No. 18-1212

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

MARIE CURTO, DIANA LUSARDI, AND STEVE LUSARDI,
Plaintiffs-Appellants,

v.

A COUNTRY PLACE CONDOMINIUM ASSOCIATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey
Civil Action No. 16-CV-5928
(The Honorable Brian R. Martinotti)

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

Defendant asks this Court to find that a regime of gender segregation is permissible so long as it metes out injury to men and women in almost-equal sum. This position finds no support in the law. Nor, for that matter, do the facts of this case give rise to such a scenario: The gender-segregated pool-use policy at issue here perpetuates gender stereotypes and effectively precludes working women from using the pool during the week. It burdens women more than it burdens men. But even if it could be said that the policy affects women as a class in exactly the same way as it affects men as a class, the policy would still be discriminatory. The pool schedule provides for sixty-six gender-segregated swimming hours each week. During each one of those sixty-six hours, community members face treatment that, but for their gender, would be different: Men are turned away from the pool during women's swim hours; women are prohibited from using the pool during men's swim hours. Discrimination is not only a matter of tallying harm to two groups and finding more strikes in one column. It also occurs when individual choices and opportunities are conditioned on protected status. That is precisely what this gender-segregated pool-use policy does.

Defendant, A Country Place Condominium Association, Inc. (CPCA),[1] cursorily suggests that the Fair Housing Act (FHA) *requires* it to maintain a gender-segregated pool schedule in order to accommodate the religion of some residents, lest CPCA face a future disparate-impact claim for religious discrimination. There is no support in the FHA, or the relevant case law, for Defendant's position. If Defendant's interpretation were to prevail, the FHA would compel condominium associations and apartment buildings to implement racially segregated pool hours if the majority of residents adhered to a faith that prohibits swimming with another race. The FHA would require pool hours to be segregated by disability if the majority of a community's residents believed—as a religious matter—that they could not swim with individuals who have HIV or another disability because God had imposed the condition as a punishment. Even within the gender-segregated hours, a condominium association could be forced to discriminate further by barring same-sex couples from using the pool together at certain times because it offends the religious beliefs of a majority of residents and would thus impose a disparate impact on their ability to use the pool. These scenarios are not far-fetched.[2]

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[1] Plaintiffs used the acronym "ACP" to refer to Defendant A Country Place Condominium Association, Inc., in their opening brief. Defendant's response, however, uses the acronym "CPCA." For clarity, Plaintiffs adopt "CPCA" here.

[2] *Cf., e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966) (restaurateur challenged Title II of the Civil Rights Act because "his religious beliefs compel him to oppose any integration of the races whatever."), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968); *Stepp v. Review Bd. of Ind. Emp't Sec.*

The untenable implications of Defendant's argument do not end at the pool's edge: Under CPCA's theory, condominium associations and apartment buildings would be *legally obligated* to adopt policies that invidiously and facially discriminate against members of protected classes in numerous contexts. Depending on the religious beliefs and practices of a majority of residents, such housing providers could be required to promulgate blatantly discriminatory policies—based on gender, race, disability, or even faith—for any number of community facilities and services. For example, if a majority of residents' religious beliefs dictated that girls and boys, or white children and children of color, may not play together, a condominium association would, in Defendant's view, be compelled by the FHA to segregate playgrounds according to gender or race to avoid imposing a disparate impact on religious residents. In a community where religious residents largely believe that women should be subservient to men, or that people of color or those of the non-dominant faith are inferior, a condominium-operated shuttle service might be forced to impose a rule requiring that women, people of color, or non-adherents of the majority community faith sit in the back.[3]

Div., 521 N.E.2d 350, 352 (Ind. Ct. App. 1988) (upholding employer's dismissal of lab worker who refused to analyze specimens that contained AIDS warnings because her religious beliefs regarded AIDS as "God's plague on man and performing the tests would go against God's will").

