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)

BRIEF FOR NATIONAL FAIR HOUSING ALLIANCE AS AMICUS CURIAE SUPPORTING APPELLANTS

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Dated: January 29, 2019

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 18-1212

Marie Curto, Diana Lusardi, and Steve Lusardi

v.

A County Place Condominium Association, Inc.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Fair Housing Alliance makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: N/A

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

Lila Miller
(Signature of Counsel or Party)

Dated: January 29, 2019

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INTERESTS OF AMICUS CURIAE[1]

Amicus National Fair Housing Alliance, Inc. ("NFHA") is a national organization dedicated to ending all forms of discrimination in housing. As a consortium of private, non-profit fair-housing organizations, state and local civil rights groups, and individuals, NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. As part of its enforcement activities, NFHA participates in federal and state court litigation involving claims under the Fair Housing Act, monitors federal cases brought under the Fair Housing Act, and files amicus briefs in cases in which it has an interest. With its extensive involvement in fair housing cases across the country, NFHA stands in a unique position to comment on how the FHA's structure protects, not burdens, religious exercise and why application of the Religious Freedom Restoration Act is unnecessary and inappropriate under the factual circumstances of this case.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. In addition, pursuant to Appellate Rule 29(a)(4)(E), NFHA certifies 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 NFHA, its members, and its counsel) contributed money intended to fund the preparation or submission of the brief.

Summary of Argument

This case centers around the Fair Housing Act ("FHA" or "the Act"), a robust and comprehensive remedial scheme that, among its other purposes, fosters and safeguards religious exercise in housing. The FHA protects religious adherents as they find shelter, establish religious residential communities, and enjoy shared building amenities. The Act is also drafted in ways that ensure it will rarely, if ever, directly compel people to act in ways inconsistent with their religious beliefs: its full requirements do not extend to non-commercial religious housing, nor does the Act reach many intimate owner-occupied settings. Because the FHA's comprehensive framework adequately protects religious exercise, resort to the Religious Freedom Restoration Act ("RFRA") as a defense for an FHA violation is unnecessary.

In any event, analysis under RFRA would not change the outcome in this case. The challenged swim schedule directly undermines the compelling interest in eradicating housing discrimination in multiple ways. By relegating women to the pool during the hours of a traditional nine-to-five job, the schedule is based on and reinforces harmful sex stereotypes that men work and women do not. Because Defendant requires residents to segregate by sex—whether they want to or not—and does so in ways that fall differently on women than on men, women have inferior access to the pool, a community amenity. It is therefore fundamentally incompatible with the FHA's animating principle that all residents, regardless of personal

preferences, presumptively enjoy equal access to common areas without regard to sex, race, disability, or other protected class.

Enforcing the Fair Housing Act as written in this case is the least restrictive means of furthering the compelling government interest in eliminating housing discrimination. NFHA accordingly urges the Court to apply the FHA to the facts of this case without resorting to RFRA. As the discussion below demonstrates, doing so requires that the district court's summary judgment decision be reversed.

Argument

NFHA agrees with Plaintiffs that Defendant may not rely on a defense under RFRA to justify what otherwise would be a Fair Housing Act violation. Specifically, NFHA agrees that Defendant has waived any possible RFRA defense and that RFRA has no place in this private litigation. Instead, for the reasons set forth below and in Plaintiffs' briefs, the district court's summary judgment decision should be reversed.

The FHA's comprehensive scheme provides robust protections for religion. Compliance with the FHA generally fosters, not impedes, religious exercise because the Act affirmatively protects religious exercise and because it is carefully tailored to avoid infringing on religious liberty. And even if RFRA ever could be invoked as a defense to a Fair Housing Act violation, such a defense could not succeed here.[2]

[2] 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 government

To the extent that remedying the sex discrimination at issue risks an incidental burden on religious exercise, it does so to fulfill the FHA's compelling interest in eradicating sex discrimination (like other discrimination) from housing. Thus, enforcing the FHA as written is the least restrictive means of furthering the urgent interest in eliminating housing discrimination.

I. The Fair Housing Act Provides Comprehensive Protection for Religious Adherents and Safeguards to Avoid Infringement on Religious Practice

Congress did not pass the FHA without regard to religion. To the contrary, protections for religious adherents are both express and inherent in the Act.

