus[es] on the actor's state of mind." 527 U.S. at 535. The Court cited examples from similar determinations under 42 U.S.C. 1983 in which "callous indifference" and "indifference to civil obligations" were found to constitute recklessness. *Id*. at 536. *Kolstad* relied extensively on *Smith* v. *Wade*, 461 U.S. 30 (1983), a Section 1983 case brought by an inmate who was beaten and sexually assaulted by his cellmates. The inmate argued that corrections officials "knew or should have known that an assault against him was likely under the circumstances." *Smith,* 461 U.S. at 32. The *Smith* defendants, like the PCOA here, took no active part in the initial wrongdoing, but nevertheless, the Court held them eligible for punitive damages based on their "reckless or callous disregard of,

or indifference to, the rights or safety of others." *Id*. at 33 (alterations and quotations omitted). This Court has applied *Smith* in other civil rights cases — indeed specifically in the Fair Housing context. *Combs*, 285 F.3d at 906-907 (citing *Smith* and upholding punitive damages where landlord refused to rent to blacks).

In fact, a rule exempting inaction from punitive damages liability would defeat the law's goals of punishment and deterrence. It would provide an incentive for housing providers to sit on their hands when faced with the possibility of harassment. Such a rule would allow potential defendants to rely on a defense of inaction rather than set up an active anti-discrimination policy. However "[d]issuading employers from implementing programs or policies to prevent discrimination, is directly contrary to the purposes underlying" civil rights laws. *Kolstad*, 527 U.S. at 545. This Court should remand the punitive damages claim for reconsideration by the district court under the legal standards set forth above.

CONCLUSION

This Court should vacate the district court's dismissal of punitive damages claims and plaintiff's children's and grandchild's compensatory claims and remand for further consideration under the appropriate legal standards.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using WordPerfect 12 and contains no more than 6,500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: November 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES SEEKING TO VACATE PORTIONS OF THE DISTRICT COURT'S ORDER AND REMAND were served by first class mail, postage prepaid, upon the following:

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