13-4792

United States Court of Appeals for the Second Circuit

HEIDI RODRIGUEZ and JUAN RODRIGUEZ, individually and as parents and natural guardians of the minor child, A.R.,

Plaintiffs-Appellants,

vs.

VILLAGE GREEN REALTY, INC., d/b/a COLDWELL BANKER VILLAGE GREEN REALTY and BLANCA APONTE,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of New York; Case No. 1:11-CV-1068-TJM-CFH

BRIEF OF *AMICI CURIAE* THE EPILEPSY FOUNDATION, AUTISM NATIONAL COMMITTEE, THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, NATIONAL COUNCIL ON INDEPENDENT LIVING, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, NATIONAL DISABILITY RIGHTS NETWORK AND AARP SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici Curiae* certifies the following information:

Amici Curiae The Epilepsy Foundation of America, Autism National Committee, National Council on Independent Living, Judge David L. Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, the National Disability Rights Network and AARP are not-for-profit associations that do not have parent corporations and are not owned, in whole or in part, by any publicly held corporations.

Dated: April 10, 2014

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief by *amici curiae*.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a governmental agency and various non-profit advocacy organizations that represent the interests of people with disabilities of all ages who will be affected by the outcome of this case. These organizations, which are described in more detail in the following paragraphs, have significant substantive knowledge of the issues addressed in this brief, including the question of whether a child who lives with epilepsy and autism can be precluded from living in the housing of her choice because of her disability. *Amici* care deeply about cases like the one on appeal because the court's rulings, if permitted to stand, seriously would undermine the ability of *amici's* members or the constituencies they represent to be full and active participants in the American mainstream.

The following organizations are participating in this case as *amici curiae*:

The **Epilepsy Foundation of America** (also known as the "Epilepsy Foundation") is a non-profit corporation founded in 1968 to advance the interests of the 2.8 million Americans with epilepsy and seizure disorders. Together with its

[1] *Amici curiae* certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than *amici curiae*, their members and their counsel) contributed money intended to fund the preparation or submission of the brief.

affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures, promotes public understanding of the disorder, and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes stereotyped images and fears which affect persons with this medical condition in all aspects of life. Since its inception, the Epilepsy Foundation has stood against the stigma and discrimination associated with seizures. It supports the development and full implementation of laws, like the Fair Housing Act, which promote the integration of, and equal opportunity for, people with epilepsy.

The **Autism National Committee** ("AutCom") is a nonprofit advocacy organization dedicated to equal rights for all people on the autism spectrum. Founded in 1990, AutCom was the first autism advocacy group to include autistic people as officers, and also comprises family members, caring professionals, and other friends who have joined together to provide information, support, networking, and a strong voice in federal legislation and policy. AutCom rejects dehumanizing practices such as segregation and aversive conditioning, and offers an ongoing reappraisal of fundamental research and treatment issues in light of what people with autism themselves find meaningful and respectful.

The State of Connecticut Office of Protection and Advocacy for Persons with Disabilities was established by statute in 1977. Conn. Gen. Stat. § 46a-7. The State of Connecticut recognized that it "has a special responsibility for the care, treatment, education, rehabilitation of and advocacy for its [citizens with disabilities]" and The Office of Protection and Advocacy has the authority to "represent, appear, intervene in or bring an action on behalf of any person with disability . . . in any proceeding before any court . . . in this state in which matters related to this chapter are in issue . . . ." Conn. Gen. Stat. § 46a-11(7). Individuals with disabilities are traditionally discriminated against in the provision of services and housing. In the case before this Court, The Office of Protection and Advocacy has an interest in protecting the rights of persons with disabilities who are refused housing opportunities in violation of the Fair Housing Act. It is in furtherance of its statutory obligations that The Office of Protection and Advocacy appears as *amicus curiae*.

The **National Council on Independent Living** ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy

and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

Founded in 1972 as the Mental Health Law Project, the **Judge David L. Bazelon Center for Mental Health Law** ("Bazelon Center") is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and education, the Bazelon Center works to advance equal opportunities for individuals with mental disabilities in all aspects of life, including housing and community living. Community integration of individuals with disabilities is a primary focus of the Center's work.