[3] *Cf., e.g., NY Hasidic Village Agrees to Stop Gender Segregation in Public Park*, Times of Isr. (Apr. 2, 2014), https://www.timesofisrael.com/ny-hasidic-village-agrees-to-stop-gender-segregation-in-public-park/ (noting that local park featured

Indeed, if the majority of residents' religious beliefs prohibited them from living next door to people of another faith or race, a condominium association could—under CPCA's suggested rule—be required to go so far as to segregate entire floors, streets, or buildings in accordance with those religious beliefs to comply with the FHA's disparate-impact protections for faith.

The FHA neither requires nor permits housing providers to subjugate the rights of other protected classes to the religious beliefs of residents in the manner proposed by Defendant. The remedy for an unintentional disparate impact on one protected class cannot be intentional, invidious discrimination against a separate, protected class.

"blue-painted playground equipment and pink-painted playground equipment located in separate areas" as well as Yiddish signs explaining the park's gender-segregation rules); Barbara Bradley Hagerty, *Controversy Erupts Over Sex-Segregated Brooklyn Bus*, NPR (Oct. 20, 2011), https://www.npr.org/2011/10/20/141559320/controversy-erupts-over-sex-segregated-brooklyn-bus.

ARGUMENT

I. DEFENDANT'S GENDER-SEGREGATED POOL-USE POLICY UNLAWFULLY RESTRICTS RESIDENTS' CHOICES AND OPPORTUNITIES ON THE BASIS OF THEIR SEX.

A. The Gender-Segregated Pool-Use Policy is Unequal and Discriminatory, Regardless of Whether, On the Whole, It Imposes Superficially Similar Burdens on Women and Men.

Plaintiffs' opening brief exhaustively demonstrates that CPCA's gender-segregated pool-use policy disfavors women by reinforcing gender stereotypes and limiting access for women who work outside the home. *See* Pls.' Br. at 28-31.[4] Defendant does not address this argument. CPCA ignores, for example, the fact that Plaintiff Marie Curto was fined for swimming at 4:30 p.m. on a Friday, JA171 (Email from Board to Curto, July 21, 2016), a period expressly reserved for men because "[t]he ladies don't go swimming in the afternoon . . . . The house has to be prepared so that's the lady's job," JA85 (Engleman Dep. 49:22-50:7). CPCA also ignores the fact that the gender-segregated schedule excludes women from using the pool during weekday evenings, when those with traditional work schedules have the leisure time to swim. JA156, 158 (2016 pool schedules). Instead, Defendant asserts that the segregation policy is not discriminatory because the total sum of swimming hours allocated to men and women is roughly equal. This argument ignores the harm

[4] "Pls.' Br." refers to the opening brief filed by Plaintiffs-Appellants in this matter on June 7, 2018.

that issues from the distribution of single-gender hours within the day. But, more fundamentally, it misunderstands the harm of gender classification and segregation itself, which lies not merely in broad subordination but also in individual exclusion.

A policy that facially dictates that a man may do something that a woman may not, and vice versa, discriminates, even if men and women—counted separately and in the aggregate—are burdened by the rule to a similar degree.[5] *See Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon J., concurring). When determining that policies "facially classify on the basis of gender, it is of no moment that the prohibitions 'treat men as a class and women as a class equally' and in that sense give preference to neither gender." *Id.* at 482 (Berzon, J., concurring).

For example, "[s]urely, a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men." *Id.* at 481 (Berzon, J., concurring). "Either way, the *classification* is one that limits the affected individuals' opportunities based on their sex, as compared to the sex of the other people involved in the arrangement." *Id.* (Berzon, J., concurring) (emphasis in original).

[5] Plaintiffs dispute that the gender-segregated pool-use policy burdens men and women to a similar degree. *See* Pls.' Br. at 29-31. However, even if it did, Plaintiffs would prevail, as the following discussion details.

