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)

SUPPLEMENTAL BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This Court requested supplemental briefing about whether and how the Religious Freedom Restoration Act (RFRA), 42 U.S.C § 2000bb *et seq*., may bear on the analysis and outcome of this case. The answer is simple: RFRA plays no role whatsoever in this matter. RFRA does *not* apply in matters where the government is not a party and, even if it did, Defendant, A Country Place Condominium Association, Inc. (CPCA), is *not* a religious organization and cannot assert a RFRA defense on behalf of itself or a fraction of its members. Moreover, a RFRA defense in this matter would fail because robust enforcement of the Fair Housing Act (FHA), 42 U.S.C § 3601 *et seq*., is the least restrictive means of achieving the government's compelling interest in prohibiting the very sort of sex discrimination in housing that CPCA has adopted. Given the insurmountable obstacles to a RFRA defense in this case, it is hardly surprising that, even after full merits briefing on appeal, Defendant never once mentioned RFRA in any pleading or brief. Thus, even were the argument not futile, it has been waived.

Exempting CPCA from the FHA could open the door to widespread discrimination. In communities like CPCA where the majority of residents or board members practice a particular faith, condominium and homeowner associations could subject minority members to a range of discriminatory conduct based on the majority's religious beliefs. If, for example, the majority of residents' religious

beliefs forbade swimming with adherents of other faiths or races, owners could be forced to comply with a pool schedule setting separate swimming hours for Christians, Jews, and Muslims, or whites and people of color. While the right to religious freedom is of paramount importance, it is not absolute and does not confer carte blanche to impose religious beliefs on others, to discriminate against others, or to deny others their rights under the law.

ARGUMENT

I. DEFENDANT HAS WAIVED ANY RFRA DEFENSE.

As the Supreme Court has recognized, '"[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)). Courts, therefore, generally address only those claims and arguments advanced by the parties. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). And "[t]o preserve a matter for appellate review, a party 'must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.'" *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) (quoting *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999)).[1]

[1] Failure to plead an affirmative defense also waives the defense. *See* 5 Charles Wright & Arthur R. Miller, Federal Practice and Procedure § 1278 (3d ed. 1998).

But Defendant did not raise a RFRA defense below. "Where a party fails to assert a substantial burden on religious exercise before a district court . . . the party may not raise that issue—an inherently fact-based one—for the first time on appeal." *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006); *accord United States v. Comrie*, 842 F.3d 348, 351-52 (5th Cir. 2016) (finding that defendant's "failure to raise RFRA arguments below deprived the district court of its best opportunity to consider the fact-driven RFRA analysis, and left the Government with no opportunity to present factual evidence of either its compelling governmental interests or the legitimate . . . objectives to be served") (internal quotation marks omitted).

Even if RFRA were a permissible and viable defense, then, Defendant has waived the argument. *See, e.g.*, *Comrie*, 842 F.3d at 350 ("[F]ailure to raise a RFRA defense below may constitute a waiver."); *United States v. Horning*, 105 F.3d 667 (9th Cir. 1996) (declining to consider RFRA defense raised for the first time on appeal "[b]ecause establishing such a claim or defense involves a number of factual questions"). There is no reason for this Court to abandon these principles here. *See, e.g.*, *In re McGough*, 737 F.3d 1268, 1277 (10th Cir. 2013) (declining to consider RFRA argument made by *amicus* party because debtor did not raise it, "the issue is neither jurisdictional nor does it touch on an issue of federalism or comity which should be considered *sua sponte*," and "no other exceptional circumstances exist justifying our consideration of the issue"). Indeed, the waiver rule "applies with

added force" where, as here, "the timely raising of the issue would have permitted the parties to develop a factual record." *See Shell Petroleum*, 182 F.3d at 219 (internal quotation marks omitted).

II. EVEN IF CPCA HAD TIMELY ASSERTED A RFRA DEFENSE, IT WOULD FAIL BECAUSE RFRA DOES NOT EXEMPT DEFENDANT FROM COMPLYING WITH THE FHA.