The **Disability Rights Education & Defense Fund** ("DREDF") is a national non-profit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF is led by members of the community it represents. Recognized for its expertise in the interpretation of federal civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts.

The **National Disability Rights Network** ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states. P&A agencies are authorized under various federal statutes

to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A system is the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN works to create a society in which people with disabilities are afforded equality of opportunity and are able to participate fully by exercising choice and self-determination.

AARP is a non-profit, non-partisan organization that helps people turn their goals and dreams into possibilities, strengthens communities and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is deeply concerned about the fair housing rights of its members who desire to age in place in their homes and the ability of the oldest and most vulnerable portion of the population to have access to appropriate housing options in their community. AARP has an interest in vigorous enforcement of the Fair Housing Act and its prohibitions against discrimination based on disability, the incidence of which increases with age and for which chronic disease is the primary contributor among the elderly.

SUMMARY OF THE ARGUMENT

A.R., who was 11 at the time of the alleged housing discrimination, has epilepsy and a pervasive developmental disorder on the autism spectrum. The evidence in the record shows that, as a result of these conditions, A.R. recently had experienced two grand mal seizures during which she lost consciousness and had violent muscle contractions, that she had uncontrolled petit mal (or absence) seizures multiple times a day, that she had significant sensory processing problems and deficits in communication, that she required an Individualized Education Plan ("IEP") to address her disabilities, and that, despite the support she received, her grades were suffering and her academic performance was deteriorating. Yet, the district court concluded *as a matter of law* that A.R.'s disabilities did not substantially limit her ability to learn, and that defendants' discriminatory conduct, therefore, was not unlawful.

If permitted to stand, the district court's rulings seriously would undermine the purposes and goals of the Fair Housing Act and its subsequent amendments (the "FHA" or the "Act"), which were intended to promote housing choice for people with disabilities and to encourage the integration of people with disabilities into the American mainstream.[2] The court's rulings also would limit housing

[2] The FHA prohibits discrimination in housing because of a person's "handicap." Unless quoting the statute or other source materials, this brief uses the more current term "disability."

options for the millions of Americans living with disabilities, like epilepsy and autism. At their core, the rulings countenance unfounded prejudices and validate unwarranted assumptions about individuals with disabilities. Because the district court's rulings are flatly inconsistent with the priorities established by Congress and the promises of the FHA, they must be reversed.

The district court's rulings also must be reversed because the evidence was more than sufficient to support a ruling that A.R. had a disability within the meaning of the FHA. In no event, however, was it appropriate for the district court to conclude, as it did, that *no reasonable juror* could have found that A.R. was substantially limited in the major life activity of learning and, therefore, protected from unlawful discrimination under the FHA. In fact, the only way the court could have reached this improper result was by viewing each piece of evidence in isolation and disregarding the cumulative effect of A.R.'s impairments on her educational progress, which is exactly what it did. Not only is this contrary to the scientific and medical literature, but it also conflicts with the Supreme Court's directive that the FHA must be construed generously to promote the policies that underlie it.

The district court further erred when it concluded that no reasonable juror could have found that Blanca Aponte's text messages to A.R.'s mother violated Section 3604(c) of the FHA, which prohibits statements that indicate a preference

based on disability. Although the district court found that Aponte's statements "appeared to be discriminatory on their face" because they expressed a preference for not renting to A.R.'s parents based on their daughter's medical condition, the court wrongly concluded that this discriminatory conduct was not actionable because it found that A.R. did not have a disability under the FHA.

A key problem with the court's ruling is that it would allow housing providers to exclude broad swaths of the disability community from the housing market based on archaic attitudes and impermissible assumptions about their suitability as tenants. Indeed, under the district court's analysis, a real estate agent, like Aponte, can say, with impunity, that she will not rent to people who live with seizures and autism. This is not the law. To the contrary, under established precedent, a plaintiff can challenge just this sort of discriminatory statement, which the ordinary reader would understand as a general and undifferentiated intent to deprive *all* people who have epilepsy and autism from living in the housing of their choice. In other words, where a statement unequivocally indicates a preference not to rent to members of a protected class, as Aponte's statements did here, liability cannot be avoided even if it turns out that plaintiffs are not members of that protected class.

