DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 05-CV-1487 through 05-CV-1499 &
05-CV-1536 through 05-CV-1539

MARIA GOMEZ, *et al.*,

Defendants-Appellants,

v.

INDEPENDENCE MANAGEMENT OF DELAWARE, INC,

Plaintiff-Appellee.

BRIEF OF THE LEGAL AID SOCIETY, BREAD FOR THE CITY AND WASHINGTON LEGAL CLINIC FOR THE HOMELESS AS *AMICI CURIAE* SUPPORTING APPELLANTS

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STATEMENT OF THE ISSUE PRESENTED

Section 42-3505.02 of the D.C. Code, titled "[r]etaliatory action," provides, in pertinent part:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

This brief *amici curiae* addresses the following question: Whether a tenant who has engaged in statutorily protected activity -- such as reporting housing code violations, withholding rent to compel repairs, or joining a tenants association -- may defend against a landlord's eviction suit on the ground that the suit, although purportedly brought for a reason "permitted by law" under the Rental Housing Act, was actually brought to retaliate against the tenant for engaging in protected activity.

INTEREST OF THE AMICI CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II, § 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Housing law is among Legal Aid's principal practice areas.

Bread for the City is a private, non-profit organization that offers free food, clothing, medical care, social services, and legal assistance to impoverished residents of the District of Co-

lumbia. On a monthly basis, Bread for the City's programs serve more than 10,000 people, many of whom are homeless or at risk of losing their homes.

The Washington Legal Clinic for the Homeless is a private, non-profit legal services and advocacy organization concerned with the needs of persons who struggle with homelessness and poverty. An integral part of its work is assisting clients in securing and retaining stable housing.

This appeal presents important issues for low-income tenants attempting to enforce their rights under District of Columbia law, including their right to a safe, decent, and habitable home. When a landlord fails to maintain the premises or otherwise violates its legal obligations to tenants, a more affluent tenant can simply move elsewhere. A low-income tenant, however, often does not have that option, given the District's limited supply of affordable housing. Such tenants must resort to other means to attempt to improve their living conditions, such as withholding rent, complaining to government authorities, joining a tenants association, or initiating litigation against the landlord. Without adequate protection against landlords' retaliatory suits for eviction, tenants would engage in such activities at their own peril.

ARGUMENT

The trial court apparently concluded that a landlord engages in impermissible retaliation by seeking to evict a tenant only if the eviction is *already* "illegal" without regard to the landlord's retaliatory motive. *See* JA 132 (landlord's memorandum in support of motion for summary judgment), 448 (order granting summary judgment). That view not only would read the explicit protection against retaliatory eviction out of the Rental Housing Act, but also would eliminate the pre-existing protection against retaliatory eviction delineated by this Court and the D.C. Circuit. This Court has never adopted such a self-defeating construction of this important tenant protection. To the contrary, the Court has repeatedly applied the prohibition against re-

taliation to evictions and other adverse actions that would have been lawful but for the landlord's retaliatory motive. That approach is vital to assuring that tenants do not lose their homes for having sought to hold landlords to their obligations under District law.

I. SINCE ITS INITIAL RECOGNITION IN DISTRICT OF COLUMBIA CASE LAW, THE RETALIATION DEFENSE HAS TURNED ON WHETHER THE LANDLORD ACTED WITH AN IMPROPER MOTIVE IN SEEKING THE TENANT'S EVICTION

For nearly four decades, first as a matter of case law and later as a matter of statute, District of Columbia law has recognized that a tenant may defend against an eviction suit on the ground that the landlord brought the suit to retaliate against the tenant for seeking to enforce his right to a safe, sanitary, and habitable home. The retaliation defense has always turned on the landlord's motive for bringing the suit. Accordingly, even if the landlord has stated a facially permissible basis for eviction (*e.g.*, the tenant's violation of a lease provision or the landlord's intent to convert the premises to commercial use), the tenant still may prevail by showing that the landlord's motive for bringing the suit was retaliatory.

