No. 19-35390

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEREMY R. MORRIS; KRISTY MORRIS,
Plaintiffs - Appellants,

v.

WEST HAYDEN ESTATES FIRST ADDITION HOMEOWNERS ASSOCIATION, an Idaho corporation,
Defendant - Appellee.

On Appeal from the United States District Court
for the District of Idaho, No. 2:17-cv-00018-BLW

APPELLANTS' OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The Morrises respectfully suggest that oral argument would be helpful to the Court in resolving the multiple legal issues presented in this appeal.

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INTRODUCTION

The Fair Housing Act has a "broad and inclusive compass," *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995), that protects individuals from being discriminated against or harassed in the housing market—including on the basis of religion. The jury heard evidence that Jeremy and Kristy Morris endured violent threats, verbal harassment, intimidation, and insults. The jury heard evidence that the president of the Morrises' Homeowners Association didn't want them "pressing [their] beliefs in the neighborhood." ER 155–56 (Trial Tr. 87:7–88:10). And the jury heard evidence that the Homeowners Association just didn't want them in the neighborhood. ER 324 (Trial Tr. 237:6–13).

The jury found unanimously for the Morrises on their Fair Housing Act claims and awarded modest compensatory damages ($60,000) and punitive damages ($15,000). But the district court set aside the jury's verdict, granted judgment to the Homeowners' Association as a matter of law, and even granted an injunction against the Morrises and ordered them to pay the Homeowners Association's attorneys' fees. The district court acknowledged that it was declining to "defer[] to the wisdom of our Founders and trust[] that the jury's collective mind was able to more accurately assess the facts than my own"—but the court ultimately concluded that "[t]his case is simply different." ER 35 (Dkt. 118 at 33).

To reach that conclusion, the district court disregarded evidence of harassment and discrimination that this Court's precedent required it to consider. The district court substituted its own judgment for the jury's—impermissibly reweighing the evidence and improperly making credibility determinations. And it set aside the presumption that juries follow instructions—in addition to disregarding evidence that the jury should have been permitted to consider. The district court was free to disagree with the jury's verdict. But it was not at liberty to set aside that verdict as a matter of law.

It's easy to dismiss this case as just being about Christmas decorations and lights and nativity-scene camels, but it's really about religious discrimination and harassment—conduct no one should have to endure. The judgment should be reversed and the jury's verdict reinstated.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Morrises appeal from the district court's final judgment, entered on April 4, 2019, granting judgment as a matter of law for the Homeowners Association, ordering remittitur or a new trial in the alternative, and entering a permanent injunction against the Morrises on the Homeowners Association's counterclaim. ER 1 (Dkt. 119). The Morrises timely filed a notice of appeal on May 3, 2019. ER 62 (Dkt. 127). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether, in this Fair Housing Act case, the district court reversibly erred in setting aside a jury verdict for the plaintiffs and granting judgment as a matter of law to the defendant Homeowners Association where the district court:

   - Disregarded evidence of discrimination occurring after the homeowners purchased their home, in violation of this Court's precedent requiring that evidence to be considered;
   - Substituted its own judgment for that of the jury's in finding the evidence to be insufficient;
   - Disregarded substantial evidence supporting the jury's verdict; and
   - Cast aside the presumption that the jury followed the court's instruction to disregard evidence of harassment and discrimination by members of the Homeowners Association—which, in all events, was admissible.

2. Whether the district court reversibly erred in granting, in the alternative, a new trial or remittitur where the court improperly weighed the credibility of witnesses.

3. Whether the district court reversibly erred in issuing a permanent injunction against the homeowners on the Homeowners Association's counterclaim,

where the association acquiesced in the conduct that is the subject of the injunction and where the findings in support of the injunction are erroneous.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent materials are in the addendum. *See* Cir. R. 28-2.7.

STATEMENT OF THE CASE

I. Statement of Facts

A. The Morrises Purchase A Home In West Hayden.

Jeremy and Kristy Morris are residents of Idaho. ER 120 (Trial Tr. 383:22). They are Christians who believe in living out their faith and serving their community. ER 141 (Trial Tr. 22:12–13).

In October 2014, in lieu of passing out Halloween candy to the local trick-or-treaters, the Morrises decided to set up an old-fashioned cotton candy machine on their driveway. ER 141–42 (Trial Tr. 22:18–23:12). Children flocked to the Morrises' home, and the runaway success gave the Morrises an idea: Why not do the same thing for the Christmas season, along with serving hot chocolate and singing Christmas carols? ER 141–42 (Trial Tr. 22:18–23:12).

Their plans soon came to fruition. The Morrises' first Christmas program was held in December 2014 and met with enormous success. ER 142–43 (Trial Tr. 23:23–24:8). It ran from December 15–22, and featured cotton candy, candy canes, hot chocolate, Christmas lights, and appearances by Santa. ER 142–43 (Trial Tr.

23:20–24:3). The Morrises used the opportunity to accept donations to local charities serving children who are homeless or suffering from cancer. ER 142 (Trial Tr. 23:13–16); ER 182 (Trial Tr. 208:5-8); ER 175 (Trial Tr. 167:16-19).

Shortly thereafter, the Morrises decided to purchase a new home—with an eye to continuing their Christmas program in subsequent years. ER 143 (Trial Tr. 24:4–15). Through their realtor, the Morrises came across the West Hayden home where they currently reside—and, as he was legally required to do, their realtor provided them with a copy of the West Hayden Homeowners Association covenants, conditions, and restrictions ("the rules"). ER 143 (Trial Tr. 24:9–15).

The Morrises carefully reviewed the rules to ensure they would not prevent the Morrises from hosting their Christmas program. ER 143 (Trial Tr. 24:14–18). The Morrises and their realtor even retained outside counsel to make absolutely certain the rules would not bar the program. ER 143 (Trial Tr. 24:19–23). Finding no obstacles, the Morrises made an offer on the home, and their offer was accepted. ER 143 (Trial Tr. 24:21–23).

In keeping with the teachings of their faith, the Morrises sought from the very beginning to be good neighbors in their new community. In early January 2015, Jeremy Morris called Jennifer Scott, the president of the Homeowners Association, to discuss his plans for future Christmas programs and address any potential concerns well in advance. ER 143–44 (Trial Tr. 24:24–25:5). Her response

reassured him: She said she was looking forward to the program and believed it would be a great idea for the community. ER 144 (Trial Tr. 25:6–8).

But behind the scenes, opposition to the Morrises was building. On January 14, 2015, the board of the Homeowners Association—which included Scott—began circulating, internally, a draft letter addressed to the Morrises, identifying several ways in which the Morrises' proposed Christmas program allegedly violated the rules. ER 8–9 (Dkt. 118 at 6–7). In particular, the Homeowners Association raised concerns about provisions requiring single-family residential use of property, limiting noise, and restraining excessive lighting. ER 193 (Ex. 3005).[1]

Those were not the only considerations on the Homeowners Association's mind. An initial draft of the letter prepared by a former board member concluded:

> And finally, I am somewhat hesitant in bring [sic] up the fact that some of our residents are avowed atheists and I don't even want to think of the problems that could bring up. It is not the intention of the Board to discourage you from becoming part of our great neighborhood but we do not wish to become entwined in any expensive litigation to enforce long standing rules and regulations and fill our neighborhood with the riff-raff you seemed to attract over by WalMart.. [*sic*] Grouse Meadows indeed!!! We don't allow "those kind" in our neighborhood.

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[1] *See* ER 194–237 (Ex. 3001) (CC&R 5.1.3 ("No owner may modify or decorate the exterior of any building . . . without the prior written consent of the Board[.]"); CC&R 5.4.1 ("No dwelling unit shall be used for any purpose other than single-family residential purposes."); CC&R 5.4.2 ("No noise or other nuisance shall be permitted to exist or operate upon any portion of the Property so as to be offensive or detrimental to the Property or to its occupants or to other property in the vicinity or to its occupants."); CC&R 5.4.15 ("Lighting shall be restrained in design, and excessive brightness shall be avoided."); CC&R 5.5.2 ("No . . . livestock . . . shall be raised, bred or kept on any lot[.]")).