ARGUMENT

I. THE DISTRICT COURT'S RULINGS UNDERMINE THE PURPOSES AND GOALS OF THE FHA

The district court's rulings were wrong and cannot stand. Not only are they contrary to the evidence, the science and the law, but they also undermine the fundamental purposes and goals of the Fair Housing Act and its subsequently enacted amendments, which outlaw housing discrimination against persons with disabilities.

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, has been called "the last of the great civil rights laws of the 1960's."[3] Enacted after the 1964 Civil Rights Act (which prohibits discrimination in public accommodations, employment and federally assisted programs) and the 1965 Voting Rights Act, the FHA prohibits discrimination in housing based on race, color, religion or national origin.[4] Congress added sex as a protected status in 1974, and, fourteen years later, extended the promise of equal housing opportunity to persons with disabilities through the Fair Housing Amendments Act of 1988 (the "FHAA").[5]

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[3] Robert G. Schwemm, Discriminatory Housing Statements and § 3604(c): A new Look at the Fair Housing Act's Most Intriguing Provision, 29 Fordham Urban Law Journal 187, 194 (Oct. 2001).

[4] 42 U.S.C. §§ 3601-3619.

[5] 42 U.S.C. § 3604(f).

The FHAA was enacted against a backdrop of "misperceptions, ignorance, and outright prejudice" against people with disabilities, which had long served as a barrier to their entry into the markets for rental housing and home ownership.[6] In the House Report accompanying the FHAA, Congress strongly repudiated these archaic attitudes and categorically rejected the notion that people with disabilities should be subjected to discrimination based on unfounded assumptions and paternalistic attitudes about what people with disabilities are capable of doing and where they should (or should not) live.[7] Indeed, Congress found that generalized perceptions about disabilities and reliance on stereotypes no longer could be the basis for decisions by housing providers.[8]

With the passage of the FHAA, Congress decreed that people with disabilities, like others who hold a protected status under the Act, have the right to live in the housing of their choice. This right is nothing less than a basic civil right and an essential pre-condition to the realization of other basic civil rights.[9] It also

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[6] H.R. Rep. No. 100-711, at 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

[7] *Id.* at 2185 (finding that "discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose").

[8] *Id.* at 2179.

[9] *See* 134 Cong. Rec. S10, 556 (daily ed. Aug. 2, 1988) (statement of Sen. Cranston (noting that the "right to vote, to work, and to travel freely are all important aspects of an individual's life, but none is more elementary than having the freedom to choose where and how one lives"); *see also* 134 Cong. Rec. S10, 558 (daily ed. Aug. 2, 1988) (statement of Sen. Metzenbaum) (noting that "[t]here is nothing more fundamental than the right to choose one's home").

reflects, as Congress forcefully said, "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[10]

Of course, a commitment to end unnecessary exclusion cannot be realized without a corresponding commitment to promote the integration of people with disabilities into neighborhoods and communities. This goal of community integration was central to the FHA, as originally enacted, and to FHA jurisprudence even before the promise of the Act was extended to people with disabilities.[11] As the Supreme Court observed in 1972, racial discrimination in housing not only harms the direct object of discrimination but also the community as a whole.[12]

This is equally true in the disability context, as proponents of the FHAA recognized.[13] Indeed, both people who live with disabilities and their advocates,

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[10] H.R. Rep. No. 100-711, at 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

[11] *See* 114 Cong. Rec. 2706 (1968) (statement of Sen. Javits) (commenting that the person on the landlord's blacklist is not the only victim of discriminatory housing practices, but that "the whole community" suffers as well); *id.* at 3422 (statement of Sen. Mondale) (noting that the law was intended to replace the ghettos "by truly integrated and balanced living patterns"). *See also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 93 S. Ct. 364, 367, 34 L.Ed.2d 415 (1972) (citing with approval the statements of Senators Javits and Mondale in support of the FHA).

[12] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. at 211.

[13] *See, e.g.*, 134 Cong. Rec. S10, 552 (daily ed. Aug. 2, 1988) (statement of Sen. Weiker) (observing that "the attitudes, stereotypes, and misconceptions of the

including *amici*, are committed to community integration because it vindicates the fundamental right of people with disabilities to "live in the world," as well as the interest of society in living in diverse neighborhoods comprised of people with disabilities and people without disabilities.[14]

Community integration is now a well-established hallmark of FHA jurisprudence.[15] It also is consistent with the notion that people with disabilities cannot and should not be defined by their disabilities. Instead, the FHA "mandates that persons with handicaps be considered as individuals"[16] and afforded the same right as others to live in the communities and neighborhoods of their choice.