A. The Retaliation Defense Was Initially Recognized In Cases Where Eviction Would Have Been Permissible But For The Landlord's Retaliatory Motive

1. The retaliation defense was first recognized in this jurisdiction in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1969). That decision arose out of an eviction suit brought against a month-to-month tenant after she complained about housing code violations to the D.C. Department of Licensing. *Id.* at 688-689. The tenant was able to set aside a default judgment awarding possession to the landlord based on the defense that the landlord's otherwise lawful eviction was motivated by the tenant's housing code complaints. *Id.* at 689. At trial, however, "a different judge apparently deemed evidence of retaliatory motive irrelevant and directed a verdict for the landlord." *Ibid.*

The D.C. Circuit reasoned that protection against retaliatory eviction is necessary to the efficacy of the District's housing code, which necessarily depends largely on private enforcement that would not occur if landlords were free to retaliate against complaining tenants. 397 F.2d at 699-700. The court described the consequences of allowing landlords to use otherwise lawful court proceedings to evict tenants who reported housing code violations:

> There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid.

Id. at 701. Thus, even in the absence of express statutory language forbidding retaliation, the court read the District's housing code as implicitly forbidding an otherwise lawful eviction motivated by retaliation for the reporting of housing code violations. *Id.* at 702 (citing *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967) (striking down Florida law denying unemployment compensation to workers discharged for exercising rights under federal labor law)).[1]

The *Edwards* court construed the D.C. Code provisions that then generally authorized the eviction of month-to-month tenants as "inapplicable where the court's aid is invoked to effect an

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[1] Federal court decisions confirm that protection against retaliation is implicit in statutes protecting substantive rights. *See, e.g., Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (prohibition against discrimination in property transactions under 42 U.S.C. 1982 includes protection against retaliation for complaints of discrimination); *Forman v. Small*, 271 F.3d 285, 296-297 (D.C. Cir. 2001) (federal employee provision of Age Discrimination in Employment Act); *Hoyt v. St. Mary's Rehabilitation Ctr.*, 711 F.2d 864, 867 (8th Cir. 1983) (Rehabilitation Act). In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), the Supreme Court ruled that Title IX of the Education Amendments of 1972, although not containing an express retaliation provision, gave a coach a right of action to challenge his firing in retaliation for his complaints about sex discrimination. This Court similarly concluded that the federal Family and Medical Leave Act confers protection against retaliation for exercising rights under that statute. *Chang v. Institute for Public-Private Partnerships, Inc.*, 846 A.2d 318, 328 (D.C. 2004).

eviction in retaliation for reporting housing code violations." 397 F.2d at 702. Under *Edwards*, therefore, whether the landlord is entitled to evict a tenant depends on the landlord's motive for seeking to do so. As the court explained, "while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities." *Id.* at 698; s*ee id.* at 702-703 (observing that the landlord may evict, raise rents, or take other action against the tenant "if this illegal purpose [to retaliate] is dissipated").[2]

2. In the years immediately after *Edwards*, the courts continued to recognize the availability of a retaliation defense to a landlord's otherwise lawful suit for eviction.

In *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), for example, the D.C. Circuit reversed a decision of this Court that "limited [*Edwards*] to its facts." *Id.* at 857 (quoting *Robinson v. Diamond Housing Corp.*, 267 A.2d 833, 835 (1970)). There, the landlord sued to evict a tenant for non-payment of rent. The tenant defended on the basis of uncorrected housing code violations, and won. The landlord sued again, claiming that the tenant's previous victory had nullified the lease and, with it, the tenant's right to possession. This Court ruled that the tenant was a "tenant at sufferance," who could be removed through a 30-day notice to quit. 463 F.2d at 858.