A. RFRA does not apply because the government is not a party to this case.

Although this Court has not yet ruled on the question, several circuit courts have recognized that RFRA's text and legislative history make clear that '"Congress intended RFRA to apply only to suits in which the government is a party'"—not as a defense against private litigants. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 596 (6th Cir. 2018) (quoting *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010)), *petition for cert. filed on unrelated issues*, No. 18-107 (June 24, 2018); *see also Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015) (same); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999) (same).

RFRA provides that the "*[g]overnment* shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the "*[g]overnment* . . . demonstrates that application of the burden to the person—(1) is in furtherance of a compelling *governmental* interest; and (2) is the least restrictive means of furthering that compelling *governmental*

interest." 42 U.S.C § 2000bb–1 (emphasis added). Congress easily could have included language in RFRA applying its protections to conduct by private entities, as in Title VII and the Americans with Disabilities Act, but "chose not to include similar wording." *See Sutton*, 192 F.3d at 834 (contrasting RFRA with 42 U.S.C. § 2000e(b) & 42 U.S.C. § 12111(2)). Instead, Congress enacted a burden-shifting standard that *requires* the government's involvement: The government must demonstrate that a substantial burden is the least restrictive means of furthering a compelling *governmental* interest. It is self-evident that this part of the RFRA standard cannot be carried out if the government is not a party to the lawsuit. *See McGill*, 617 F.3d at 410 ('"Where, as here, the government is not a party, it cannot 'go[ ] forward' with any evidence.'") (internal quotation marks omitted); *see also Listecki*, 780 F.3d at 736 ("A private party cannot step into the shoes of the 'government' and demonstrate a compelling governmental interest and that it is the least restrictive means of furthering that compelling governmental interest because the statute explicitly says that the 'government' must make this showing.").[2]

In addition to its plain text, RFRA's legislative history confirms that

[2] Likewise, in RFRA's "[j]udicial relief" section, Congress stated that a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government*." 42 U.S.C. § 2000bb-1(c) (emphasis added). As the Seventh Circuit has observed, "[t]he relief is clearly and unequivocally limited to that from the 'government.'" *Listecki*, 780 F.3d at 737. That is, "[i]f the 'government' is not a party, no one can provide the appropriate relief." *Id.*

Congress did not intend for RFRA to apply to lawsuits between private parties. The Report from the Committee on the Judiciary repeatedly expressed concern about "government actions," "only governmental actions," and "every government action," in discussing RFRA's purpose to protect against "[g]overnment actions singling out religious activities for special burdens," as well as other governmental intrusions on religious exercise. *See Listecki*, 780 F.3d at 736 (quoting and citing S. Rep. No. 103–111, at 4, 8-9 (1993)). Moreover, "all of the examples cited in the Senate and House Reports on RFRA involve[d] actual or hypothetical lawsuits in which the government [was] a party." *Id.* (internal quotation marks omitted).

In sum, "[t]he legislative history shows Congress did not mean for RFRA to be applicable when the government is absent," and like the Sixth, Seventh, and Ninth Circuits, this Court should "not read into the statute what neither the plain language nor legislative history has included." *Id.*[3] Here, because the government is not a party

[3] The Second and Eighth Circuits have applied RFRA in lawsuits where the government is not a litigant. *See Hankins*, 441 F.3d at 103-05; *In re Young*, 141 F.3d 854, 860-61 (8th Cir. 1998); *see also EEOC v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (finding "that the EEOC's and [plaintiff nun's] claims are barred by the Free Exercise and the Establishment Clauses of the First Amendment and by RFRA" without explicitly considering whether RFRA defense would be applicable against private plaintiff alone). But the courts' reasoning in these cases is untenable in light of RFRA's text and history. In fact, the Second Circuit has expressed strong "doubts" about the conclusion reached by an earlier panel in *Hankins.* Noting that RFRA's text plainly "requires the *government* to demonstrate that application of a burden to a person is justified by a compelling governmental interest," the court explained that "we do not understand how it can apply to a suit between private parties, regardless of whether the government is capable of

to this case, CPCA cannot assert a RFRA defense, whether on its own behalf or on behalf of its residents.[4]

B. Defendant is not a religious organization and cannot assert a RFRA defense on behalf of itself or a fraction of its members.