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rest of society about people with disabilities are not going to change until those of us without disabilities have the opportunity to be around people with them – as classmates, as colleagues, and as neighbors").

[14] Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 Cal. L. Rev. 841 (1966); Samuel R. Bagenstos, Disability and Integration: Remarks as Prepared for Delivery at the University of Cincinnati College of Law, at 2 (Mar. 3, 2010) (transcript available at http://www.ada.gov/olmstead/bagenstos_speech_cin.pdf) (noting J. tenBroek's comment that the right to live in the world is key to disability rights, and that integration is "the answer" to achieving that right).

[15] *See Laflamme v. New Horizons, Inc.*, 605 F. Supp.2d 378, 385 (D. Conn. 2009); *Bentley v. Peace & Quiet Realty 2 LLC*, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005); *Tsombanidis v. City of W. Haven*, 180 F. Supp.2d 262, 292 (D. Conn. 2001); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, N.Y.*, 808 F. Supp. 120, 130 (N.D.N.Y. 1992). *See also Olmstead v. L.C. by Zimring*, 527 U.S. 581, 597, 119 S. Ct. 2176 (1999) (holding that "[u]njustified isolation . . . is properly regarded as discrimination" under the Americans with Disabilities Act (the "ADA"), and noting the benefits of community living for people with developmental disabilities).

[16] H.R. Rep. No. 100-711, at 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

The FHA's commitment to end unnecessary exclusion and its corresponding goal of promoting the integration of people with disabilities into the mainstream of American life cannot be reconciled with the district court's rulings. That is because, at their core, these rulings validate Aponte's baseless (and illegal) assumption that A.R. and other children who have epilepsy and autism cannot live in the housing of their choice because they "should be in a more convenient location to medical treatment."[17]

If permitted to stand, the district court's rulings would make it far easier for housing providers to do just what Aponte did here – exclude A.R. and her family from their home based on unwarranted fears, prejudices and stereotypes about A.R.'s disabilities – which, in turn, would harm the community as a whole. As Congress found more than a quarter of a century ago, however, this is both unfair and wrong. And, since the passage of the FHAA, it also is against the law.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT NO REASONABLE JUROR COULD FIND THAT A.R. HAD A DISABILITY

In its decision on the parties' cross-motions for summary judgment, the district court systematically reviewed A.R.'s physical, psychological and emotional limitations, only to conclude, as to each and without reference to the others, that A.R. was not substantially limited in the major life activity of learning. This

[17] Joint Appendix ("JA") 042.

conclusion is wrong for two reasons. First, the district court did not need to conduct a detailed factual analysis to determine that A.R. had a disability within the meaning of the FHA. Second, even if a detailed factual analysis were appropriate, the district court erred by ignoring the facts, the science and the law.

To begin with, there is no dispute that A.R. had both epilepsy and a pervasive developmental disorder on the autism spectrum, diagnosed as Autism Spectrum Disorder ("ASD") and Asperger's disorder.[18] Based on this evidence, the district court could have – and should have – concluded that A.R. was disabled within the meaning of the FHA.[19]

Even if a further factual analysis were appropriate, the district court easily should have reached the conclusion that A.R.'s conditions, separately and together,

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[18] JA 218, 229, 240, 243.

[19] In finding that A.R. was not "substantially limited" in a major life activity, the district court relied on *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) and its progeny, which imposed a strict disability analysis. JA 023, 027. That analysis, however, was invalidated by the ADA Amendments Act of 2008 (the "ADAAA"), which was a legislative response to judicial opinions (like *Toyota*) that "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress." Pub. L. No. 110-325, § 2(a)(7), 122 Stat. 3553 (2008). Regulations promulgated pursuant to the ADAAA confirm that diagnoses of epilepsy and autism – without more – are sufficient to establish disability. *See* 29 C.F.R. § 1630.2(j)(3)(iii) (2014) (concluding that "autism substantially limits brain function" and "epilepsy substantially limits neurological function"). In these circumstances, the district court should not have imposed an unduly stringent standard in determining whether A.R.'s condition substantially limited a major life activity.

substantially limited her ability to navigate the academic aspects of her life. Indeed, the factual evidence in this regard was extensive and compelling.