The landlord served a notice to quit and sued for eviction a third time. The trial judge refused to allow the tenant to defend on grounds of retaliatory motive, and this Court affirmed. The landlord argued that the tenant could not invoke the retaliation defense for either of two reasons: first, because the tenant raised housing code violations as a defense to non-payment of rent

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[2] After *Edwards*, the D.C. Council narrowed the circumstances in which landlords may evict residential tenants, so that a landlord no longer may evict for "no reason at all." *See, e.g.,* Rental Accommodations Act of 1975, D.C. Law 1-33, § 213 (enacting predecessor provision to current D.C. Code § 42-3505.01).

in the first eviction suit, rather than reporting them to government authorities, and, second, because the landlord was seeking to evict the tenant in order to remove the unit from the rental housing market altogether, so that the landlord would not have to bring the premises into compliance with the housing code. 463 F.2d at 861.

The D.C. Circuit rejected the landlord's effort to limit the *Edwards* retaliation defense. First, the court read *Edwards* as forbidding the "state's judicial processes" to be used to punish a tenant for exercising legal rights. 463 F.2d at 862. The court noted that the District's housing regulations prohibited retaliation against a tenant for a good faith assertion of rights, including the right to void a lease if the premises are unsafe or unsanitary. *Id.* at 863-864. Thus, the court explained that the *Edwards* rule forbids the eviction of a tenant as retaliation for having defended a non-payment of rent suit on the basis of housing code violations that negated the lease.

Turning to the landlord's second argument, the D.C. Circuit agreed that a landlord was not forbidden, in all circumstances, from evicting a tenant so that it could pull the apartment off the rental housing market entirely. The question remained one of motive: "If the landlord's actions are motivated by a desire to punish the tenant for exercising his rights or to chill the exercise of similar rights by other tenants, then they are impermissible." 463 F.2d at 866. In other words, an unlawful purpose to retaliate may prevent a landlord from exercising its otherwise lawful right to remove a housing unit from the market. *See ibid.* ("An eviction grounded on a desire to punish a tenant's exercise of [the right to withhold rent] is plainly illegal, and its illicit status remains unchanged even if it is accompanied by withdrawal of the unit from the housing market.").

In order to assess the landlord's motive, the D.C. Circuit prescribed a burden-shifting framework similar to that applied under civil rights laws in which motive is at issue. Thus, when

a landlord moves to evict a tenant shortly after the tenant's exercise of rights protected by the housing code, a presumption arises that the landlord's action was retaliatory; "it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed." 463 F.2d at 865; *cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Jung v. George Washington Univ.*, 875 A.2d 95, 111 (D.C. 2005) (discussing burden shifting under the D.C. Human Rights Act); *Chang v. Institute for Public-Private Partnerships, Inc.*, 846 A.2d 318, 331 (D.C. 2004) (discussing temporal proximity as supporting an inference of retaliation). The court added that a landlord is not entitled to judgment simply because it articulates a permissible basis for eviction: "The mere existence of a legitimate reason for the landlord's actions will not help him if the jury finds that he was in fact motivated by some illegitimate reason." 463 F.2d at 867.

3. This Court followed suit in *Golphin v. Park Monroe Assocs.*, 353 A.2d 314 (D.C. 1976).[3] There, the landlord sued to evict the tenant at the end of a fixed lease term, an action that would ordinarily have been lawful under existing law. The tenant proffered a defense of retaliatory eviction, contending that the landlord had refused to allow him to remain on a month-to-month tenancy because he had become president of the tenants association. *Id.* at 315-316. The trial court refused to allow the defense, and granted judgment for the landlord. This Court reversed and remanded for a new trial.

The Court understood *Edwards* to "stand[] for the proposition that the states' *judicial processes* may not be used to accomplish an eviction for retaliatory purposes." 353 A.2d. at 318 (citing *Robinson*, 463 F.2d at 861-862). Consequently, if the landlord had "sought to utilize the

[3] Although *Golphin* was decided after the D.C. Council's enactment of a retaliation prohibition in the Rental Accommodations Act of 1975, the case arose before that enactment. The decision does not reference that Act.