ER 9 (Dkt. 118 at 7); ER 144–45 (Trial Tr. 25:14–26:8). After internal discussions among the Homeowners Association's board members, the letter was subsequently revised to read as follows:

> And finally, I am somewhat hesitant in bringing up the fact that some of our residents are non-Christians or of another faith and I don't even want to think of the problems that could bring up. It is not the *intention* of the Board to discourage you from becoming part of our great neighborhood but we do not wish to become entwined in expensive litigation to enforce long standing rules and regulations and fill our neighborhood with the hundreds of people and possible undesirables.

ER 9 (Dkt. 118 at 7) (emphasis added by the district court); ER 145 (Trial Tr. 26:16–20); *see* ER 193 (Ex. 3005). The Homeowners Association delivered the letter to the Morrises. ER 145 (Trial Tr. 26:21–24).

Shocked by the sudden about-face, Jeremy Morris called Jennifer Scott, the Homeowners Association's president, in search of an explanation. ER 145–46 (Trial Tr. 26:25–27:1). She rebuffed him, suggesting he should be thanking her because she "got them to tone that letter down a bit." ER 146 (Trial Tr. 27:1–3). Nonetheless, still hoping for an amicable resolution, Jeremy asked to meet with the Homeowners Association's board, and the board agreed. ER 146 (Trial Tr. 27:5–13).

Jeremy met with the board on January 27, 2015, and the board agreed that Christmas lights were not prohibited by the rules and that the Morrises had sufficiently planned to address any traffic, parking, and security issues associated

with the Christmas program. ER 146 (Trial Tr. 27:14–23). Following this ostensibly successful meeting, Jeremy believed the matter was resolved. ER 146 (Trial Tr. 27:24–25). The Homeowners Association, however, had other ideas.

B. The Morrises Are Subjected To Discrimination And Harassment—Including A Death Threat.

Even before they moved into the neighborhood, the Morrises were met with a frosty reception. The reason soon became clear: As Christina Breazeal—the previous occupant of their home—explained to the Morrises, the Homeowners Association had resorted to walking a letter around the neighborhood in an attempt to drum up opposition to the Morrises' plans. ER 162–64 (Trial Tr. 110:10–112:10). Even more disturbingly, Breazeal's husband explained that the Homeowners Association did not want the Morris family's Christian beliefs "pressed on the community because there w[ere] nonbelievers in the community." ER 155–56 (Trial Tr. 87:21–88:1).

Following these revelations, Jeremy sought legal advice from a law firm focused primarily on religious liberty issues. ER 323 (Trial Tr. 484:13–19). On February 9, 2015, that firm drafted and mailed a letter to all members of the Homeowners Association, rebutting the charges made against the Morrises and explaining that their planned program—grounded as it was in their faith commitments—was a protected exercise of religious freedom. ER 99 (Trial Tr. 743:10–13); ER 286 (Dkt. 1 at 6).

The Homeowners Association convened an emergency meeting on February 13, 2015, to which the Morrises were not invited. ER 334–35 (Trial Tr. 601:24–602:8). The Association circulated a letter in advance of the meeting stating that "this type of traffic and event is in violation of the [rules.]" ER 189 (Ex. 3006). But the rules had, for years, been applied inconsistently.

For instance, to the extent the Homeowners Association was concerned about traffic, the Morrises presented evidence of large-scale football parties in the neighborhood that frequently led to congestion—with as many as 50 cars lined up along the street ER 157–58 (Trial Tr. 90:12–91:17). Every Fourth of July, neighbors blocked access to the street with a fireworks display that lasted for hours. ER 131 (Trial Tr. 432:22–25); ER 132 (Trial Tr. 434:19–25); ER 329 (Trial Tr. 509:4–8). And the Homeowners Association itself hosted "block parties" that obstructed the street completely. ER 131 (Trial Tr. 432:3–12).

Nonetheless, the Homeowners Association's attorney sent a demand letter to the Morrises—warning them that their Christmas program would violate the Association's rules, and threatening legal action should the Morrises proceed. All of this was directly contrary to the Homeowners Association's initial position that the program complied with the rules. ER 185–88 (Ex. 3035); ER 121 (Trial Tr. at 400).

Community hostility toward the Morrises continued to build, particularly as the time of the Morrises' Christmas program approached. Most disturbingly, the Morrises' neighbor, Larry Bird, came to the end of their driveway and in front of Kristy threatened to have Jeremy murdered, warning that "we have enough guns and ammunition that will take care of you." ER 122–23 (Trial Tr. 402:16–403:5).

The Morrises refused to be intimidated, and the 2015 Christmas program went forward as planned. Just like the year before, it was an enormous success—and the Homeowners Association's purported fears turned out to be unfounded. As one attendee recounted, "there wasn't really any noise to speak of. I mean, just people talking. There was one part where they sang Christmas carols, but not over speakers or anything, just people's voices." ER 178 (Trial Tr. 179:11–14).

Santa stood in front of the garage, tables along the side of the driveway served hot chocolate, and a live nativity scene—complete with a tame camel named Dolly—was set up to the right of the driveway. ER 177–78 (Trial Tr. 178:25–179:4). The Christmas lights were no brighter than any other "really well-decorated house during Christmas," ER 178 (Trial Tr. 179:18–24), and the Morrises also arranged for buses to transport attendees to their home in an attempt to diminish traffic and reduce the number of cars in the neighborhood, ER 104 (Trial Tr. 241:6–8). That year, all donations went to the Children's Village, a transitional home for homeless and abused children. ER 175 (Trial Tr. 167:14–19); ER 182 (Trial Tr. 208:5–8).

Following the success of their first Christmas program in their new neighborhood, the Morrises sought to defuse any lingering conflict with their neighbors. In January 2016, Jeremy spoke with Ron Taylor, then-president of the Homeowners Association, about the neighborhood's hostility. ER 325 (Trial Tr. 498:5); ER 327 (Trial Tr. 500:1–20). Jeremy sought an answer to one simple question: "[W]hy does everyone keep coming after me?" ER 327 (Trial Tr. 500:16–17). Taylor's response was blunt and to the point: "Because someone in this association doesn't like Christmas." ER 327 (Trial Tr. 500:18–20).

C. The Harassment Of The Morrises Escalates.

Not even the success of the 2015 program—and the abundant evidence of its small footprint and limited impact on the neighborhood—was enough to placate the West Hayden community. For example, in the lead up to the program a neighbor screamed obscenities at a volunteer that he "did not live in this neighborhood" and that he "was not welcome in the neighborhood." ER 170 (Trial Tr. 142:2–142:18).

During the 2016 Christmas program, one visitor was accosted by a neighbor cursing and kicking her vehicle, demanding to know "why are you in my neighborhood? Why are you here?" ER 166 (Trial Tr. 118:9–14); ER 169 (Trial Tr. 136:22–24). Another visitor was told that he "[wasn't] welcome in that neighborhood and . . . didn't belong there." ER 183 (Trial Tr. 210:3–7).

II. Procedural History

With the situation in the neighborhood escalating, the Morrises sought relief in court, filing this suit and alleging violations of the Idaho Human Rights Act, Idaho Code § 67-5909, and the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604, 3617. ER 290–92 (Dkt. 1 at 10–12). The Morrises requested injunctive relief—specifically, de-annexation of the Morrises' home from the Homeowners Association and mandatory antidiscrimination training for Association members—as well as compensatory and punitive damages. ER 292–93 (Dkt. 1 at 12–13).

The Homeowners Association moved to dismiss the Morrises' complaint under Rule 12(b)(6) for failure to state a claim and lack of jurisdiction, asserting that the Morrises failed to exhaust their state-law remedies. ER 280 (Dkt. 6 at 2). The district court dismissed the Morrises' state-law claims, but denied the Homeowners Association's motion with regard to the FHA claims. ER 60 (Dkt. 18 at 10).

Shortly thereafter, the Homeowners Association filed its answer, including a counterclaim against the Morrises for alleged breach of the rules and seeking an injunction barring the Morrises from hosting their Christmas program. ER 271–78 (Dkt. 19 at 12–19). The district court denied the Morrises' motion to dismiss the counterclaim. ER 50 (Dkt. 41 at 7).