For example, "religion" is one of several protected classes included within the Act. 42 U.S.C. §§ 3604(a)−(e), 3605 ("[I]t shall be unlawful . . . to discriminate . . . because of . . . religion . . . ."). Thus, a landlord cannot impose different conditions on access to housing or to community facilities based on religious beliefs. The courts have embraced these religious protections. The FHA protects those of Islamic faith from both denial of housing and being subjected to hostile comments regarding their religion. *El v. People's Emergency Center*, 315 F. Supp. 3d 837, 842 (E.D. Pa. 2018). It protects a Jehovah's Witness from being singled out for unfavorable treatment, such as denial of her ability to host religious meetings and requirement that she

"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(a), (b).

attend political meetings that conflict with her beliefs. *See Lloyd v. Presby's Inspired Life*, 251 F. Supp. 3d 891, 902−03 (E.D. Pa. 2017). It protects Jewish families who affix mezuzot[3] to their doorways in accordance with their beliefs. *Bloch v. Frischholz*, 587 F.3d 771, 783–86 (7th Cir. 2009) (en banc). And it protects Christian families who face religiously motivated harassment. *Morris v. W. Hayden Estates First Addition Homeowners Ass'n, Inc.*, No. 2:17-CV-00018, 2017 WL 3666286, at *3−4 (D. Idaho Aug. 24, 2017).

Indeed, claims under the FHA often go hand in hand with claims under RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, a rabbinical college challenged the Village's zoning and environmental ordinances, which were enacted in response to the plaintiffs' proposal to build a rabbinical college and dormitories, under both the FHA and RLUIPA. 280 F. Supp. 3d 426, 448, 491−93 (S.D.N.Y. 2017). In the Venn diagram of protections provided to religious adherents by the FHA and RFRA/RLUIPA, the overlap is significant.

Not only does the FHA thus affirmatively protect religious exercise, but it also has coverage carve-outs that ensure that it will not incidentally infringe upon such exercise to an unwarranted degree. Anticipating that religious organizations may wish to operate specialized housing, Congress explicitly declined to extend the full

[3] Mezuzot is the plural of "mezuzah," which is a small tube containing a scroll of religious text.

panoply of FHA protections to dwellings owned or operated by "a religious organization, association, or society," for non-commercial purposes. 42 U.S.C. § 3607(a). A bona fide religious organization does not run afoul of the FHA if it "limit[s] the sale, rental or occupancy of dwellings which it owns or operates . . . to persons of the same religion." *Id.* In other words, religious adherents are free to establish religious housing, and to make occupancy decisions that accord with their beliefs. *See Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 996 (9th Cir. 2011) (drug treatment program's limitation on participants permissible; it was "a bona fide Christian organization" that "operate[d] its homeless shelters and drug treatment program for 'other than a commercial purpose'").

Similarly, the Fair Housing Act does not regulate intimate housing settings. Many of its protections do not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(2). Thus, as is often the case, religious adherents may rent out rooms or serve as landlords of small complexes without fear that they will have to rent units (and live in close proximity) to tenants who are hostile to or otherwise do not share their religious beliefs.

In sum, the FHA is a carefully crafted statute that accounts for religion in multiple ways. Religious adherents, like any other protected group, may invoke the antidiscrimination provisions in Sections 3604, 3605, and 3617. Congress also left room for religious exercise by excluding non-commercial religious housing and small owner-occupied complexes from much of the FHA's coverage. Accordingly, the FHA's comprehensive scheme protects religious exercise in those situations where enforcing non-discrimination in housing creates practical infringement risk. Moreover, as described below, in the rare circumstances when enforcing the FHA touches religious practice, any incidental burden is justified by the compelling interest in ending housing discrimination based on sex or other protected classes.

II. In the Rare Instances Where FHA Enforcement Incidentally Infringes on Religious Exercise, the Burden Is Justified by the Compelling Need to Eradicate Housing Discrimination

Even if RFRA could apply, it would not change the outcome here. RFRA asks whether a governmental policy imposes a substantial burden on religious exercise and, if so, whether the policy is the least restrictive means of advancing a compelling government interest. Even assuming Defendant could articulate a substantial burden, applying the FHA to bar the discriminatory requirement that residents must swim in sex-segregated fashion or be denied pool access on account of sex for virtually all pool hours is necessary to achieve the urgent national interest in eliminating housing discrimination.

A. The FHA's Non-Discrimination Requirements Further the Compelling Interest in Equal Access to Housing

Even assuming FHA compliance would impose a substantial burden on a religious practice, a RFRA defense to such compliance would fail because protecting residents against facial discrimination in housing and ensuring housing integration are compelling governmental interests, both in this case and in general. *See* 42 U.S.C. § 2000bb-1(b)(1). The FHA is the central mechanism for eradicating housing discrimination, an interest so compelling that it sparked a whole statutory and regulatory framework. Congress enacted the FHA in the wake of the assassination of Dr. Martin Luther King, Jr. with the ambitious aim of remedying the discriminatory denial of housing opportunities and ensuring truly integrated housing environments. *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (explaining the FHA's historical context).