In *NLRB v. Local No. 106, Glass Bottle Blowers Ass'n, AFL-CIO*, 520 F.2d 693 (6th Cir. 1975), for instance, a national union established two local unions segregated by gender. Under union rules, women's grievances were processed through the women's union and men's grievances through the men's union. *Id.* at 694-95. The administrative law judge (ALJ) "found, in effect, that the male and female employees received, equal, though separate, treatment and therefore there was no violation." *Id.* at 695. The NLRB reversed the ALJ, ruling that the practice was discriminatory and constituted an unfair labor practice and explaining that "[s]eparate but equal treatment on the basis of sex is as self-contradictory as separate but equal on the basis of race." *Id.* (internal quotation marks omitted). The Sixth Circuit agreed with the NLRB's reasoning and, in enforcing its order, rejected the union's argument that a majority of women members preferred segregated unions:

> Even assuming that a majority or even all the women in the unit preferred a separate union to attain 'clout,' . . . we hold that the Board was justified in concluding that this would not provide a defense for the refusal of the joint bargaining representatives to admit to membership or to process the grievances of any unit employee, upon request, without regard to sex.

Id. at 697.

As the Sixth Circuit's ruling in *Glass Bottle Blowers* suggests, accepting Defendant's position that gender classifications are permissible so long as they reduce women's collective opportunities relative to men just as much as they reduce men's collective opportunities relative to women would revive the thoroughly

discredited logic of "separate but equal." That logic found its original home in cases like *Pace v. Alabama*, 106 U.S. 583, 585 (1883), *overruled by McLaughlin v. Florida*, 379 U.S. 184 (1964), which upheld an anti-miscegenation statute on the ground that "[t]he punishment of each offending person, whether white or black, is the same," and *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which upheld a statute instituting racial segregation because it did "not discriminate against either race, but prescribe[d] a rule applicable alike to white and colored citizens."

Loving v. Virginia, 388 U.S. 1, 8 (1967), carried forward the lessons of *Brown* in rejecting "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." As the *Loving* Court held, "an even-handed" purpose contravenes anti-discrimination principles by curtailing individuals' rights or choices, even if black people as a group and white people as a group are limited in symmetrical fashion. *Id*. at 11 n.11, 12; *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 126 (2d Cir. 2018) (en banc), *petition for cert. filed*, No. 17-1623 (U.S. May 29, 2018) (finding in the Title VII context that "*Loving*'s insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex").

CPCA appears to endorse *Loving*'s individual-rights reasoning, but misapplies it to reach a conclusion inconsistent with both the letter and spirit of the ruling. According to Defendant, the anti-miscegenation law at issue in *Loving* "prevented a black man from marrying a white woman" and was therefore "discriminatory because it treated this man differently and less favorably than a black man marrying a black woman, whose marriage would have been allowed." Def.'s Br. at 17.[6] Similarly, Defendant explains that the *Zarda* plaintiff, a gay man who was fired for his sexual orientation, was "discriminated against because of his sex because he is treated differently and less favorably than a woman who is attracted to a man." *Id*. For these reasons, Defendant argues that *Loving* and *Zarda* do not involve examples of "equal application" analogous to the present case. Not so. The challenged law in *Loving* prevented black people from marrying white people *and* white people from marrying black people. And sexual orientation discrimination affects gay women just as it affects gay men. These cases feature classic examples of equal application of a burden based on a protected class, and they resoundingly reject it as a justification for discrimination.

What is more, the present case fails the test that Defendant would take from *Loving* and *Zarda*. On weekday evenings (for instance), the gender-segregated pool

[6] "Def.'s Br." refers to the response brief filed by the Defendant-Appellee in this matter on July 9, 2018.

schedule prevents a woman from using the pool, thereby treating her "differently and less favorably" than a man wishing to use the pool during that time. Likewise, on weekday mornings (for instance), the schedule prevents a man from using the pool, thereby treating him "differently and less favorably" than a woman. All sixty-six single-gender swimming hours exclude a set of residents, who, by virtue of their gender, are marked for treatment that is different and less favorable. *See* JA156, 158 (2016 Pool Schedules). And nothing would prevent Defendant, under its theory, from eliminating all gender-neutral hours entirely, so long as half the hours were set aside for men, and the other half for women.