'judicial processes' to evict the tenant for retaliatory reasons," the Court explained, Section 45-901 of D.C. Code, when then "provide[d] that a landlord is entitled to possession without notice upon the expiration of a fixed term," would not be "dispositive." *Ibid.* As did the D.C. Circuit in *Edwards* and *Robinson*, this Court ruled that courts could not order an otherwise lawful eviction if the landlord's motive was, as proffered, to retaliate against the tenant for protected activity.[4]

It is clear under *Edwards*, *Robinson*, and *Golphin* that, although D.C. law generally permits landlords to evict tenants for the purpose of making renovations that "cannot safely or reasonably be accomplished while the rental unit is occupied," D.C. Code § 42-3505.01(f)(1), tenants may defend against such eviction in a particular case on the ground that the landlord's motive is retaliatory.[5] The trial court's rejection of the tenants' retaliation defense at the summary judgment stage cannot stand, therefore, unless the D.C. Council somehow narrowed the existing defense in enacting it into positive law. There is no reason to conclude that the Council did so.

B. The D.C. Council Codified The Retaliatory Eviction Defense As An Important Protection For Tenants, Without Evincing Any Intent To Cut Back On Its Scope As Delineated In The Pre-Existing Case Law

Since 1975, the D.C. Code has expressly prohibited landlords from retaliating against tenants by, among other things, seeking their eviction. Although the Council has occasionally modified the language of the retaliation provision -- currently Section 42-3505.02 of the D.C. Code -- the Council has never evinced any intent to curtail the protections afforded tenants under *Edwards* and its progeny. To the contrary, the Council has extended tenants' protections against

[4] Similarly, a court would deny equitable relief to a party with "unclean hands" with respect to the matter for which it is seeking the court's aid. *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 367 & n.25 (D.C. 1996) (discussing retaliation as triggering an unclean hands defense); *Donohoe & Drury, Inc. v. Crowther,* No. L&T 8414-80, 108 DWLR 2405, 2412 ((D.C. Super. Ct. Nov. 25, 1980) (invoking the unclean hands doctrine in the context of retaliatory eviction).

[5] In this case, as shown in the tenants' brief, the landlord did not properly invoke this ground for eviction, thereby lending further support to the tenants' retaliation defense.

retaliation beyond those previously recognized in the case law. The statutory retaliation defense was thus recognized shortly after its enactment in its present form as essentially a codification of *Edwards* under which the lawfulness of an eviction "hinges on the landlord's intent." *Donohoe & Drury, Inc. v. Crowther*, No. L&T 8414-80, 108 DWLR 2405, 2410 (D.C. Super Ct., Nov. 25, 2980) (Schwelb, J.).

1. The Council enacted the predecessor of Section 42-3505.02 as part of the Rental Accommodations Act of 1975. The provision stated, in relevant part:

> No landlord shall take any retaliatory action against any tenant who exercises any right conferred upon him by this act, or by any rule or order issued pursuant thereto, or by any other provision of law. Retaliatory action shall include any action or proceeding to recover possession of a rental unit; action which would increase rent, decrease services, increase the obligation of a tenant or constitute undue or unusual inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service; and any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause; and any other form of threat or coercion.

Rental Accommodations Act of 1975, D.C. Law 1-33, § 214(a).

Two years later, the Council reenacted the provision, in essentially its present form, as part of the Rental Housing Act of 1977. The second sentence of the provision was modified so as to define "[r]etaliatory action" to include "any action or proceeding *not otherwise permitted by law* which seeks to recover possession of a rental unit." Rental Housing Act of 1977, D.C. Law 2-54, § 502(a) (emphasis added). That language persists in the present statute. *See* D.C. Code §42-3505.02(a). It is that language on which the appellee has relied to argue that, so long as the landlord recites a reason "otherwise permitted by law" as the basis for its eviction suit, the tenant is foreclosed from asserting a retaliatory eviction defense.

2. Nothing in the text, purpose, or history of the amendment suggests that the Council intended any reduction in tenant protection against retaliatory eviction, much less the dramatic reduction that would be required for the landlord to prevail as a matter of law in this case.