Among other things, the district court found that A.R. experienced both grand mal seizures, which are the most intense type of seizure, as well as petit mal seizures, known as "absence seizures," during which a person briefly and suddenly lapses into unconsciousness.[20] According to the evidence, A.R. had multiple petit mal seizures on a daily basis and had experienced two grand mal seizures just days before Aponte sent A.R.'s mother the text messages the court found were discriminatory on their face.[21] In other words, at the time of the allegedly discriminatory conduct, the evidence in the record shows that A.R. actively was experiencing serious seizures that were not controlled by medication.

The record also contains evidence that, as a result of her developmental disorder, A.R. had significant sensory processing problems, deficits in communication and writing skills, behavioral problems and anxiety.[22] These limitations, together with the effects of A.R.'s epilepsy, had an observable impact on A.R.'s school work to the point that her grades were deteriorating.[23] And, in the weeks immediately following the discriminatory statements, A.R.'s ability to learn was compromised even further. The evidence shows that A.R. was forced to leave

[20] JA 029.
[21] JA 229, 243, 247, 262-63.
[22] JA 250-55.
[23] JA 247.

school entirely because her seizures and the reactions to her medications "were making her crazy" and leading to "outbursts."[24]

These effects are palpable and severe. They also are consistent with the medical literature and with numerous studies of children who live with the same conditions. For example, there is substantial evidence that childhood epilepsy, which is a chronic condition, significantly impacts learning, as well as social interaction and development.[25] It also has been found that the effects of epilepsy in children are not dependent on intellectual ability. In other words, even children with epilepsy who have average or above average intelligence frequently fail to achieve academic success.[26] Indeed, studies have shown that epilepsy, apart from *any other* learning disability, has a substantial adverse effect on learning in

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[24] JA 166-67.

[25] J. Austin, *et al.*, Does Academic Achievement in Children with Epilepsy Change Over Time, 41 Developmental Medicine & Child Neurology 473 (1999) (citing multiple sources) (finding that there "is strong empirical support that childhood epilepsy is associated with academic underachievement"). *See also* Paul C. Van Ness, *The Epilepsies*, in Atlas of Clinical Neurology, 395, 395-96 (Roger N. Rosenberg, M.D. ed., 2009) (noting that epilepsy is a chronic and disabling neurologic condition characterized by recurrent seizures).

[26] C. Bulteau, *et al.*, Epileptic Syndromes, Cognitive Assessment and School Placement: A Study of 251 Children, 42 Developmental Medicine & Child Neurology 319-327 (2000) (observing that "poor academic achievement is widely reported in children with epilepsy, although many of these children have normal intelligence and stable intellectual ability"). *See also* P. Fatenau, *et al.*, Academic Underachievement Among Children with Epilepsy: Proportion Exceeding Psychometric Criteria for Learning Disability and Associated Risk Factors, 41(3) J Learn Disabil. 195-207 (2008) (concluding that children with epilepsy "are at dramatically increased risk for [learning disabilities]").

multiple arenas (memory impairment, reduced alertness, interference with short-term information storage and abstraction), and that all of these effects are particularly problematic for children because even temporary cognitive impairments can have a negative impact on learning.[27]

Similarly, children with ASD or Asperger's may have intelligence and language within the normal range of functioning but nevertheless have difficulty at school due to the impaired social skills that are the hallmark of the disorder.[28] In fact, children with Asperger's, whose deficiencies in social skills are well-documented, typically "lack the behavioral repertoire necessary to interact with others according to social convention," which "affects both academic and social development."[29]

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[27] H.M. de Boer, *et al.*, The Global Burden and Stigma of Epilepsy, 12 Epilepsy & Behavior 540, 542 (2008) (noting that children with epilepsy often have multiple disease-related cognitive impairments, and concluding that cognitive impairments in children, even if temporary, "may affect educational progress"); *see also* U.S. Nat. Library of Medicine, MedlinePlus Medical Encyclopedia, Petit mal seizure," available at http://www.nlm.nih.gov/medlineplus/ency/article/000696.htm (describing a petit mal or "absence seizure," and noting that these seizures occur "many times a day" and, therefore, "[i]nterfere with school and learning").