Defendant does not—and cannot—dispute that, under its strained equal-application logic, a pool schedule that dictated certain hours for "black only" swimming and certain hours for "white only" swimming would be permissible, assuming people of both races were accorded "an almost exactly equal number of hours a week, and are thus treated the same." Def.'s Br. at 15; *see* Pls.' Br. at 34 (arguing that acceptance of Defendant's theory would make it "permissible for condominium associations to create racially segregated access to common rooms, child play areas, and swimming pools"); *see cases cited supra* n.2. The analogy to race is particularly relevant because the present case arises under the FHA, which prohibits sex discrimination on the same terms as race discrimination. *See* Robert G. Schwemm, Housing Discrimination Law and Litigation § 11C:1 (July 2017 Update)

(explaining that, under the FHA, "the prohibition against sex discrimination should be understood to ban the same types of practices that would be illegal if undertaken on the basis of race or any other prohibited ground").

Defendant relies on a series of employment cases concerning dress codes and grooming policies for its proposition that facial discrimination is lawful so long as it apportions gender-based limitations in a manner that is roughly balanced. *See* Def.'s Br. at 13-14. But "[w]hether and when the adoption of differential grooming standards for males and females amounts to sex discrimination is the subject of a discrete subset of judicial and scholarly analysis." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). These cases focus on an employer's authority to conscript employees to sell a certain image through the employees' appearances, raising a set of concerns plainly distinguishable from those at issue here, and their reasoning is not transferrable. *See, e.g.*, *Zarda*, 883 F.3d at 119 ("Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is 'because of . . . sex[.]'").

Defendant cites *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc), but that case—like the others that Defendants rely on—dealt with the narrow context of dress codes and grooming policies. No federal court has extended *Jespersen's* holding beyond this specialized setting. Indeed, at least

two federal courts of appeal have strongly criticized *Jesperson's* reasoning and have refused to apply it in other contexts.

In *EEOC v. R.G.*, 884 F.3d 560, 573 (6th Cir. 2018), the Sixth Circuit noted that the central question in *Jespersen* ("whether certain sex-specific appearance requirements violate Title VII") was not before the court, explaining, "We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits." Rather, the court in *R.G.* was tasked with determining "whether the Funeral Home could legally terminate [an employee], notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex." *Id.* The court added that, even if the employer's sex-specific dress code were at issue, the Supreme Court's governing precedent simply does not support the suggestion that "sex stereotyping violates Title VII *only* when" it results in a heavier overall burden on one gender. *Id.* at 564. According to the Sixth Circuit, under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), "an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave." *Id.*

Similarly, in *Zarda*, the U.S. Court of Appeals for the Second Circuit explicitly rejected extending the reasoning of cases like *Jesperson* to other contexts.

883 F.3d at 119. The *Zarda* plaintiff alleged that he was fired, in violation of Title VII, based on his sexual orientation and failure to conform to gender norms. *Id.* at 109. The government argued that, "even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men." *Id.* at 123. The Court rebuffed the argument:

> We believe the government has it backwards. *Price Waterhouse* . . . stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms . . . It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.

Id.

Defendant also attempts to enlist a line of familial-discrimination pool-use cases in support of its position. This maneuver is misleading. In *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1061 (E.D. Cal. 1998), for example, the court found that requiring children to swim in "family pools" and banning them from "adult pools" was facially discriminatory because it "prohibit[ed] children from accessing a large area of the complex." It was this different and less favorable treatment of children, Defendant suggests, that led the court to

find the policy discriminatory. Def.'s Br. at 16. But the treatment would still be different and less favorable if, say, adults without children were banned from swimming in "family pools." Subjecting a second group to reciprocal restrictions does not cure discrimination; it duplicates it.