With respect to the statutory language: The distinction in Section 42-3505.02(a) between eviction suits that are, and are not, "otherwise permitted by law" comports with the distinction in *Edwards* between eviction suits that are, and are not, "for any legal reason." *See* 397 F.2d at 698 ("[W]hile the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities."). Just as *Edwards* would bar the eviction suit there, although ostensibly based on a "legal reason," if the landlord was found on remand to have acted with a retaliatory motive, Section 42-43505.02(a) bars an eviction suit, although ostensibly based on a reason "permitted by law," if the landlord acts with a retaliatory motive. Nothing in the phrase "not otherwise permitted by law" compels the conclusion that the Council meant to give landlords free rein to bring retaliatory eviction suits so long as they could articulate a facially permissible ground for seeking a tenant's eviction.

The text of Section 42-3505.01, the immediately preceding D.C. Code provision dealing with "[e]victions," reinforces that the landlord's motive or "purpose" is central to the landlord's entitlement to evict. For example, the statute allows a landlord to seek possession "for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied," "for the purpose of immediately demolishing the housing accommodation," "for the purpose of immediate, substantial rehabilitation," or "for the immediate purpose of discontinuing the housing use and occupancy of the rental unit." D.C. Code § 42-3505.01(f)(1), (g)(1), (h)(1), and (i)(1). If the landlord's true "pur-

pose" for invoking one of those provisions is to retaliate against tenants, the provision, by its own terms, does not authorize the tenants' eviction.

With respect to the legislative history: The scant legislative history of Section 502(a) of the 1977 Act does not explain the insertion of the phrase "not otherwise permitted by law," which did not appear until the final version of the measure that was enacted by the Council. (The committee report and other legislative history materials on the 1977 Act are principally concerned with its other, seemingly more controversial provisions, such as those dealing with rent control.) Certainly, there is no indication that this phrase was intended, as the landlord here contends, to confine the retaliation defense to evictions that would be illegal regardless of the landlord's motive.[6]

It may be that the Council added the phrase to clarify that an eviction would not necessarily be unlawful merely because it occurred so close in time to a tenant's protected activity that, under *Robinson*, it would be presumed to be retaliatory. The 1977 Act also revised the same sentence from "[r]etaliatory action shall include * * * " to "[r]etaliatory action may include * * * ." Like the addition of the phrase "not otherwise permitted by law," that change confirmed that the legality of the landlord's action depends upon the fact-finder's ultimate determination of motive,

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[6] The legislative history of earlier versions of the 1977 Act -- which did not include the "not otherwise permitted by law" language -- reflects Council members' concern with preserving the 1975 Act's strong protections against retaliation. For example, the Section-by-Section Summary of Bill 2-152, which ultimately became the 1977 Act, described the retaliation provision as "prevent[ing] a landlord from harassing or evicting a tenant merely because the tenant chooses to exercise his rights under the act." An alternative proposal, Bill 2-158, contained the same retaliation language, the purpose of which was described as "[p]rohibit[ing] retaliatory acts by a landlord against any tenant," adding that "[t]he specific and general standards for determination by the trier of fact are similar to the provisions of the [1975 Act]." A press release summarizing Bill 2-152 explained that the measure "[c]ontinues eviction controls and protection against retaliatory action." In short, there is no evidence that the Council intended to allow retaliatory evictions that were forbidden under prior statutory and case law.

even if the landlord's motive is presumed to be retaliatory under *Robinson* so that the burden shifts to the landlord to disprove retaliation.

With respect to the statutory purpose: If Section 42-3505.02 were to be construed, as the landlord urged below, to prohibit only landlord conduct that would be unlawful without regard to its retaliatory motive (*e.g.*, destroying a tenant's property, cutting off a tenant's water, or pursuing frivolous litigation), the Council's purpose to protect tenants from retaliatory eviction would be fatally undermined. If, for example, a landlord sued to evict a tenant for non-payment of rent that the tenant had actually paid, or if a landlord sued to evict a tenant for lease violations that the tenant did not actually commit, the tenant would have no need for a retaliatory eviction defense in order to defeat the suit. The tenant would not have to show that the landlord acted with a retaliatory motive or any motive at all. By contrast, when the landlord uses an otherwise permissible action -- such as an eviction suit based on non-payment of rent, violation of the lease, or personal use and occupancy -- to punish the tenant for activity protected under Section 42-3505.02, the retaliatory eviction defense is crucial to ensuring that tenants will not be deterred by the threat of homelessness from engaging in the private enforcement of the housing code that the Council intended.