[28] P. Rao, *et al.*, Social Skills Interventions for Children with Asperger's Syndrome or High Functioning Autism: A Review and Recommendations, 38 Autism Dev. Disord 353 (2008) (noting that "impaired social skills are a core feature of [Asperger's], and [that] these difficulties permeate all areas of academic, emotional, and social development").

[29] *Id.* *See also* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 31 (5th ed. 2013) (noting that Asperger's is characterized by a persistent deficit in social reciprocity, and that lack of social

Although the district court took note of the multiple ways in which A.R.'s disabilities affected her educational progress, and purported to consider her limitations "in totality," the court in actuality assessed each of A.R.'s limitations separately and in isolation, concluding at each stage of the analysis that a particular impairment did not sufficiently limit A.R.'s ability to learn. What the court did not do, however, and what it was required to do, was to consider the *cumulative effect* of A.R.'s disabilities on her ability to learn.[30]

The district court also failed to give sufficient weight to the determination by the Saugerties School District that A.R. required an IEP in order to address (though, as it turned out, unsuccessfully) the limitations she experienced as a result of her disabilities. Similarly, the court ignored the fact that A.R. was forced to leave school just weeks after the discriminatory statements were made, which meant that she no longer received the in-school services the school district found she needed.

These facts are relevant because a child is eligible for an IEP under federal and state law *only* if she has a disability that adversely affects the child's

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skills and communication abilities may hamper learning).

[30] *See Rowles v. Automated Production Systems, Inc.*, 92 F. Supp. 2d 424, 429 (M.D. Pa. 2000) (denying summary judgment to defendants on the issue of whether plaintiff's epilepsy substantially limited his ability to work, and holding that a reasonable juror could conclude that plaintiff's limitations, individually, "may not be particularly significant," but, "viewed in their entirety," are substantial).

educational performance.[31] Yet, here, the district court failed to find – contrary to the school district's decision – that A.R. could not function or learn at school without the services and other accommodations to which she was entitled by law. This was error.[32]

For all of these reasons, the district court should have concluded that A.R. was substantially limited in the major life activity of learning and, therefore, had a disability within the meaning of the FHA.[33] In no event, however, was it appropriate for the court to conclude, as it did, that no reasonable juror could have found that A.R. had such a disability.[34] The court's ruling is contrary to the evidence, the medical literature and the law. It also is inconsistent with the

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[31] *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). The regulations implementing IDEA are to the same effect. *See* 34 C.F.R. § 300.8 (noting that an IEP is required where a disability "adversely affects a child's educational performance"). *See also* NY CLS Educ. §§ 4401 *et seq.*; 8 NYCRR § 200.1(zz) (tracking the language of IDEA and the regulations that implement it).

[32] *See Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 47-48 and n. 3 (2d Cir. 2003) (measuring plaintiff's disability against statutorily defined standard).

[33] *See, e.g.*, *Otting v. J.C. Penny Co.*, 223 F.3d 704, 709-711 (8th Cir. 2000) (holding that plaintiff, who had epilepsy, was disabled within the meaning of the Americans with Disabilities Act (the "ADA") because her seizures were not under control).

[34] *See, e.g.*, *Rowles v. Automated Production Systems, Inc.*, 92 F. Supp. 2d at 429 (denying defendants' motion for summary judgment on the issue of whether plaintiff's epilepsy was sufficiently limiting to constitute a disability under the ADA). *See also Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224 (2d Cir. 1994) ("the trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them").

Supreme Court's directive that the Fair Housing Act must be construed generously to promote the policy of equal opportunity in housing that underlies it.[35] The district court's decision must be reversed.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT NO REASONABLE JUROR COULD FIND THAT APONTE'S STATEMENTS INDICATED A PREFERENCE BASED ON DISABILITY

Recognizing the broad sweep of Section 3604(c), which prohibits statements indicating a preference based on disability, the district court's decision and order on reconsideration at first concluded (correctly) that plaintiffs could pursue a claim for a violation of this provision even if the court did not find that A.R. had a disability that substantially limited a major life activity.[36] Where the court veered off course, however, was in its determination that Aponte's discriminatory statements did not indicate a preference based on disability because they were aimed only at A.R., who, according to the court, did not have such a disability.[37]

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[35] *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. at 211 (1972) (observing that the Fair Housing Act serves a "policy that Congress considered to be of the highest priority," and holding, for that reason, that the language of the Act – which is "broad and inclusive" – must be a given a "generous construction"); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731, 115 S. Ct. 1776, 1780 (1995) (citing *Trafficante* for the same point).