After discovery closed, the Homeowners Association moved for summary judgment. The court denied summary judgment, explaining that:

> [I]f I were to grant summary judgment, I think the Ninth Circuit would reverse me almost immediately. I think the

> letter . . . may have been an attempt to offer some type of conciliation or recognition of sensitivity to others' religious beliefs. The problem, though, is the summary judgment standard, which requires that the court construe the evidence and any reasonable inference that can be drawn from the evidence in a light most favorable to the plaintiff. So the question is whether a jury could . . . view that as evidencing a discriminatory intent. And I just have to say: I think they could.

ER 241 (Dkt. 59, 41:12–42:3). The case then proceeded to trial in October 2018. ER 38 (Dkt. 65 at 1).

The jury heard extensive testimony from Jeremy Morris and his neighbors about the discrimination and harassment suffered by the Morrises. ER 138–39 (Trial Tr. 2–3); ER 100–02 (Trial Tr. 226–228); ER 321 (Trial Tr. 459). After deliberating for 15 hours, the jury returned a unanimous verdict in the Morrises' favor—finding that the Homeowners Association violated several provisions of the FHA and awarding compensatory ($60,000) and punitive ($15,000) damages. ER 94–95 (Dkt. 103 at 1–2).

The Homeowners Association moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, asserting that the jury's finding—"that Plaintiffs were intentionally discriminated against, at least in part, because of their religion"—was "not supported by substantial evidence." ER 91 (Dkt. 110 at 11).

The district court granted the motion—overturning the jury verdict, ruling for the Homeowners Association on its counterclaim, permanently enjoining the

Morrises from hosting their Christmas program in their neighborhood, and ordering the Morrises to pay the Homeowners Association's attorneys' fees. ER 36–37 (Dkt. 118 at 34–35). The court also ordered a new trial in the alternative and remitted the damages to a total of $2.

The district court acknowledged that it was declining to "defer[] to the wisdom of our Founders and trust[] that the jury's collective mind was able to more accurately assess the facts than my own," because "[t]his case is simply different." ER 35 (Dkt. 118 at 33).

STANDARD OF REVIEW

Judgment as a matter of law is improper unless the evidence, construed in the light most favorable to the nonmoving party, permits only one conclusion—a conclusion that is contrary to the jury's findings. *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th Cir. 2000).

This Court reviews *de novo* a district court's decision to grant judgment as a matter of law. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). In doing so, the Court "gives significant deference to the jury's verdict and to the nonmoving parties . . . when deciding whether that decision was correct." *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1036 (9th Cir. 2018) (alterations in original, citations and internal quotation marks omitted).

A district court's decision to grant a conditional motion for new trial under Rule 59 is reviewed for abuse of discretion—which may be shown if the jury's verdict was not actually against the clear weight of the evidence. *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009); *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). As a general rule, "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter." *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) (quoting 11 Charles Alan Wright & Arthur A. Miller, Federal Practice and Procedure § 2806 (1973)).

This Court reviews the decision to grant an injunction for an abuse of discretion. *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1030 (9th Cir. 2013).

SUMMARY OF THE ARGUMENT

The district court reversibly erred in substituting its own judgment for the jury's and setting aside the verdict, which found the Homeowners Association liable for discriminating against the Morrises and harassing them in violation of the FHA.

I. The Fair Housing Act, 42 U.S.C. § 3604, prohibits discrimination in the housing market on the basis of religion. In ruling that the Morrises had not put forward sufficient evidence, the district court committed multiple legal errors.

First, in violation of this Court's precedent, the district court erroneously ignored all evidence of discrimination that occurred *after* the Morrises purchased their home. This Court has squarely held that evidence of discriminatory conduct occurring both before *and* after the purchase of a home can be used to support an FHA claim. *Comm. Concerning Cmty. Improvement v. Cty. of Modesto*, 583 F.3d 690, 714 (9th Cir. 2009) ("*CCCI*"). Under the proper legal standard, ample evidence supports the jury's verdict—including the Homeowners Association president's statement that the Association sought to prevent the Morrises from "pressing [their] beliefs in the neighborhood," ER 155–56 (Trial Tr. 87:7–88:10), as well as the letter the Homeowners Association sent to the Morrises, singling out their religious beliefs as a reason the Homeowners Assocation was concerned about the Morrises purchasing a home in West Hayden Estates (with previous drafts of that letter revealing an even more explicit distaste for the Morrises' faith).

Second, the district court applied the wrong legal standard in believing that § 3604(c) of the FHA always requires proof of *intent* to discriminate, when in fact a violation can *also* be proved by showing that an ordinary reader would find "that a particular [class of persons] is preferred or dispreferred." *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991). As the jury found, the letter sent to the Morrises reflected a preference that a non-religious individual—or, at the very least, an individual with religious beliefs other than those of the Morrises—purchase the

Morrises' home. The district court's decision was error twice over: In demanding that the Morrises demonstrate intent, rather than preference, the district court applied an incorrect legal standard. And in substituting its own interpretation of the contested language for that of the jury's, the district court usurped the jury's role.

Third, the district court ignored evidence that the Homeowners Association interfered with the Morrises' practice of their faith. The Homeowners Association hand-delivered false and inflammatory information regarding the Morrises to neighborhood residents, called emergency meetings with the aim of shutting down the Morrises' Christmas program, and sent letters demanding the program be shut down and threatening legal action. The district court failed entirely to reckon with this evidence. The jury saw it for what it was, and returned a verdict for the Morrises—and that verdict should be reinstated.

The district court doubled down on its errors by instructing the jury not to consider evidence of discrimination and harassment by the members of the Homeowners Association—and then setting aside the presumption that juries follow instructions. The evidence was proper for the jury to consider as a matter of law, however, because the statute, federal regulations, and case law all permit liability where, as here, a Homeowners Association knows about discriminatory housing practices, has the tools to address those practices, and fails to do so. 24 C.F.R. § 100.7. All three elements are satisfied here.

It is indisputable that the Homeowners Association here knew about the discrimination the Morrises faced from their neighbors—indeed, the Homeowners Association was the architect of much of that discrimination, and neighborhood residents simply followed the Homeowners Association's lead. The Morrises presented extensive trial testimony about the death threat and explicitly anti-religious statements with which they were forced to contend. In instructing the jurors not to consider this (admissible) evidence and then declining to consider the evidence itself, the district court reversibly erred. The Homeowners Association was not entitled to judgment as a matter of law, and the jury's verdict should be reinstated.

II. The Homeowners Association is not entitled to a new trial either. The clear weight of the evidence, which includes extensive testimony from the Morrises and the Homeowners Association members as well as evidence of selective enforcement by the Homeowners Association, amply supports the jury's verdict for the Morrises. The sole reason given by the district court for its ruling was its own opinion that Jeremy Morris was simply less credible than Jennifer Scott (the former Homeowners Association President). But that assessment, which primarily rests on spurious notions of "inconsistencies" in Jeremy's testimony, does not withstand scrutiny. Similarly flawed is the district court's remittitur of the damages to only $1 in compensatory damages and $1 in punitive damages.

III. Finally, the district court reversibly erred in ruling for the Homeowners Association on its counterclaim and enjoining the Morrises' Christmas program. Equity demands clean hands, and the Homeowner Association's were anything but. The Homeowners Association had originally assured the Morrises that their program did not violate the rules—so they acquiesced in the very conduct they sought to enjoin. In all events, the findings of fact that the district court ultimately adopted—prerequisites to the Homeowners Association's success on their counterclaim—are clearly erroneous. The injunction should be vacated for that reason, too.

ARGUMENT

I. The District Court Reversibly Erred By Granting Judgment As A Matter Of Law And Setting Aside The Jury's Verdict.

The district court committed multiple errors in overriding the jury's verdict and granting judgment as a matter of law. Any one of these errors is sufficient for this Court to reverse and reinstate the jury's verdict, which rests on ample evidence. Taken together, these errors compel that result.

Most fundamentally, the district court impermissibly substituted its own judgment for the jury's—ignoring evidence it was bound by this Court's precedent to consider, and reweighing evidence to reach a result contrary to the jury's findings.