Eliminating sex discrimination, which takes many forms, is integral to the FHA's goal of eradicating discrimination. Victims of domestic violence are often revictimized by the housing industry. Landlords might reject applications, deny lease renewals, or even evict domestic violence survivors in order to ensure safety on their property or minimize disruptions. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (Feb. 9, 2011), *available at* https://www.hud.gov/sites/documents/FHEODOMESTICVIOL

GUIDENG.PDF. Or a housing provider may impose "quid pro quo" terms, requesting sexual favors in exchange for services such as repairs or rent. *See West v. DJ Mortgage, LLC*, 271 F. Supp. 3d 1336, 1345 (N.D. Ga. 2017).[4] The Eighth Circuit noted that such conduct is especially "egregious" because one's home is where she is "entitled to feel safe and secure and [like she] need not flee." *Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010).

The pool schedule at issue here presents a different but no less concerning strain of discrimination: sex stereotyping. A common amenity has been divided into "men's hours" and "women's hours," which is concerning enough. What makes it worse is that the distribution of hours is predicated on the assumption that men work nine-to-five jobs, and thus need the pool after work, while women stay at home, and thus can swim during traditional work hours. The Supreme Court has long recognized that requiring women to conform to such stereotypes has no place in a coequal society. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

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[4] *See also* Bryce Covert, *Women in Baltimore Public Housing Were Forced to Trade Sex for Basic Repairs*, THINKPROGRESS (Jan. 9, 2016), *available at* https://thinkprogress.org/women-in-baltimore-public-housing-were-forced-to-trade-sex-for-basic-repairs-b649b58c9a05/#.fb0p1gbej; Gustavo Velasquez, *Battling Housing Discrimination: Victories Start with a Few Brave Women*, THE HUDDLE (Mar. 25, 2015), *available at* https://blog.hud.gov/index.php/2015/03/25/battling-housing-discrimination-victories-start-with-a-few-brave-women/ (Department of Housing and Urban Development sued housing providers who sexually harassed female tenants, in some cases forcing them to have sex or face eviction).

The challenged policy also imposes *some* residents' religious views to limit *all* residents' access to a shared amenity, requiring the pool to be segregated by sex nearly 75% of the time.

The interest in ending such discrimination is sufficiently compelling that, to the extent FHA compliance incidentally burdens religion here, it does so consistent with RFRA. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court stated that RFRA could not create exemptions from a bar on racial discrimination in hiring, given the "compelling interest in providing an equal opportunity to participate in the workforce without regard to race." 134 S. Ct. 2751, 2783 (2014). Likewise, the Court has held that the "compelling interest in eliminating discrimination against women" is sufficient to justify a potential infringement on expressive association. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 1948 (1987).

Thus, governing precedent teaches that RFRA's protections against infringement of religious exercise cannot be enforced to compromise the full realization of Congress's paramount interest in ending discrimination in housing, including but not limited to sex discrimination. By contrast, where the Supreme Court has granted religious adherents exemptions from neutral rules, it has explained that such an exemption would *not* compromise the stated interests underlying those rules. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (finding that permitting an inmate to grow a ½ inch beard would not undermine the interest in preventing

contraband); *Hobby Lobby*, 34 S. Ct. at 2782 (noting that the requested accommodation left room for an alternative that "serve[d] HHS's stated interests equally well"); *Wisconsin v. Yoder*, 406 U.S. 205, 221–26 (1972) (finding that permitting Amish to provide informal vocational education after the age of 14 would not undermine the stated interest in preparing children for participation in society).

Unlike in those cases, granting Defendant an exemption here—i.e., permitting it to continue to impose a facially discriminatory pool schedule on its residents that otherwise would violate the FHA—would directly undermine the interest in ending housing discrimination in ways both general and specific. *See Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 592 (6th Cir. 2018) ("Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to [this employee] as to any other employee discriminated against based on sex."). This is not merely an abstract interest, as illustrated by Plaintiff Curto's inability to access the pool most days because the women's hours conflict with her job. *See U.S. v. Virginia*, 518 U.S. 515, 534 (1996) (holding that "sex classifications . . . may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." (citation omitted)). The pool schedule's baseline of segregation has likewise impeded the Lusardis' efforts to use the pool for Mrs. Lusardi's rehabilitation. Thus,

the pool schedule not only undermines the FHA's general interest in eradicating discrimination, but also inflicts tangible and personal harm on the Plaintiffs.