[36] JA 048.

[37] JA 052-53 (finding that Aponte's statements did not express a preference "based on" disability because the statements were aimed at A.R., and A.R. was not disabled).

The problem with this circular reasoning is that it gives the discriminator a free pass for her otherwise illegal statements.

In finding that Aponte's statements were aimed only at A.R., the district court failed to consider the context in which the statements were made and how her message would have been perceived by an "ordinary reader."[38] Had it done so, the court could not have found, as it did, that Aponte's discriminatory statements were based solely on A.R.'s actual medical condition. That is because Aponte knew very little about A.R's condition – other than that she had experienced seizures.[39] She did not know the severity of A.R.'s seizures or the extent to which these seizures affected A.R.'s life. All Aponte knew – and what she said – is that she did not want the property to be leased to a family whose daughter had seizures.

Because Aponte did not have any particularized knowledge of A.R.'s illness, her statements could not have had the narrow focus the court attributed to them. Instead, as any "ordinary reader" would have concluded, Aponte's statements, in context, indicated a generalized intent to exclude from rental housing *all persons* who experience seizures – including those who are found by a court to have a

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[38] *See Soules v. U.S. Dept. of Housing & Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992) (observing that facially nondiscriminatory statements can "indicate an impermissible preference in the context in which they were made"); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (applying the "ordinary reader" standard to determine whether a statement runs afoul of Section 3604(c)).

[39] *See, e.g.*, JA 140-41. There also is some evidence that Aponte knew that A.R. had been diagnosed with epilepsy and autism but no evidence that she knew or understood the impact on A.R. of these diagnoses. JA 118-19.

disability within the meaning of the FHA.[40] Alternatively, because Aponte's statements were based on an unwarranted assumption that A.R.'s seizures rendered her unsuitable as a tenant, the district court should have found that Aponte regarded A.R. as having a disability, which also is illegal under the FHA.

Although the district court found otherwise, Aponte's statements actually were no different from the illegal statement hypothesized by the court: an advertisement by a landlord "that he would not accept anybody who used a prosthetic leg."[41] Here, however, instead of discriminating against those who use a prosthetic device, Aponte's statements conveyed to the ordinary reader that people with epilepsy – as a group – are not suitable tenants and that they need not apply.[42] In either case, the statement indicates a preference to exclude members of a protected class, which is a violation of Section 3604(c) regardless of A.R.'s protected status.[43]

Of course, even if there were doubt about how an ordinary reader would have perceived Aponte's statements, that doubt should be resolved by the trier of

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[40] *See Ragin v. New York Times Co.*, 923 F.2d at 999 (explaining "ordinary reader" standard).

[41] JA 052 at n. 4.

[42] *See Ragin v. Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) ("the message conveyed to the ordinary reader" is "the touchstone" of the inquiry).

[43] *See Corey v. U.S. Dept. of Housing & Urban Dev.*, 719 F.3d 322, 326 (4th Cir. 2013).

fact and not by the court as a matter of law.[44] Because statements that convey an impermissible preference, by their nature, can be subtle (though just as invidious as discriminatory conduct), a jury should be the ultimate arbiter of how an ordinary reader would interpret the speaker's comments. The district court's refusal to do that in this case was error and should be reversed.

CONCLUSION

For all of these reasons, the Court should reverse the district court's denial of plaintiffs' motion for summary judgment and its grant of summary judgment to defendants.

[44] *See Ragin v. Macklowe Real Estate Co.*, 6 F.3d at 906 (concluding that the question of whether a statement violates Section 3604(c) is best left to the factfinder, who can answer the question by considering the statements and the defendant's conduct "and then applying common sense"). *See also Miami Valley Housing Center, Inc. v. The Conner Group*, 725 F.3d 571, 578 (6th Cir. 2013) (noting that whether Section 3604(c) has been violated often requires that inferences be drawn, and that "[s]uch inferences are best left to the jury to consider").

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