Imagine that the pool schedule at issue in the present case were altered so that the 32.5 men-only hours remained in place but the 33.5 women-only hours were converted to mixed-gender swimming. Presumably, Defendant would have no trouble identifying this altered schedule as discriminatory: The schedule would severely curtail women's freedom to use the pool when they wished. By what logic does introducing *more* gender-based limitations counteract that deprivation? Matching discrimination against women with symmetrical discrimination against men does not mean that no one is treated "differently and less favorably" because of their gender. It means that everyone is.

B. The Gender-Segregated Pool-Use Policy Does Not Employ A Neutral Proxy; It Unambiguously Discriminates "Because Of" Sex.

CPCA makes the puzzling assertion that its pool-use policy, which dictates access explicitly and exclusively based on gender, does not classify "because of sex." In so arguing, Defendant relies on *Community Services, Inc. v. Wind Gap Municipal Authority,* 421 F.3d 170, 177-78 (3d Cir. 2005), which considered whether a sewage authority's decision to designate a facility that cared for people with disabilities as a commercial "personal care home," resulting in an increase in

sewage fees, had used the designation as a proxy for targeting certain disability statuses. The proxy analysis recognizes that "a regulation or policy cannot 'use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination,' such as classifications based on gray hair (as a proxy for age) or service dogs or wheelchairs (as proxies for handicapped status)." *Id.* (quoting *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)).

Wind Gap is wholly inapposite here. There is no alleged proxy in this case. There is no need to "ferret out any indicia that the disparate treatment was covertly 'because of'" sex, *id.* at 179; the disparate treatment was *overtly* because of sex. Generally, to identify disparate treatment, a plaintiff must satisfy the "because of" test "by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex." *Zarda*, 883 F.3d at 118. Here, the trait at issue is sex, and reflexively, sex is a "function" of sex.

Defendant goes on to misconstrue the "because of" proxy analysis as an inquiry into the motives or intent underlying a classification. Again, on this point the law could not be more clear: "The motives of drafters of a facially discriminatory [policy], whether benign or evil, is irrelevant to a determination of the unlawfulness of the [policy]." *Horizon House Developmental Servs., Inc. v. Twp. of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993). As this Court confirmed in *Wind Gap*, "where a plaintiff demonstrates

that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, 'a plaintiff need not prove the malice or discriminatory animus of a defendant.'" 421 F.3d at 177 (quoting *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995)). The fact of discrimination rests not on "why" a policy discriminates, but on "the explicit terms of the discrimination." *United Auto. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."). The explicit terms of discrimination in this case are undisguised and unmistakable.

II. CPCA MAY NOT JUSTIFY ITS FACIALLY DISCRIMINATORY SEGREGATED POOL SCHEDULE BY CASTING IT AS A RELIGIOUS ACCOMMODATION.

Defendant's perfunctory suggestion that the FHA requires it to accommodate residents' religious views by imposing a segregated pool policy, lest it face a disparate-impact charge, would turn the FHA on its head: Under Defendant's theory, CPCA—a non-religious, commercial entity—would effectively be entitled to a sweeping religious exemption from the FHA, one far broader than the exemption that the statute explicitly provides to religious organizations. What is more, under the *de facto* religious exemption CPCA seeks, housing providers would be *legally mandated* to adopt policies that invidiously and facially discriminate against members of other protected classes in a variety of ways, based on the religious

beliefs of a majority of residents. Defendant's argument is wrong as a matter of law, and as a matter of common sense.

A. CPCA Does Not Qualify for the FHA's Religious Exemption.

Unlike some other anti-discrimination laws, such as Title VII,[7] the FHA does not require religious accommodation. *See, e.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 783 (7th Cir. 2009) (en banc); *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 88 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Congress did, however, incorporate into the statute a religious exemption, 42 U.S.C. § 3607(a), which has been narrowly construed by the courts to ensure that it does not impede "the FHA's broad policy of providing fair housing throughout the United States." *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 996 (9th Cir. 2011); *accord U.S. v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990).