A. The District Court Ignored Evidence This Court's Precedent Required It To Consider, And Impermissibly Re-Weighed The Evidence It Did Consider, On The Morrises' § 3604(b) Claims.

The Fair Housing Act makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services of facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). To prove discrimination under § 3604(b), the Morrises had to show that they are (1) members of a protected class (i.e., people of faith), and (2) that they were treated differently than other homeowners because of their membership in that class (i.e., because they are religious). *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). The Morrises were not required "to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016).

The evidence presented to the jury—especially when considered in the light most favorable to the jury's verdict—amply satisfied the Morrises' evidentiary burden. In nonetheless setting aside the jury's unanimous findings that the Homeowners' Association violated § 3604(b), the district court made two fundamental, legal errors: (1) ignoring all of the evidence of discriminatory conduct that took place *after* the purchase, in direct contravention of this Court's decision in *CCCI*, and (2) setting aside the jury's findings despite the substantial evidence that supported them. Either error is sufficient to justify reversal.

1. In keeping with the FHA's broad mandate to prevent discrimination in the housing market, this Court has held that an FHA plaintiff can rely on evidence of discriminatory conduct occurring not only *before* the plaintiffs acquire their home, but also *after*. *CCCI*, 583 F.3d at 714. In *CCCI*, residents of unincorporated neighborhoods near the city of Modesto alleged that the city discriminated against them in the provision of municipal services based on their race, ancestry, color or national origin, in violation of the FHA. *Id.* at 711. The district court held that the FHA did not apply because the alleged conduct involved discrimination against people who were *already* homeowners and renters. *Id.* This Court reversed and held that "the FHA reaches *post-acquisition* discrimination." *Id.* at 712–14 (emphasis added).

The district court made no secret of its disagreement with *CCCI*, saying at the summary judgment hearing:

> I may write a decision because I—frankly, if only because I've got a bone to pick with the Ninth Circuit, I think the decision I cited to earlier [*CCCI*] which is inconsistent with the decision by the Seventh Circuit which I do agree with—I think it might be worthwhile to include language to that effect just in the event that this record goes up on appeal at some point. But I'll have to decide whether I want to take the time to do that.

ER 241–42 (Summary Judgment Tr. 42–43). At the hearing, however, the court went on to correctly recognize the propriety of considering post-purchase conduct under *CCCI* and properly concluded that the question was for the jury to decide:

> [T]he plaintiffs will be able to show at trial that, in fact, there was discriminatory intent in writing the letter and in taking the actions which have been and subsequently were taken by the homeowners association. That's something the jury is going to have to sort out. And I'm only saying that there is enough evidence that a jury should be allowed to consider the case, and that's going to be the decision of the court.

ER 242 (Summary Judgment Tr. 43). The court then denied summary judgment for the Homeowners Association. ER 242 (Summary Judgment Tr. 43).

At trial, the Morrises submitted ample evidence that—both before and after they purchased their home—the Homeowners Association discriminated against them. In particular, the jury heard evidence that *after* the Morrises purchased their home, the Association selectively enforced the rules against them. For example, the seller of the Morrises' home testified that he had routinely hosted parties with 30 to 80 people at his home, and that it was common for "30, 40, [or] 50 vehicles" to be parked on the public road in front of his home during these events. ER 157 (Trial Tr. 90:18–24); ER 160 (Trial Tr. 98:3–7); ER 161 (Trial Tr. 106:19–20). Unlike the Morrises, however, the previous owner was never reprimanded by the Homeowners Association, despite hosting the parties on a weekly basis during football season at the exact same property. ER 158 (Trial Tr. 91:6–11).

There was also evidence of a neighbor's "large fireworks display[s]," in the middle of the street, taking place "every Fourth of July" without any action by the Association, ER 131 (Trial Tr. 432:22–25); ER 132 (Trial Tr. 434:19–25); ER 329

(Trial Tr. 509:4–7).[2] Yet the Morrises—who took several precautions to minimize traffic during their Christmas program to keep the roads clear, *see, e.g.*, ER 154 (Trial Tr. 61:2–10) (attendee stating that they took buses and there was no program traffic on the street where the Morrises lived); ER 128 (Trial Tr. 418:7–9) (Morrises also had traffic attendants)—were subject to extensive scrutiny and threatened with legal action. ER 121 (Trial Tr. 400:4–21).

The evidence presented at trial thus entitled the jury to unanimously conclude that the Homeowners Association "intentionally discriminated against Mr. and Mrs. Morris, at least in part due to their religion, *after the purchase* of their home." ER 94 (Dkt. 103 at 1) (emphasis in original).

That should have been the end of the matter. But after the jury rendered its verdict, the district court substituted its own judgment and set aside the jury's verdict. In doing so, it inexplicably ignored all evidence of *post*-purchase discrimination by discussing *only* the Homeowners Association's *pre*-purchase conduct (i.e. the January 2015 letter), which it found to be insufficient. ER 16–17

[2] In addition, there was also evidence, erroneously excluded by the district court because the district court believed it was irrelevant to the Homeowners Association's liability, *see* Section I.D, *infra*, of discriminatory conduct by homeowners in West Hayden—including a death threat against Jeremy Morris, ER 122 (Trial Tr. 402:16–403:5), and aggression toward program volunteers and visitors, ER 170 (Trial Tr. 142:2–18); ER 183 (Trial Tr. 210:3–7). This evidence provides further support for the jury's finding of discrimination. ER 94 (Dkt. 103 at 1).

(Dkt. 118 at 14–15). This directly contravenes this Court's holding in *CCCI*, which required the district court to consider the evidence of *post*-purchase discrimination as well. *CCCI*, 583 F.3d at 714 ("[T]he FHA does apply to post-acquisition discrimination, and the District Court erred in deciding otherwise.").

The district court was certainly free to express its disagreement with *CCCI*, but it was not at liberty to ignore it altogether. In doing so, the district court committed reversible error by ignoring evidence that was properly considered and credited by the jury.

2. Even if the district court were free to ignore *post*-purchase evidence of discriminatory conduct (and it was not under *CCCI*), it still erred in setting aside the jury's finding on the Morrises' § 3604(b) claim, ER 94–95 (Dkt. 103) (jury verdict form), because viewing the evidence in the light most favorable to the jury's verdict, the Morrises' claim was also supported by substantial evidence of discrimination *before* the Morrises purchased their home.

The jury had before it evidence concerning a letter the Homeowners Association sent to the Morrises before they purchased their home expressing "concern" about their religious practices: "And finally, I am somewhat hesitant in bringing up the fact that some of our residents are non-Christians or of another faith and I don't even want to think of the problems that could bring up." ER 193 (Exhibit 3005) (January 2015 letter). The same letter stated that "we do not wish to . . . fill

our neighborhood with the hundreds of people and possible undesirables." *Id.* These statements alone are sufficient evidence to find that the religion was at least a motivating factor in the Homeowners Association's attempts to shut down the Morrises' Christmas program and drive the Morrises from the neighborhood. *See Ave. 6E Investments*, 818 F.3d at 504.

Earlier drafts of the letter disclose even more explicit anti-religious animus that was later "toned down" in the final version. ER 105–06 (Trial Tr. 266:22–267:25). At trial, one of the Homeowners Association's witnesses confirmed that an earlier draft expressed concern about "people of other faiths," and that he had voiced his opinion that he "didn't believe that that belonged in the letter." ER 107 (Trial Tr. 268:1–14); *see also* ER 332 (Trial Tr. 564:15–565:4); ER 322 (Trial Tr. 482:17–22); ER 338 (Trial Tr. 632:5–17). It stated, "I am somewhat hesitant in bring up the fact that some of our residents are avowed atheists and I don't even want to think of the problems that could bring up . . . we do not wish to . . . fill our neighborhood with the riff-raff you seemed to attract." ER 144–45 (Trial Tr. 25:14–26:8).[3]

[3] Contrary to the district court's views, ER 10 (Dkt. 118 at 8), it does not matter that the letter was written by an agent rather than a member of the Homeowners Association. *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (corporate landlord vicariously liable for actions of agent property manager). In all events, the letter was also sent to the board members for their review, edited by board members, and sent to the Morrises by a board member—and whether or not it received "formal approval" by the board, it is still *evidence* of discrimination.