3. In *Donohoe & Drury*, one of the first judicial decisions to contain an extended discussion of the statutory retaliation defense in essentially its present form (*i.e.*, as revised by the 1977 Act), the Superior Court made clear that under the statute, as under the pre-existing case law, the landlord's motive is central to the application of the defense. There, after the tenant complained to D.C. government authorities about an illegal rent increase, the landlord sued to evict the tenant, claiming that his apartment was to be converted to commercial use. The court recognized that the landlord's "stated purpose" for eviction was one that, "on its face, is permitted by Dis-

trict of Columbia law." 108 DWLR, at 2408. Accordingly, said the court, the landlord would prevail unless the tenant "is able to sustain a defense of retaliatory eviction." *Ibid.*

Citing *Edwards* and *Robinson*, the court explained that "the retaliatory eviction defense hinges on the landlord's intent." 108 DWLR, at 2410. In order to prove intent, the court observed, the tenant "need not show that the landlord had been foolish or candid enough to articulate that purpose openly," but may demonstrate retaliation from the circumstances, such as the landlord's choice in that case to single out the tenant's apartment for conversion to commercial use even though the building contained empty apartments that could have been converted instead. *Ibid.* "Moreover," said the court, "the tenant need not show that the landlord's sole purpose was to retaliate against him for legally protected activity"; rather, if the tenant shows that "he would not have been evicted but for his participation in protected activity, the eviction is unlawful, whether or not retaliation was the landlord's sole purpose." *Id.* at 2411 (footnote omitted); *see Adams v. George W. Cochran & Co.*, 597 A.2d 28, 36 (D.C. 1991) (Newman, J., concurring) (citing *Donohoe & Drury* for that proposition).[7]

C. This Court Has Recognized The Availability Of The Statutory Retaliation Defense Where Eviction Would Be Permissible Absent The Landlord's Retaliatory Motive

On several occasions, including as recently as last year, this Court has recognized that the applicability of the retaliation prohibition in Section 42-3505.02 turns on whether the landlord has acted with an improper motive -- in other words, that the statute forbids a landlord from suing for eviction, or taking other adverse action, to penalize the tenant for having engaged in protected activity, even if the landlord could have taken the same action for some other purpose.

[7] The court recognized the applicability of the burden-shifting framework discussed in *Edwards* and *Robinson*. 108 DWLR, at 2410. The case was decided shortly before the Council codified the presumption of retaliation in Section 502(b) of the Rental Housing Act of 1980, D.C. Law 3-131. The presumption currently appears in D.C. Code § 42-3505.02(b).

Although *dicta* in an earlier case, on which the landlord relied below, suggests a narrower reading of the statute, the Court has since rejected such a reading.

1. In *De Szunyogh v. William C. Smith & Co.*, 604 A.2d 1 (D.C. 1991),the landlord sued the tenant for eviction on the ground that she had violated the lease, and the tenant countered with a defense of retaliation. The trial court directed judgment for the landlord, because the tenant admitted that she had violated the lease, and did not permit the tenant to present her retaliation defense. The trial court relied on dicta in *Wahl v. Watkis*, 491 A.2d 477 (D.C. 1985) (per curiam), where, after concluding that the tenant had failed to raise a retaliation defense to the landlord's suit to recover possession of the apartment for personal occupancy, the Court observed that "[t]he retaliation statute is applicable only where a landlord takes an action not otherwise permitted by law." *Id.* at 480.[8] In other words, the trial court read *Wahl*, as the landlord has urged here, to foreclose a retaliation defense if the landlord sues for eviction based on one of the grounds for which eviction is generally permitted under the Rental Housing Act.