CPCA is ineligible for this statutory religious exemption—a fact it does not dispute. Nor could it. CPCA is not a "religious organization association, or society,"

[7] Despite providing for religious accommodations that would not impose an undue burden, Title VII does not require employers "to allow an employee to impose his religious views on others." *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1342 (8th Cir. 1995); *see also Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.").

or a non-profit organization "operated, supervised, or controlled by or in conjunction with a religious organization, association, or society." *See* 42 U.S.C. § 3607(a); Def.'s Br. at 1 (admitting that CPCA is "not an explicitly religious" community). Indeed, even if CPCA could claim the statutory exemption, it would not be permitted to segregate pool use by gender. The exemption authorizes qualifying religious entities to "limit[] the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purchase to *persons of the same religion*" or to "giv[e] preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." 42 U.S.C. § 3607(a) (emphasis added). Except for this limited exemption, which merely allows religious organizations to offer housing to members of the same faith, the FHA does not permit any type of faith-based discrimination.[8]

[8] *See* Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 Tex. J. C.L. & C.R. 1, 11 (2005) ("[S]ection 3607(a) only exempts religious organizations' preferential treatment of members of their religion. It does not exempt religious organizations that discriminate on a basis other than religion. Because the Fair Housing Act prohibits discrimination based on sex, handicap, or familial status generally, because exemptions are to be narrowly construed, and because Congress has not articulated a sound policy reason that would allow religious organizations to discriminate on the basis of sex, handicap or familial status, this type of discrimination by religious organizations should be illegal under the Act.") (footnotes omitted).

B. The FHA's Disparate-Impact Protections Do Not Require CPCA's Gender-Segregated Pool Policy.

Recognizing that it does not qualify for the FHA's religious exemption, CPCA instead tries to bootstrap its residents' religious beliefs and the statute's disparate-impact protections into what would be—for all intents and purposes—a religious exemption that is even more expansive than the one afforded actual religious entities. Defendant's argument fails at every step of the disparate-impact analysis.

1. *CPCA's unreliable evidence fails to show that a gender-integrated pool schedule would impose a disparate impact.*

As an initial matter, Defendant's assertion that an integrated pool policy would exercise a disparate impact on CPCA's Orthodox Jewish population is speculative. To maintain a disparate-impact claim against CPCA, a resident would have '"the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.'" *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2514 (2015) (quoting 24 C.F.R. § 100.500(c)(1) (2014)). "Speculation as to the potential for disparate impact cannot serve as evidence of such impact itself." *Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990).

Here, CPCA's "evidence" of disparate impact boils down to its contention that "more than 70% of its residents [are] Orthodox Jews adhering to strict *tzniut* laws . . . [who] could only swim if the pool had single-sex swimming times." Def.'s

Br. at 9. Although such statistical evidence can, in some instances, demonstrate a disparate impact, courts are not "obliged to assume that . . . statistical evidence is reliable." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 276 (3d Cir. 2014) (pointing, for example, to "the weaknesses inherent in small or incomplete data sets and/or inadequate statistical techniques").

CPCA has proffered no reliable evidence supporting its statistical claims. Rather, Fagye Englemen, the Board treasurer, testified that she keeps an unofficial list of Orthodox Jewish residents, which she compiled in her personal capacity. According to Engleman, the list is "just a service [she] personally provide[s]," and "[i]t has nothing to do with the board." JA97 (Engleman Dep. 99:21-25). Though Defendant relies heavily on Engleman's list, that document is not in the record and CPCA has not produced a copy.

Likewise, CPCA has not produced any evidence showing how Engleman assembled the list or whether any steps were taken to ensure its accuracy. Nor has CPCA offered any evidence that all residents on Engleman's unofficial list would be deterred from using the pool under a gender-neutral pool policy. It is well-documented that, even within the same religious sect, adherents often follow divergent practices. *See, e.g.*, Alan Cooperman & Gregory A. Smith, *Eight Facts about Orthodox Jews from the Pew Research Survey*, Pew Research Ctr. (Oct. 17, 2013), http://www.pewresearch.org/fact-tank/2013/10/17/eight-facts-about-orthodo

x-jews-from-the-pew-research-survey/ ("Not all Jews who describe themselves as Orthodox always meet all the standards that might be considered normative for their group. For example, while 77% of Orthodox Jews say they refrain from handling or spending money on the Sabbath, 22% say they do not."). Yet, it appears that Engleman (and Defendant) simply made assumptions about how every resident whom she believes to be an Orthodox Jew would respond to an integrated pool schedule. *See* JA97 (Engleman Dep. 100:22-24) (testifying that she did not use her list to poll people regarding pool hours because "[i]t was just self-understood").[9]