The jury also heard Jeremy Morris's testimony that the Homeowners Association president discussed his religion with him on January 7th, before the Homeowners Association sent him the letter. Trial Tr. ER 132–33 (Trial Tr. 452:17–453:14). The president later stated that the board did not want the Morrises pressing their beliefs in the neighborhood. ER 155–56 (Trial Tr. 87:7–88:10).

In sum, especially when viewed in the light most favorable to the verdict, the evidence was more than sufficient to support the jury's separate, independent findings of intentional discrimination, in violation of section 3604(b) before *and* after the Morrises purchased their home. The district court reversibly erred in setting aside those findings.

B. The District Court Applied The Wrong Legal Standard In Setting Aside The Jury's Finding On The Morrises' § 3604(c) Claim.

In addition to prohibiting discrimination in the housing market based on religion, the FHA also imposes liability for making statements indicating a preference based on religion. 42 U.S.C. § 3604(c). "[A] plaintiff may prove a § 3604(c) violation in one of two ways: by proof that the defendant made the statement with the actual intent to discriminate . . . ***or*** by proof that an 'ordinary listener' would

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Nor does it matter that some members of the board are Christians like the Morrises. *See, e.g.*, *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426, 461 (S.D.N.Y. 2017) (sustaining FHA claim against village based on discrimination against Orthodox Jewish individuals, even though mayor of village identified as Jewish).

naturally interpret the statement as indicating a preference." *Fair Hous. Res. Ctr., Inc. v. DJM's 4 Reasons Ltd.*, 499 F. App'x 414, 415 (6th Cir. 2012) (emphasis added); *Jancik v. Dep't of Hous. & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995).

That is, to prevail on a § 3604 claim, plaintiffs need not prove actual intent, *McNamara v. F 48*, 83 F.3d 427, 427 (9th Cir. 1996) (tbl.), if they can show that a statement "suggests to an ordinary reader that a particular [class of persons] is preferred or dispreferred." *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991). In setting aside the jury's finding for the Morrises on their § 3604(c) claim, however, the district court reversibly erred in conflating the two ways of proving a § 3604 claim and grafting an intent requirement onto the ordinary-reader standard—and then concluding that the Morrises failed to carry that evidentiary burden.

1. As courts have held, § 3604(c) is "an objective, strict-liability . . . standard," *Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n, Inc.*, 682 F. App'x 768, 799–800 (11th Cir. 2017), that derives from the statute's use of the word "indicating." *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993). As a result, even if the record is devoid of "discriminatory intent," a court can "still conclude[] that an ordinary reader would find that [a statement] expressed a [ ] preference." *Id.* at 907. A violation of § 3604 thus occurs whenever an ordinary listener or reader "would have interpreted [the] statements . . . to suggest an impermissible *preference*," e.g., a preference against

religion, regardless of the speaker's intent. *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992) (emphasis added).[4]

Consistent with § 3604(c), the jury here was asked whether the 2015 letter to the Morrises from the Homeowners Association expressed "a preference that a non-religious individual purchase Mr. and Mrs. Morris' home." ER 94–95 (Dkt. 103) (jury verdict form). In setting aside the jury's finding, the district court neglected the "touchstone" of the § 3604(c) analysis—whether the "message" suggested, to an ordinary reader, a *preference* against religion, *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 53 (2d Cir. 2015) (quoting *Ragin*, 923 F.2d at 1000), and focused instead on the Homeowners Association's self-serving disclaimer that "'[i]t is not the *intention* of the Board to discourage you from becoming part of our great neighborhood.'" ER 18 (Dkt. 118 at 16) (emphasis added).

The court described this as "the clearest statement of the Homeowners Association's *intent*." ER 18 (Dkt. 118 at 16) (emphasis added). But discriminatory intent is not required to prove a violation of § 3604(c), *Ragin*, 923 F.2d at 907, so lack of intent cannot be a permissible basis for setting aside a jury finding on a §

[4] *See also Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577 (6th Cir. 2013) (emphases added) ("[A]n ad violates the statute if it suggests to an ordinary reader that a particular group is '*preferred* or *dispreferred*.'"); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) ("To the ordinary reader the natural interpretation of the advertisements published in The Courier is that they indicate a racial *preference*." (emphasis added)).

3604(c) claim that, like this one, proceeds under an ordinary-reader theory. The district court reversibly erred in concluding otherwise and imposing a burden on the Morrises to prove an element of their claim that neither the statute nor the case law requires.

Under the proper ordinary-reader standard, it was of course the jury's—not the court's—role to weigh the evidence and draw "legitimate inferences from the facts." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In determining whether to direct a verdict in defendant's favor, the court was obligated to "give[ ] *significant* deference to the jury's verdict and to the nonmoving parties." *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1036 (9th Cir. 2018) (emphasis added). Had the district court examined the evidence through the correct lens, it would have been plain that there was a "legally sufficient basis for a reasonable jury to find," that the Homeowners Association's letter "indicate[d] to an ordinary reader" that the Homeowners Association had a preference against the Morrises' religion. *Krechman v. County of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013).

2. In applying the ordinary-reader standard, courts do not require evidence of preference to "jump out at the reader." *Jancik*, 44 F.3d at 556. Instead, courts "have found . . . that the statute is violated by [for example by] 'any ad that would discourage an ordinary reader of a particular [protected group] from answering it.'" *Id.* (quoting *Ragin*, 923 F.2d at 999–1000).

Here, the letter states: "[S]ome of our residents are non-Christians or of another faith and I don't even want to think of the problems that could bring up." ER 10 (Dkt. 118 at 8); ER 193 (Ex. 3005). It goes on to say: "[W]e do not wish to . . . fill our neighborhood with the hundreds of people and possible undesirables." ER 193 (Ex. 3005). An ordinary reader, who is "neither the most suspicious nor the most insensitive person in our society," *Miami Valley*, 725 F.3d at 575, could have reasonably drawn the inference that the letter expressed a preference against Christians. At the very least, the letter does not require the *opposite* conclusion—that it does *not* express a preference against Christians—and that is all the Morrises must show for the jury's verdict to be reinstated. *McLean*, 222 F.3d at 1153 (JMOL requires that the evidence, construed in the light most favorable to the nonmoving party, only permits a conclusion contrary to the jury's findings.).[5]

Other courts facing similar facts have held that an inference of discriminatory preference was reasonable. The use of all-white models in housing advertisements, for example, was held to be a sufficient "expression of a racial preference" such that a jury could find liability under § 3604(c). *Ragin*, 923 F.2d at 1000. So too with

[5] The district court thought the letter could be read in only one possible way: as an "an attempt to express a concern that Plaintiffs' Christmas program, if allowed to proceed, would leave non-Christian homeowners in the West Hayden Estates with the impression that an exception was being made to the [rules] in favor of Christians." ER 10 (Dkt. No. 118 at 8). Merely to state that rationale is to refute it.

respect to a preference based on familial status expressed by an email to a tenant who had recently become the guardian of a child, stating that if the "guardianship is long term, we need to have [a] direct discussion about the continuing material breach of our lease agreement." *Na'im v. Sophie's Arms Fine Residences*, 2015 WL 401257, at *7 (S.D. Cal. Jan. 8, 2015).[6]

Perhaps the best explanation for why an ordinary reader could interpret the Homeowners Association's letter as expressing a preference against religion was offered by the district court itself in denying summary judgment:

> [I]f I were to grant summary judgment, I think the Ninth Circuit would reverse me almost immediately. I think the letter . . . may have been an attempt to offer some type of conciliation or recognition of sensitivity to others' religious beliefs. The problem, though, is the summary judgment standard, which requires that the court construe the evidence and any reasonable inference that can be drawn from the evidence in a light most favorable to the plaintiff. So the question is whether a jury could . . . view that as evidencing a discriminatory intent. And I just have to say: I think they could.

[6] *See also Watson v. Palm Crest Apartments*, 2007 WL 9706307, at *5 (C.D. Cal. 2007) (publication stating that children under fourteen must "be supervised at all times" on the property could have indicated a preference based on familial status); *Rojas v. Bird*, 2014 WL 260597, at *2 (C.D. Cal. 2014) (granting summary judgment for plaintiffs and finding that a notice listing "noisy children" as an example of a violation of community rules was sufficient to demonstrate discrimination against children, even though defendants argued its rules were intended to provide "a quiet and well maintained environment for our tenants").