Even if RFRA did apply to lawsuits between two private litigants, CPCA could not assert a valid RFRA claim here. CPCA admits that it is not a religious entity and that it does not exercise any religion.[5] *See* JA55 & 66 (Def.'s Resp. Req. Admis. Nos. 4, 5); Def.'s Br. at 1. Rather, CPCA is a secularly established condominium association. *See* JA53, 59 & 68 (Def.'s Resp. Interrog. Nos. 4, 5). It follows, then, that CPCA cannot assert a RFRA claim on behalf of itself because it

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enforcing the statute at issue." *Rweyemamu v. Cote*, 520 F.3d 198, 203 n.2 (2d Cir. 2008).

[4] Nor can CPCA argue—merely because it must comply with a number of state and federal laws and regulations, including the FHA—that it is somehow a government actor whose pool policy is subject to RFRA. *See, e.g.*, *Listecki*, 780 F.3d at 741 (holding that RFRA did not apply because creditors' committee formed in course of bankruptcy proceedings was not acting under color of law); *Sutton*, 192 F.3d at 837-39 (finding that private employer was not acting under color of law, for purposes of RFRA, based on the "mere fact" that government compelled employer-defendant to collect social security numbers from prospective employee).

[5] By contrast, in *Burwell v. Hobby Lobby Stores, Inc.*, the corporation asserting a RFRA claim operated "in a manner consistent with Biblical principles." 134 S. Ct. 2751, 2766 (2014) (internal quotation marks omitted). It closed on Sundays for religious reasons, "refused to engage in profitable transactions that facilitate or promote alcohol use," "contributed profits to Christian missionaries and ministries," and bought "hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'" *Id.* Even in the cases that erroneously applied RFRA to suits between private parties, *see supra* n.3, the parties invoking RFRA were religious entities. *Cf. Hankins*, 441 F.3d at 96 (New York Annual Conference of the United Methodist Church and its bishop); *In re Young*, 141 F.3d at 854 (church).

cannot demonstrate any "substantial burden" on its nonexistent religious exercise.[6]

Nor may CPCA assert a RFRA defense on behalf of a fraction of its members. RFRA mandates an individualized, fact-intensive determination at every step. Specifically, those seeking safe haven in RFRA must demonstrate the sincerity of the personal religious beliefs on which they base their claim. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014). They must then show that the challenged conduct substantially burdens their exercise of those religious beliefs. The sincerity determination and substantial-burden inquiry are typically "fact-specific and require[] a case-by-case analysis." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012), *as corrected* (Feb. 20, 2013) (internal quotation marks omitted).[7] Finally, the government must demonstrate that the compelling interest test is satisfied by applying the challenged law "to the person"—*i.e.*, "the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do*

[6] CPCA cannot "pick and choose which of its members' potentially conflicting beliefs it wishe[s] to assert at any given time" in order to claim a religious defense on behalf of the association itself. *See Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 313-14 (5th Cir. 1977) (holding that "an avowedly secular school should not be permitted to interpose a free exercise defense to a s[ection] 1981 action merely because it can find some of its patrons who have a sincere religiously based belief in racial segregation").

[7] RFRA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, are "sister statute[s]" that apply identical legal standards. *See Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015).

Vegetal, 546 U.S. 418, 430-31 (2006).

While it may be possible to undertake this individualized analysis where a RFRA claimant is a closely held corporation or association that is owned and controlled by a few individuals professing identical religious beliefs,[8] "the idea that unrelated shareholders . . . would agree to run a corporation under the same religious beliefs seems improbable." *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2774 (noting that "the companies in the cases before us are closely held corporations, each owned and controlled by members of a single family"). The facts here confirm this conclusion. The various "unrelated shareholders" of the CPCA—*i.e.*, its members, including Plaintiffs, who own condominium units—have *not* agreed to run the condominium association under a single set of religious beliefs. Indeed, the condominium owners have not even agreed to adopt a pool schedule that discriminates based on gender: When setting the pool hours, CPCA never put the schedule before the community for a vote, even though its own by-laws required that it do so.[9] The Board instead

[8] *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (mining corporation owned and controlled by Mr. and Mrs. Townley could assert free exercise claim); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (pharmacy was entirely family-owned).