In relying on the 70% statistic, CPCA and Engleman additionally presumed that all Orthodox Jewish residents within the community (or, at least, those whom Engleman believes to be Orthodox Jewish, as reflected on her list) use the pool. In fact, CPCA has proffered no evidence showing the number of residents who use the

[9] CPCA has not proffered any record of residents making requests for segregated hours or registering opposition to an integrated pool schedule. And, the "poll" that Defendant mentions in its statement of the case, Def.'s Br. at 5, was ad hoc and completely unrigorous: Defendant asked women using the pool during "Ladies Swim" time from 3 p.m. to 5 p.m. whether they would like additional "Ladies Swim" time, limited to residents only. JA93 (Engleman Dep. 81:8-82:17). No matter—even if most residents would vote in favor of a gender-segregated pool schedule, community support for a discriminatory policy does not override the FHA's protections. *Cf., e.g.*, *Glass Bottle Blowers*, 520 F.2d at 697; *Step by Step, Inc. v. Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990) (noting that a "discriminatory act would be no less illegal simply because it enjoys broad political support"); *accord W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (holding that some subjects belong "beyond the reach of the majorities and officials" and that "fundamental rights may not be submitted to vote" nor depend on the outcome of elections).

pool or the number of residents who generally object to swimming with the opposite gender. Built on multiple levels of assumption—and not backed up by any official records or other documentation—CPCA's 70% figure, then, is the definition of unreliable. It is insufficient to support Defendant's disparate-impact defense.

2. *CPCA cannot demonstrate that an integrated pool schedule would be the legal cause of any disparate impact.*

CPCA also has failed to offer evidence sufficient to satisfy the FHA's "robust causality" requirement for disparate-impact claims. *See Inclusive Cmtys.*, 135 S. Ct. at 2523. In *Inclusive Communities*, the Supreme Court opined that a plaintiff likely could not establish a causal connection between the challenged policy and the identified disparate impact where "federal law substantially limits the [Defendant's] discretion" vis-à-vis the policy. *Id.* at 2524. So too here.

Any resident challenging an integrated, facially neutral pool policy on religious grounds could not prove causality because federal law—in this case, the FHA—limits CPCA's discretion in setting the terms of access to facilities and services within the community. By its express language, the FHA prohibits policies that intentionally and facially discriminate on the basis of gender or any of the statute's enumerated classes. *See generally* Pls.' Br. at 17-35. In other words, it is federal law that mandates a facially neutral policy when it comes to protected classes, and, therefore, federal law—not CPCA's policy itself—would cause the disparate impact, if any.

3. *An integrated pool schedule is necessary to achieve a valid interest: the maintenance of a pool policy that does not perpetuate intentional, facial discrimination against a protected class.*

Even if a resident challenging an integrated pool schedule could somehow establish a *prima facie* case for disparate impact, CPCA would not be required to adopt a gender-segregated policy as a remedy. First, in *Inclusive Communities*, the Supreme Court made clear that, in the housing context, disparate effects generally should not be remedied by relying on facial classifications. *See Inclusive Cmtys.*, 135 S. Ct. at 2524. (expressing concerns about "[r]emedial orders that impose racial targets or quotas").