ER 241 (Dkt. 59, 41:12–42:3). The district court was correct—and its subsequent about-face was reversible error.

C. The District Court Improperly Ignored Evidence Supporting The Jury's Verdict On The Morrises' § 3617 Claim.

Section 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [sections 3603-06] of this title." 42 U.S.C. § 3617. To establish a § 3617 violation, the Morrises had to show that they (1) engaged in a protected activity; (2) the Homeowners Association subjected them to an adverse action; and (3) the existence of a causal link between their protected activity and the Homeowners Association's adverse action. *Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001). The district court reversibly erred in setting aside the jury's finding that the Morrises met their burden.

The district court did so because, in its view, the Morrises did not prove the second prong—an adverse action—because the Morrises were able to host their Christmas programs in 2015 and 2016. ER 19 (Dkt. 118 at 17). That finding, however, is contrary to the clear evidence in the record that the Homeowners Association threatened, intimidated, and interfered with the Morrises' enjoyment of their right to purchase and occupy a home free from religious discrimination.

That evidence shows that the Association subjected the Morrises to adverse action by sending a discriminatory letter to the Morris family, ER 193 (Ex. 3005),

walking a false and inflammatory letter to each resident in the neighborhood, and holding an emergency meeting about the Morrises before they even moved in, ER 189 (Ex. 3006). These actions were plainly linked to the Morrises' religion. The Association's board flatly stated it did not want the Morrises' "press[ing]" their beliefs "on the community," ER 155–56 (Trial Tr. 87:21–88:1), ER 332 (Trial Tr. 564:15–565:4), and there was testimony the jury could have credited that the adverse actions were taken because "someone in this association doesn't like Christmas," ER 327 (Trial Tr. at 500:19–20).

The adverse action continued after the Morrises purchased their home when the Homeowners Association's attorney sent a demand letter warning that the Christmas program would violate the Association's rules, and threatening legal action should the Morrises proceed—notwithstanding the fact that the Association had previously informed Jeremy that the program complied with the rules. ER 185–88 (Ex. 3035); ER 121 (Trial Tr. at 400); *see also infra* Section III. Eventually, the Association's actions drove the Morrises to end the Christmas program. ER 331 (Trial Tr. at 560:9).

The jury heard evidence that this ongoing treatment was expressly linked to the Morrises' religion—demonstrating that the jury's verdict and damages award were "supported by substantial evidence," *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007), even if it is possible to draw two inconsistent conclusions

from that evidence, *St. Elizabeth Cmty. Hosp. v. Heckler*, 745 F.2d 587, 592 (9th Cir. 1984).[7] The district erred by ignoring all of this evidence, setting aside the jury's verdict, and substituting its own judgment for that of the jury.

D. The District Court Reversibly Erred In Declining To Presume The Jury Followed Instructions To Disregard Evidence That Should Not Have Been Stricken Anyway.

The district court set aside the jury's findings for the additional reason that, in the court's view, "the trial in this case was also infected by repeated testimony and exhibits related to threats allegedly received by Plaintiffs and other attendees of the Christmas program from homeowners of the West Hayden Estates." ER 13 (Dkt. 118 at 11). Although the district court ultimately ordered all of that evidence stricken and instructed the jury not to consider it, ER 13–15 (Dkt. 118 at 11–13), the district court declined to follow the rule that juries are presumed to follow the instructions they are given, *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), and set aside the jury's verdict instead. The district court cited no authority for departing from the rule, and none appears to exist.

[7] "A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion. In making this determination, the court must not weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion." *Harper v. Cty. of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008) (quotation omitted).

The district court's error is compounded by the fact that the evidence at issue should not have been stricken in the first place. Courts have held—specifically with regard to the responsibility of landlords—that the FHA "creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment." *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

In 2016, HUD promulgated a final rule clarifying that homeowners associations, too, can be liable where they fail "to take prompt action to correct and end a discriminatory housing practice by a third-party, where [they] knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. § 100.7; *see also* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (codified at 24 C.F.R. § 100).

Under the HUD rule, a plaintiff must show: "(1) The third-party created a hostile environment for the plaintiff or complainant; (2) the housing provider knew or should have known about the conduct creating the hostile environment; and (3) the housing provider failed to take prompt action to correct and end the harassment while having the power to do so." 81 C.F.R. at 63,069. Applying that standard here, the evidence of resident-on-resident harassment, detailed more fully below, was

properly admissible against the Homeowners Association. Indeed, the conduct was so egregious that the Morrises ultimately reported it to the county sheriff. ER 113 (Trial Tr. 298:4–13).

First, the death threat against Jeremy Morris—made in front of his wife—by a resident of West Hayden estates was "sufficiently severe" to create a hostile environment without more. *See* 24 C.F.R. § 100.600(c) ("A single incident of harassment . . . may constitute a discriminatory housing practice, where the incident is sufficiently severe"). But there was much more. The hostility drummed up by the Homeowners Association pervaded the neighborhood and inflamed its residents against the Morrises.

One neighbor came to the actual show and was "loud . . . [and] obnoxious . . . [and] using foul language." ER 119 (Trial Tr. 367:12–14). Residents placed cones in the street to prevent any parking. ER 115–18 (Trial Tr. 319:13–322:13). Another resident accosted multiple volunteers, kicking their vehicles and screaming obscenities. ER 166 (Trial Tr. 118:9–14); ER 169 (Trial Tr. 136:22–24). This is more than enough evidence of a hostile environment.

Second, it is indisputable that the Homeowners Association knew or should have known about the harassment. Jeremy Morris himself told the Association president that "[t]here was a lot going on that was making my family feel like we were being driven out of the neighborhood and that the Homeowners Association

started this whole mess; first, by writing a discriminatory letter, in my view; and then, secondly, by contacting the sellers about that, and then by distributing a letter to all of our neighbors, walking it before we even moved in." ER 326 (Trial Tr. at 499). The Association was aware of this and other threatening conduct against the Morrises. *See* ER 326 (Trial Tr. 499:6–16); *accord* ER 13 (Dkt. 118 at 11) (noting that Jeremy asked the Association president, "How about we circulate a letter about Larry Bird threatening to murder my family . . . says he is gonna take care of me and that the people that showed up, the militia people or whatever the three percenters could not protect me").

Third, the Homeowners Association took no action to address any of this conduct, despite its power to do so. ER 124 (Trial Tr. at 404). The Association had "[t]he power to levy Assessments on any Owner or any portion of the Property and to force payment of such Assessments" and "[t]he power and authority . . . to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration or the Articles or the Bylaws . . . and to enforce by injunction or otherwise, all provisions thereof." ER 201 (Ex. 3001 at 8); *see also* ER 125 (Trial Tr. at 405). And the Association used this power frequently to protect the community against nuisance activity.

For example, the Homeowners Association sent a letter to one homeowner whose dog had bitten a child requiring that owner to fence their animal—and the

owner complied. ER 126 (Trial Tr. at 406). Contrary to the district court's assessment, then, the Association *did* have the authority to compel compliance with the rules, and it was therefore required "to take whatever actions it legally can take" to end "harassing conduct" of which it is aware. 81 Fed. Reg. at 63,068.

It does not matter, as the district court thought, that this case involves a homeowners association (rather than a landlord). ER 14 (Dkt. 118 at 12 n.6) (distinguishing cases and concluding that "West Hayden cannot be held liable for the actions of non-Board Member homeowners"). If it did, the Morrises would have no FHA claims at all, and no one argues that. Nor could they, as the FHA has a "broad and inclusive compass." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quotation omitted).

In sum, the district court, without citing any legal authority, improperly set aside the jury's verdict because it feared that evidence of the Morrises' harassment by their neighbors had "infected" the trial to such an extent that it must disregard the well-established presumption that juries follow the instructions they are given. The district court was wrong not only to ignore this presumption but also, as a matter of law, to strike the evidence as legally improper in the first place.