B. The FHA Is the Least Restrictive Means of Eliminating Sex-Based Discrimination in Housing

Applying the FHA is also the least restrictive means of furthering the compelling interest at issue. *See* 42 U.S.C. § 2000bb-1(b)(2). Where an alternative option exists that furthers the government's interest "equally well," *see Hobby Lobby*, 134 S. Ct. at 2782, the government "must use it," *Holt*, 135 S. Ct. at 864 (citation omitted). But here, the best and only way to eliminate housing discrimination is to give full force and effect to the FHA as written. As the Sixth Circuit recently held, "[w]here the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement." *Harris*, 884 F.3d at 596 (applying Title VII, a comparable framework). Similarly, the Supreme Court has deemed civil rights statutes "precisely tailored" to their interest in ending discrimination. *Hobby Lobby*, 134 S. Ct. at 2783. That reasoning applies here.

It is especially critical to apply the FHA as written because, as discussed in Part I, *supra*, the Act is already carefully drawn. The FHA has carve-outs for religious housing and small owner-occupied dwellings, neither of which describes Defendant. Congress deliberately chose not to create any further religiously-based

exemptions from the prohibition on sex-based discrimination. That is because its purpose of eradicating housing discrimination and furthering housing integration can be fully achieved only by applying the FHA to covered dwellings as written. To upend the FHA's balanced scheme with a RFRA-based exemption for policies that *require* residents to segregate themselves would threaten the integrity of the whole framework. Some residents of multifamily dwellings may not wish to live alongside, swim with, or otherwise interact with other residents, for religious or other reasons. At the FHA's very core is the principle that such personal preferences cannot be enacted into official policy and so defeat Congress's insistence on the right to integrated living environments within the spheres that the FHA regulates.

That an exemption under RFRA would deny non-adherents like Plaintiffs the FHA's protection, and impose on them discriminatory rules they do not want, also supports a finding that the FHA is the least restrictive means. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 (considering "the burdens a requested accommodation may impose on nonbeneficiaries" (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). That distinguishes this case from *Hobby Lobby*, where permitting employers to avail themselves of the accommodation available to religious institutions did not interfere with employees' access to contraceptives. *Id.* at 2781–82. Indeed, NFHA is not aware of any Supreme Court authority that endorsed or permitted any known and direct burden on private parties—let alone an outright

denial of civil rights protections to which they otherwise would be entitled—when granting an exemption under RFRA. This case should not be the first.

This analysis is not changed by Defendant's argument that Plaintiffs' requested relief would have a discriminatory effect on Orthodox residents. *See* Appellee Br. at 21–22. Even assuming Orthodox residents could show sufficient disparate impact if Defendant, in its words, "abolish[ed] single-sex swimming," *id.*, the proper remedy would not be to institute a schedule like the one currently in place. The third stage of the disparate impact analysis—which Defendant did not address in its brief—evaluates whether there exist any "less discriminatory alternatives." *See Inclusive Cmtys.*, 135 S. Ct. at 2514; *see also* 24 C.F.R. § 100.500(c) (discussing whether the housing provider could institute "another practice that has a less discriminatory effect"). The challenged schedule, which imposes primarily sex-segregated swimming hours in a manner that disadvantages women who work, would not satisfy that standard because it is not less discriminatory; it "cures" potential disparate impact based on religion by discriminating explicitly and severely based on sex. Whatever room RFRA or the FHA itself may give a housing provider to accommodate legitimate and documented concerns that a facially neutral policy has a disparate impact based on religion, the blatantly discriminatory policy that Defendant imposed on all its residents is not among available options.

Indeed, there is no clear limiting principle that would prevent such exceptions from swallowing the FHA's rule. If the challenged schedule is permissible under RFRA regardless of the FHA violation, then what is to stop a housing provider from denying housing altogether to single women because many of its residents share the religious belief that women should not live alone, and sincerely believe it infringes their religious exercise to be exposed to single women living in sin? The FHA violation in that case would be more egregious, but the RFRA analysis—the compelling interests at stake and the narrow tailoring of the statute—is the same.

Conclusion

The FHA is a comprehensive civil rights statute that already accounts for religion both in what it protects and what it does not reach. This careful and balanced framework is the least restrictive means of eradicating housing discrimination, an interest that both Congress and the Supreme Court have deemed compelling. *Amicus Curiae* NFHA therefore urges this Court to reverse the district court's grant of summary judgment.

Dated: January 29, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

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

Dated: January 29, 2019

/s/ Lila Miller
Lila Miller

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 16.0.8431.2110) contains 3767 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.

Dated: January 29, 2019

/s/ Lila Miller
Lila Miller

IDENTICAL PDF AND HARD COPY CERTIFICATE

I hereby certify that the text of the electronic and hard copies of this brief are identical.

Dated: January 29, 2019

/s/ Lila Miller
Lila Miller

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Dated: January 29, 2019

/s/ Lila Miller
Lila Miller

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing Brief for National Fair Housing Alliance as Amicus Curiae 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.

Dated: January 29, 2019

/s/ Lila Miller
Lila Miller