Second, the Court also emphasized that housing providers must be given an opportunity to "state and explain the valid interest served by their policies." *Id.* at 2512-15 (noting that, under HUD rules, after a plaintiff makes a *prima facie* case, "the burden shifts to the defendant to prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests") (quotation marks omitted). According to Defendant, "[i]t is unclear what 'substantial, legitimate, nondiscriminatory interest,' if any, would be served" by an integrated pool schedule. Def.'s Br. at 22. On the contrary, CPCA has an obvious interest in steering clear of a pool policy that perpetuates intentional discrimination against a protected class. The FHA prohibits the very type of intentional, facial discrimination that a gender-segregated pool schedule entails, and CPCA's interest

in complying with this legal mandate is plainly substantial, legitimate, and non-discriminatory. *Cf., e.g., Ochs v. Thalacker*, 90 F.3d 293, 297 n.3 (8th Cir. 1996) (rejecting prisoner's demand that he be placed in a cell with a white cellmate because, although the prisoner was "free to hold beliefs, including religious beliefs, that are contrary to public policy or the majority's views," he could "not be permitted to compel prison administrators to accommodate those beliefs through secular actions that would put the prison in conflict with federal and state laws and policies").

Given the nature of the interest here—avoiding a pool schedule that intentionally and facially segregates access based on a protected class—there simply could not be a less discriminatory alternative than actually maintaining an integrated swimming schedule (*i.e.*, one that that does not expressly limit pool access based on gender or any other protected class).[10]

III. CPCA'S PROPOSED INTERPRETATION OF THE FHA WOULD OPEN THE DOOR TO WIDESPREAD DISCRIMINATION IN HOUSING.

CPCA warns that, if the Court rules against its segregated pool schedule, "the majority of residents may even vote to shut down the pool entirely." Def.'s Br. at

[10] HUD regulations provide that a plaintiff alleging disparate impact has the burden of proving that the interest cited by a defendant could be served by another practice that has a less discriminatory effect. 24 C.F.R. § 100.500(c)(3).

24.[11] Defendant's threat echoes the unfortunate response of some cities and towns to the federal courts' rulings that public swimming pools must be desegregated. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (holding that closure of pools to avoid integration did not violate Equal Protection Clause). But, as illustrated by the examples referenced in the introduction to this reply, the alternative proposed by CPCA is hardly better for those who would be victimized by the widespread intentional discrimination that could be unleashed under Defendant's view of the FHA.

CPCA also suggests that an unfavorable ruling would increase segregation by incentivizing Orthodox Jewish residents to eschew mixed-faith communities. Def.'s Br. at 24. Board treasurer Engleman testified, however, that the pool schedule has had "nothing to do with" Orthodox Jewish residents' decisions to move into the community. JA100 (Engleman Dep. 112:18-113:16). Moreover, the same criticism could be made of Defendant's practice of tailoring community policies to the religious dictates of residents who follow a particular faith: Those who do not follow that faith are likely to get the message that the condominium association favors

[11] Should CPCA close its pool, Plaintiffs reserve their right to challenge the decision under any applicable local, state, and federal laws—including the FHA, to the extent that the closure represents intentional favoritism of one faith and discrimination against those who do not adhere to that faith. *See, e.g., Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1261–62 (7th Cir. 1990) (noting that "to give a preference to Catholics is to discriminate against non-Catholics, to discriminate in other words on religious grounds" under section 3604 of the FHA).

Orthodox Jewish residents and that non-adherents are unwelcome, deterring people of other faiths from living there and resulting in a less integrated, more homogenous community.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the decision below and direct the district court to enter summary judgment in favor of Plaintiffs with respect to their Fair Housing Act claim. Further, in the interest of judicial economy, convenience, and fairness to parties, Plaintiffs request that the Court also vacate the district court's remand order as it pertains to Plaintiffs' state law claims.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am counsel of record and I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

July 23, 2018

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B)(ii) because the brief (as indicated by word processing program, Microsoft Word 2016, Version 16.0.4591.1000) contains 6,302 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing Reply Brief of Appellants and were filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit. In addition, seven (7) paper copies of the brief and four (4) paper copies of the appendix were sent via New Jersey Lawyers Service to the clerk of this Court.

July 23, 2018

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