[9] Under Section 16 of CPCA's by-laws, the pool hours qualify as a "rule or regulation" that must be voted on and approved by a majority of members of the association. JA130 & JA77 (Engleman Dep. 17:23-18:8). Defendant flouted this requirement. JA130 & JA78 (Engleman Dep. 23:23-25:15). Under New Jersey law, thus, the Board's unauthorized pool schedule is ultra vires as a matter of law. *See, e.g.*, *Verna v. Links at Valleybrook*, 371 N.J. Super. 77, 92-93 (App. Div. 2004).

acted on its own to implement an unauthorized, facially discriminatory policy.

Under these circumstances, Defendant cannot assert a RFRA defense in a representative capacity. Generally, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, there is simply no reliable evidence in the record to establish whether members' sincere exercise of religion would be substantially burdened by an integrated pool policy,[10] and determining whether members meet this threshold RFRA requirement would necessitate extensive participation in the lawsuit by individual CPCA members.[11]

[10] Defendant's allegation that 70 percent of residents are Orthodox Jewish is supported only by the testimony of Ms. Engleman, who testified that she decided—on her own and without the membership's direction or approval—to keep a private list of residents whom she believes to be Orthodox Jewish. JA 97 (Engleman Dep. 97:3-101:4) & JA178 (Engleman Affidavit). This purported list was not produced by Defendant, and in any event, the list does not reflect residents' specific religious beliefs or practices pertaining to swimming.

[11] For example, to advance a RFRA defense, individual CPCA members would be required to provide evidence regarding the nature and scope of their religious beliefs. Some religious individuals might be completely opposed to integrated swimming, while others may be concerned only with modest dress in the pool or coming into physical contact with those of the opposite sex while swimming. Some, even if they identify as Orthodox Jewish, may not follow this traditional belief at all. If they could establish the sincerity of their professed religious beliefs, individual CPCA members would then be required to demonstrate that an integrated pool would substantially

Cf. Harris v. McRae, 448 U.S. 297, 321 (1980) ("Since it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion . . . the claim asserted here is one that ordinarily requires individual participation.") (internal citation and quotation marks omitted); *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) (holding that parochial school could not bring an associational free exercise claim because "[t]he involvement of parents and students . . . [was] essential to the resolution of the individualized element of coercion").

Religious matters, moreover, are completely irrelevant to CPCA's purpose. *Supra* p. 7. And, even if religion did fall within CPCA's ambit, there exists a "profound conflict of interest" here that vitiates germaneness and precludes associational standing. *See Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 866 (7th Cir. 1996). Specifically, an association's "attempt to use representational standing as a means to go after [its] own [members] . . . cannot be germane to an association's purposes." *See id.* In asserting a RFRA defense here, CPCA would effectively be doing just that with respect to a minimum of 30 percent (if Defendant's unsupported estimate is accepted) of its members who do not oppose integrated swimming and would suffer discrimination if an associational RFRA

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burden their religious exercise—another individualized, fact-intensive inquiry that could differ from family to family. *See supra* pp. 3, 7-8.

claim were to succeed.[12] Thus, CPCA cannot satisfy the germaneness requirement set forth in *Hunt. See, e.g.*, *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380-81 (7th Cir. 1987) (denying associational standing where three defendants were also members of plaintiff association because, if the association "were ultimately successful . . . its defendant members would without question be adversely affected and perhaps even seriously disadvantaged by the strictures of the [requested] injunction").

C. Robust enforcement of the FHA is the least restrictive means of achieving the government's compelling interest in eradicating sex discrimination in housing.