Because the residents' conduct created a hostile environment for the Morrises, because the Homeowners Association knew that conduct was creating a hostile environment, and because the Association had the power to do something about it,

the evidence was relevant to the Homeowners Association's liability. The district court therefore erred in setting aside the jury's verdict and its decision to do so should be reversed.

II. The Homeowners Association Is Not Entitled To A New Trial.

A. The District Court Erroneously Ordered A New Trial Based on Improper Credibility Determinations.

In the alternative to judgment as a matter of law for the Homeowners Association, the district court ordered a new trial on the ground that the Morrises and their witnesses were not "credible." ER 22 (Dkt. 118 at 20). But that assessment cannot bear scrutiny.

The court stated that "[a]lmost uniformly, Plaintiff's witnesses did not present credible testimony that held up under cross-examination" and that "[t]o the contrary, the Homeowners Association's witnesses presented credible testimony." ER 22 (Dkt. 118 at 20). Yet the district court failed to assess any evidence or testimony beyond the statements made by Jeremy Morris and Jennifer Scott. This was error in and of itself. While the trial court may indeed "assess the credibility of witnesses," in determining whether the verdict was against the clear weight of the evidence, *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010), that does not give the court *carte blanche* to ignore all other testimony and evidence.[8]

[8] To the extent the district court's new-trial analysis failed to consider evidence it erroneously disregarded in assessing the Homeowners Association's

Indeed, the crux of the district court's finding that the Homeowners Association was entitled to a new trial was the court's determination that Mr. Morris was not credible—and its observation that, by contrast, board President Jennifer Scott was. ER 21 (Dkt. 118 at 19). The cursory analysis was altogether insufficient to support the court's determination. First, the court asserted that Jeremy Morris was "aggressively confrontational" with his neighbors, "and routinely threatened them with litigation." ER 21 (Dkt. 118 at 19). But even accepting the court's characterization of Mr. Morris's behavior, this has nothing to do with any *lack of credibility*.

The court also found that Jeremy's testimony was "riddled with inconsistencies," ER 21 (Dkt. 118 at 19), on the basis of one Facebook post about the timing of the Morrises' Christmas light display. According to the court, Jeremy "testified that he only left the 200,000 lights that covered his house on past 8:00 PM one year . . . [but] a Facebook post authored by Mr. Morris explicitly states on December 23, 2016 that the lights would be left on between 5:00 PM to 10:00 PM from December 23rd through Christmas day." ER 21 (Dkt. 118 at 19). But there is no obvious inconsistency between the Facebook post describing his *initial plan* for

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entitlement to judgment as a matter of law, it could not possibly have determined that the verdict went against the clear weight of the evidence. Reversal is required for that reason alone.

the Christmas light display and his subsequent explanation of what actually occurred.[9]

The district court's threadbare analysis of witness credibility, which lacked substantive evaluation of any witnesses other than Jeremy Morris and Jennifer Scott, was no basis for ordering a new trial. It is settled law that "a trial court, in assessing whether to grant a new trial, does not properly do so merely because it might have come to a different result from that reached by the jury." *Wilhelm v. Associated Container Transp. (Austl.) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981). The district court's analysis, however, admits of no other conclusion than that the district court did precisely that.

B. The Jury's Verdict Was Not Against The Clear Weight Of The Evidence.

Had the district court properly considered the evidence, it would no doubt have come to the conclusion that the Homeowners Association is not entitled to a new trial—for the reasons already given in explaining why the Homeowners Association was not entitled to judgment as a matter of law. Because the clear

[9] The district court did not mention the inconsistencies in former Homeowners Association president Jennifer Scott's testimony. *Compare* ER 339 (Ex. 3033) at 5:00–5:07 (J. Morris: "Did you tell them [the Association's letter] was discriminatory? Did you say that was discriminatory language?" Scott: "Yeah, yeah, I did."), *with* ER 337 (Trial Tr. 624:4–6) (Q. "At one point during a phone call with Mr. Morris, you told him that this letter contained discriminatory language?" A. "No, I did not tell him that.").

weight of the evidence tipped in the Morrises' favor, the district court had no basis for second-guessing the jury's verdict.

C. The Homeowners Association Is Not Entitled To Remittitur.

A district court "must uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986) (internal quotation marks omitted). Here, the jury reasonably awarded the Morrises $60,000 in compensatory damages and $15,000 in punitive damages on their FHA claims. ER 22 (Dkt. 118 at 20). The district court, however, ordered remittitur to only $1 in compensatory damages and $1 in punitive damages. ER 24 (Dkt. 118 at 22).

The district court concluded the compensatory damages amount was speculative and not supported by the evidence because it came from Jeremy Morris's testimony about how much would be required for closing costs, moving expenses, and cleaning his current residence, and he had said he was not "positive of that number." ER 23 (Dkt. 118 at 21). Yet Jeremy also testified he had written the number down and it was between $60,000 and $80,000. ER 328 (Trial Tr. 505:6–10). As for punitive damages, the court simply concluded that "the evidence in this case uniformly supports the Homeowners Association's version of events," and speculated that the jury used punitive damages to award legal fees. ER 23–24 (Dkt.

118 at 21–22). Neither rationale is a permissible basis for remittitur—especially one that effectively zeroes out the jury's damages award. *See Los Angeles Mem'l Coliseum Comm'n*, 791 F.2d at 1360.

III. The District Court Reversibly Erred By Permanently Enjoining the Morrises' Christmas Program.

The Homeowners Association filed a counterclaim based on alleged violations of its rules by the Morrises and seeking as a remedy to enjoin the Morrises' Christmas program. ER 260–78 (Dkt. 19). The district court made a series of factual findings and legal conclusions about what the rules allow or prohibit, and granted the Homeowners Association's requested injunction based on those findings. ER 25–35 (Dkt. 118 at 23–33).[10] Because the Homeowners Association acquiesced in the conduct it now seeks to enjoin, and because, in the alternative, the district court's findings on the counterclaim are erroneous, the injunction must be vacated.[11]

A. The Homeowners Association Is Not Entitled To An Injunction Because It Acquiesced In The Very Conduct It Sought To Enjoin.

Under Idaho law, which controls the interpretation of the rules, "[w]here one party to a contract has refused to comply with the contract, and the other party has

[10] Specifically, the district court held that the Morrises' Christmas program violated Sections 5.1.3, 5.4.1, 5.4.2, 5.4.3, 5.4.9, 5.4.15, 5.5.2, and 11.5.2 of the Declaration. ER 25–35 (Dkt. 118 at 23–33).

[11] The parties did not object to the trial court ruling on the Homeowners Association's counterclaim seeking a permanent injunction against the Morrises' Christmas program. *See* ER 24–25 (Dkt. 118 at 22–23).

acquiesced in such refusal, a rescission by consent is implied." *Liebelt v. Liebelt*, 801 P.2d 52, 56 (Idaho Ct. App. 1990). Similarly, "[a] contract is abandoned where the acts of one party are inconsistent with the existence of the contract and are acquiesced in by the other party." *Id.*; *see also Am. Silver Min. Co. v. Coeur D'Alene Mines Corp.*, 480 P.2d 900, 906 (Idaho 1971).

Here, to the extent there was any "refusal" by the Morrises to comply with the rules, the Homeowners Association acquiesced in that refusal by initially approving the Christmas program and, in all events, by never citing the Morrises for any violation of the rules. As a result, the Association is not entitled to an injunction (much less attorneys' fees) against the Morrises based on the rules.

Early on, Jeremy Morris met with the Homeowners Association to discuss the Christmas program. ER 51 (Trial Tr. 56:8–13); ER 152 (57:15–24). Jeremy testified without contradiction that he was told "that basically the rules . . . wouldn't even apply to [his] program." ER 324 (Trial Tr. 487:1–9); *see also* ER 103 (Trial Tr. 237:6–13) (Homeowners Association president opining that the Morrises were not violating any rules but that they just did not want them); ER 151 (Trial Tr. 56:14–19), ER 153 (Trial Tr. 59:2–3) (Sohrweide, the real estate agent who sold the Morrises their home and who was present at the board meeting testified, "I believe in the meeting [at least one likely representative of the board] didn't feel like there was any violation."); ER 109 (Trial Tr. 270:10–12); ER 110–11 (Trial Tr. 271:14–

272:5) (Taylor testifying he expressly told Jeremy that the "Christmas lights [did not] violate the [rules]"). Indeed, Jeremy testified without contradiction that he "never received a violation notice from the board," ER 133–34 (Trial Tr. 435:24–436:10) (testimony of K. Morris), and that the Homeowners Association never "sen[t] [him] a notice of violation that he violated" the rules. ER 112 (Trial Tr. 277:14–23) (testimony of Taylor).