This Court reversed the directed verdict in *De Szunyogh* and remanded for a trial at which the tenant would be entitled to present a retaliation defense and the landlord would be entitled "to present evidence of its lawful purpose for seeking [the tenant's] eviction." 604 A.2d at 4. The Court explained that, while the tenant's conceded lease violation could provide a permissible ground for her eviction, the tenant could nonetheless defend on the ground that the landlord's motive for seeking eviction was retaliatory. Acknowledging the "difficulty" of the statutory reference to eviction suits "not otherwise permitted by law," the Court clarified the meaning of the retaliation provision: "[I]f a tenant alleges acts which fall under the retaliatory eviction statute, D.C. Code § 45-2552 [now § 42-3505.02], the statute by definition applies, and the landlord is

[8] *Wahl* was decided as an unpublished Memorandum Opinion and Judgment but was subsequently published.

presumed to have taken 'an action not otherwise permitted by law' unless it can meet its burden under the statute." *Ibid.*

De Szunyough thus makes clear that the statutory definition of retaliatory actions as including eviction suits "not otherwise permitted by law," together with the statutory presumption of retaliation for a tenant's recent protected activity, operates to allow a landlord to prevail if, but only if, it can establish that its motive for seeking eviction is a permissible one. This statutory phrasing, while not a model of clarity, has a well-established meaning in this Court, especially in light of its case law antecedents. *See Borger Management, Inc. v. Sindram*, 886 A.2d 52, 61 (D.C. 2005) (discussing *Wahl* and *De Szunyough*).

2. Several subsequent cases of this Court reinforce the understanding that, even when a landlord would otherwise be entitled under District law to sue for eviction or take other adverse action against a tenant, the landlord cannot do so if its motive is retaliatory.

In *Youssef v. United Management Co.*, 683 A.2d 152 (D.C. 1996), this Court recognized that tenants were entitled to press a retaliation defense in an eviction suit based on their failure to cure a lease violation. The Court reversed a judgment of possession for the landlord on the ground that the trial court had not accorded the tenants the protections of the statutory presumption of retaliation that arose from their membership in a tenants association, complaints of housing code violations, and participation in litigation against the landlord. While noting the landlord's argument that "these tenants were evicted for violating the terms of their lease agreement," the Court made clear that eviction would be unlawful if the landlord's motive for seeking their eviction was found to be retaliatory: "While it may be that [the landlord] had a basis in the lease to evict the tenants, under § 45-2552 [currently § 42-3505.02], [the tenants] get the benefit of the

statutory presumption that the action was retaliatory 'unless the housing provider comes forward with clear and convincing evidence to rebut this presumption.'" *Id.* at 155 (quoting statute).

In *Miller v. D.C. Rental Housing Comm'n*, 870 A.2d 556, 557 & n.1 (D.C. 2005), the tenant filed an administrative complaint of retaliation under Section 42-3505.02, alleging that, once he joined the tenants association, the landlord "for the first time sought to enforce against him a lease provision forbidding possession of dogs." The Rental Housing Commission upheld the administrative law judge's ruling in the tenant's favor, but vacated the fine because the landlord had not been found to have acted "willfully" within the meaning of D.C. Code § 42-3509.01(b). On the tenant's petition for review, this Court reversed the Commission's decision with respect to the fine and remanded for further proceedings on whether the administrative record would support a finding of willfulness. *See id.* at 559-560. Significantly for present purposes, neither the Court nor the Commission (nor, for all the decision reflects, the landlord) questioned that, although a landlord is ordinarily entitled to enforce the "no pets" provision in a tenant's lease, Section 42-3505.02 bars the landlord from doing so with the intent to retaliate against the tenant for engaging in protected activity. *See id.* at 560 (Schwelb, J., concurring) ("[A]bsent extraordinary circumstances, a finding that [the landlord] allowed [the tenant] to have a dog when he was not a member of a tenant organization, but told him to get rid of the dog after he joined the organization, would surely at least permit a reasonable inference that [the landlord's] retaliatory action was willful.").