Assuming CPCA could establish a prima facie case under RFRA, the claim would nevertheless fail because the government (were it actually a party to this case)

[12] In addition, "a profound conflict [of interest] arises where the association's suit, if successful, would cause a direct detriment to the interests of some of its members and the litigation was not properly authorized . . . in accordance with the association's procedures." *Retired Chicago Police Ass'n*, 76 F.3d at 864-65 (internal citations and discussion omitted). Here, in implementing the segregated pool schedule, CPCA flouted its own by-laws and procedures from the start—to the detriment of a sizeable portion of its membership. *See supra* p. 9 & n.9. Under these circumstances, asserting a RFRA defense in an effort to further a policy that was never properly authorized cannot be considered germane to CPCA's purpose. *See Retired Chicago Police Ass'n*, 76 F.3d at 865 (association failed to present evidence to district court that it had followed internal rules and procedures to authorize litigation). *Cf. Contractors Ass'n of E. Penn., Inc. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991) (holding association could sue city and city officials on behalf of majority of members where association had not "violated its members' rights by ignoring the association's by-laws before bringing an action on a matter of concern to the membership" or otherwise "fail[ed] to follow [its] own internal rules").

could demonstrate that enforcing the FHA is the least restrictive means of furthering a compelling government interest. As an initial matter, requiring CPCA to comply with the FHA satisfies the government's compelling interest in eliminating discrimination in housing. "The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521 (2015). Any RFRA exemption provided to CPCA would undermine the government's effort to combat housing discrimination by subjecting everyone within the condominium complex to gender-based discrimination, regardless of whether they subscribe to the same religious beliefs.

Moreover, requiring CPCA to comply with the FHA is the least restrictive way to further this governmental interest. The Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. This is especially true when it comes to anti-discrimination laws, which promote equality and are designed to prevent innocent third parties from suffering the harms inflicted by such discrimination. *See, e.g.*, *Harris Funeral Homes, Inc.*, 884 F.3d at 596 ("Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex . . . it makes sense that the only way to achieve the scheme's objectives is

through its enforcement."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that Fair Labor Standards Act was a "comprehensive statute" and that applying its equal-pay provisions to religious school, despite school's Bible-based objections, was the least restrictive way of achieving government's compelling interest in eliminating gender-based pay discrimination).

Courts have thus rejected attempts to obtain broad religious exemptions from antidiscrimination protections.[13] Consistent with these principles, the Supreme Court cautioned more recently that its decision in *Hobby Lobby* should not be read as providing a "shield" to those who seek "to cloak[] as religious practice" their efforts to engage in "discrimination in hiring[,] for example, on the basis of race." 134 S. Ct. at 2783. As the Court explained, the "[g]overnment has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id*. The "stigmatizing injury, and the denial of equal opportunities that accompanies" such discrimination "is surely felt as strongly by persons suffering

[13] For example, courts have rebuffed free-exercise defenses asserted by restaurants that refused to serve African-Americans based on their owners' religious opposition to "any integration of the races whatever." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Likewise, courts have held that religious schools do not have a religious-freedom right to opt out of laws mandating that employers provide equal pay and benefits for men and women. *See, e.g.*, *Dole*, 899 F.2d at 1398-99; *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368-69 (9th Cir. 1986).

discrimination on the basis of their sex as by those treated differently because of their race." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 625 (1984) (affirming state's "compelling interest in eradicating discrimination against its female citizens"). And because Title VII and the FHA are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination," *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988), it follows that the FHA, like Title VII, is "precisely tailored" to achieving the government's compelling interest in providing an equal opportunity to benefit from housing without facing discrimination based on gender.[14]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that RFRA has no bearing on the legality of Defendant's sex-segregated pool hours and request that this Court reverse the decision below and direct the district court to enter summary judgment in Plaintiffs' favor with respect to their FHA claim.

Respectfully submitted,

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[14] The FHA's narrow exemption for religious organizations does not offer a less restrictive alternative here. Section 3607 of the FHA allows qualifying religious organizations to give housing preference to persons of the same religion, not to discriminate on the basis of sex, race, or other protected categories. Thus, even if the exemption were expanded to include CPCA, it would not permit the sex-segregated pool schedule here.

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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.

January 29, 2019

/s/José D. Román
José D. Román

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief complies with the type-volume limitations set out by the Court's order requesting supplemental briefing (Document No. 003113103196) because the brief (as indicated by word processing program, Microsoft Word 2016) does not exceed 15 pages, 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.

January 29, 2019

/s/José D. Román
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/s/José D. Román
José D. Román

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing Supplemental Brief for Appellants was filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit.

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