The evidence thus conclusively establishes that the Homeowners Association acquiesced in the very conduct the district court deemed in breach of the rules. As a result, there was no basis for the district court to issue an injunction (or award attorneys' fees) against the that conduct.

B. Alternatively, The Homeowners Association Is Not Entitled To An Injunction Because The Findings On Which It Rests Are Clearly Erroneous.

Even if the Homeowners Association had not acquiesced in the conduct at issue (and they did), the injunction would still need to be vacated because it rests on clearly erroneous findings. *See In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1002 (9th Cir. 2016) ("A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (internal quotation marks and alteration omitted)).

At the outset, the district court ignored an admission by then-president of the Homeowners Association Jennifer Scott that the Morrises were not breaking any rules. Angelene Cox, one of the Morrises' neighbors, testified that she asked Scott whether Jeremy Morris "was breaking some rule or some law, or did they [the Association] just not want him there?" To which Scott responded, "[t]hey just don't want him there." ER 103 (Trial Tr. 237:8–11). The court similarly ignored Homeowners Association vice president Ron Taylor's admissions to Jeremy, in front of other Association board members, that putting up Christmas lights would not violate the rules. ER 108–09 (Trial Tr. 269:17–270:12).

Given these admission, it is not surprising that each of the court's findings on the Association's counterclaims that the Morrises violated the rules is contradicted by the weight of the evidence as a whole.

1. *Section 5.1.3. Exterior Appearance.* This rule regulates the "exterior appearance of the buildings," requiring conformity with "a list of design criteria" or the board's prior written consent for modifications that are visible from neighboring lots. ER 207 (Ex. 3001 at 14). The district court thought the Morrises violated this rule by putting up their Christmas decorations, but there is no evidence that any resident ever sought permission for holiday decorations. *See* ER 163–64 (Trial Tr. 111:22–112:10) (Breazeals did not seek Homeowner Association permission for putting up holiday decorations at the same property for the fifteen prior years).

The district court acknowledged that other homes in the neighborhood may have been decorated with Christmas lights, but thought this was a difference "in kind," not merely a difference "in degree." ER 132 (Dkt. 118 at 30). But under Idaho law, "all doubts and ambiguities" concerning the rules "are to be resolved in favor of the free use of land." *Brown v. Perkins*, 129 Idaho 189, 192 (1996).

2. *Section 5.4.1. Business Use.* This rule prohibits using a residence as a place of business. ER 213 (Ex. 3001 at 20) (listing as examples of prohibited business uses "gainful occupation, profession, trade, craft, commercial or manufacturing, [and] day care"). Hosting a gathering for five days a year that donates to charity does not transform the use into a non-residential use of the property.

3. *Section 5.4.2. Nuisance*. This rule "prohibits . . . any activity which would in any way interfere with the quiet enjoyment of any [other] Owner." ER 214 (Ex. 3001 at 21). The district court found that the Morrises "used speakers outside of the home to amplify sound," "blocked traffic and created noise" by using buses to transport visitors, contributed to "blocked traffic" as a result of non-residents' parking cars throughout the neighborhood, and attracted "thousands of people" thereby "creat[ing] excessive congestion in the neighborhood." ER 33 (Dkt. 118 at 31).

But each of these findings is contrary to the evidence. Multiple witnesses testified that the increase in traffic was minor, ER 159 (Trial Tr. 94:12), ER 178 (Trial Tr. 179:9), ER 180–81 (Trial Tr. 199–200); that the Morrises' Christmas program did not exceed a moderate noise level and did not use speakers, bullhorns, or microphones to project music or sound, ER 159 (Trial Tr. 94:22) (L. Breazeal), ER 165 (Trial Tr. 114) (C. Breazeal), ER 168 (Trial Tr. 134) (T. Burda), ER 174 (Trial Tr. 163) (J. Hotvedt), ER 184 (Trial Tr. 212) (A. Farley), ER 129–30 (Trial Tr. 430:13–431:2) (K. Morris); and that there were usually only 30 to 50 visitors at the Morrises' home at any given time, ER 165 (Trial Tr. 114) (C. Breazeal), ER 171 (Trial Tr. 150) (K. Dotts), ER 172 (Trial Tr. 158) (J. Hotvedt), ER 176 (Trial Tr. 174) (C. Hull), ER 178 (Trial Tr. 179:9) (C. Hull).

4. *Section 5.4.3. Signs*. This rule prohibits most signs without prior written approval. There is no evidence that this rule has ever been applied against temporary holiday decorations, like the one sign that was posted on the Morrises' lawn. Other neighbors posted decorative holiday signs without incident. ER 128 (Tr. 429:13–18).

5. *Section 5.4.9. No Hazardous Activities*. This rule prohibits "unsafe or hazardous" activities on the property. Even if an increase in traffic and parking could be considered a "hazardous" activity, the weight of the evidence shows that the increase in traffic was minor, ER 159 (Trial Tr. 94:12), ER 178 (Trial Tr. 179:9), ER

180–81 (Trial Tr. 199–200), and that there were usually only 30 to 50 visitors at the Morrises' home at any given time, ER 165 (Trial Tr. 114) (C. Breazeal), ER 171 (Trial Tr. 150) (K. Dotts), ER 172 (Trial Tr. 158) (J. Hotvedt), ER 176 (Trial Tr. 174) (C. Hull), ER 179 (Trial Tr. 179:9) (C. Hull).

6. *Section 5.4.15. Lighting*. This rule regulates the installation of exterior lighting fixtures: "Exterior lighting, including flood lighting, shall be part of the architectural concept of the Improvements on a Lot. Fixtures, standards and all exposed accessories shall be harmonious with building design, and shall be as approved by the Architectural Committee prior to installation. Lighting shall be restrained in design, and excessive brightness shall be avoided." ER 216–17 (Ex. 3001 at 23–24).

This rule does not regulate temporary Christmas lights, but even if it did, the evidence conclusively established that the Morrises' lights were on for only a few hours each night—with multiple witnesses testifying that they were not excessively bright. ER 167 (Trial Tr. 126:13–21) (Burda); ER 172 (Trial Tr. 158:17–24) (Hotvedt); ER 178 (Trial Tr. 179:18–24) (Hull); ER 114 (Trial Tr. 305:16–21) (Wilson).

7. *Section 5.5.2. Animals*. This section provides that no livestock shall be "raised, bred or kept" on the property. It is undisputed that the Morrises did not raise or breed livestock. The trained camel—and sometimes a donkey—included in the

live nativity scene were only on the property for two hours a night for five nights a year. ER 173 (Trial Tr. 160:15–17); ER 330 (Trial Tr. 528:4–7); ER 336 (Trial Tr. 606:13).

8. *Section 11.5.2. Violations*. This provision authorizes injunctive relief for violations of the rules. ER 233 (Ex. 3001 at 40). But none of these provisions regulate temporary holiday decorations—much less were violated by them. To the extent there was any ambiguity, the district court was bound to resolve that ambiguity in favor of "free use of the land." *Brown*, 129 Idaho at 192. Either way, the permanent injunction should be vacated.

CONCLUSION

For the foregoing reasons, the judgment on the Morrises' claims should be reversed, the conditional order granting a new trial and awarding remittitur should be vacated, and the jury's verdict should be reinstated. In the alternative, the judgment should be reversed and the case remanded for a new trial. As to the Homeowners Associations' counterclaims, the judgment should be reversed and the permanent injunction vacated.

Respectfully submitted this 11th day of October, 2019.

s/ *Allyson N. Ho*

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant states that there are no related cases pending before this Court.

Dated: October 11, 2019

s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 11, 2019. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 12,512 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point New Century Schoolbook typeface using Microsoft Word 2016.

Dated: October 11, 2019

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