And, in *Parreco v. D.C. Rental Housing Comm'n*, 885 A.2d 327 (D.C. 2005), after the Rental Housing Commission invalidated a landlord's rent increase for failure to give the tenant the required notice, the landlord sought judicial review. This Court reversed the Commission's ruling on the ground that the tenant had not raised the notice issue at the administrative level.

See id. at 336. In addition, the Court criticized the Commission's reasoning that the notice was inadequate because the landlord's stated reason for raising the tenant's rent -- to recoup the costs of collecting rent from a tenant who often failed to pay -- was not among the reasons for which District law allows landlords to obtain an increase in the rent ceiling. The Court perceived that the Commission had "confuse[d] the statutorily-based *authorization* for a rent ceiling increase, *e.g.*, to compensate for inflation or capital improvement, *see* D.C. Code § 42-3502.07(1), with the landlord's *motivation* for increasing the actual rent." *Id.* at 336. Given that the landlord had already received authorization to increase the rent ceiling well above the rent actually being charged the tenant, the Court explained that "the Rent Stabilization Act was no bar to increasing the rent, provided the landlord did so according to the statutorily-mandated procedures, and did not do so for an impermissible purpose, such as retaliation against for exercise of certain protected actions, and discrimination based on membership in a protected class (*e.g.*, race or ethnicity)." *Ibid.* (internal citation omitted). By parity of reasoning, if the rent increase, although within the authorized rent ceiling for the unit, *was* made for a retaliatory or discriminatory purpose, then it could not stand.

II. A STRONG RETALIATION DEFENSE IS ESSENTIAL TO THE ENFORCEMENT OF TENANTS' PROTECTIONS UNDER DISTRICT OF COLUMBIA LAW

As has been recognized in a variety of contexts, retaliation interferes not only with the individual victim's rights, but also with the government's ability to enforce its laws. Only last year, for example, the Supreme Court observed that Congress's objective in Title IX of the Education Amendments of 1972 -- to prevent discrimination by recipients of federal funds -- "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 125 S. Ct. 1497, 1508 (2005). The Court explained that, "[i]f recipients were permitted to

retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Ibid.*; *see, e.g. National Labor Relations Bd. v. Scrivener*, 405 U.S. 117, 121 (1972) (stating that employees' "complete freedom" from retaliation for participating in unfair labor practices investigations "is necessary * * * 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses'") (quoting *John Hancock Mut. Life Ins. Co. v. National Labor Relations Bd.,* 191 F.2d 483, 485 (D.C. Cir. 1951)); *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960) (observing that protection against retaliation for employees who report violations of the Fair Labor Standards Act is essential to its effective enforcement, "[f]or it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions").

So, too, with respect to tenants' protections under District of Columbia law. As the *Edwards* court recognized, because "[e]ffective implementation and enforcement of the [housing and sanitation] codes obviously depend in part on private initiative in the reporting of violations," judicial tolerance of retaliatory eviction "would clearly frustrate the effectiveness of [those codes] as a means of upgrading the quality of housing in Washington." 397 F.2d at 700-701. Indeed, the court deemed it "fundamental" that "the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated." *Id.* at 701-702.

The availability of meaningful protection against landlord retaliation is particularly important for tenants living in poverty. That is so for several related reasons.

First, low-income tenants may have more cause than other tenants to complain about landlords' violation of the housing code and other laws designed for tenants' protection. In *amici*'s experience, the housing available to low-income tenants often suffers from serious defi-

ciencies, including lack of heat or hot water, defective plumbing, broken windows or doors, exposed wiring, peeling paint, and rodent or insect infestation. Here, for example, the appellant tenants experienced persistent problems with heat and hot water, *see, e.g.,* JA 372, 379, as well as a general failure by the landlord to maintain the building, *see, e.g.,* JA 379, 390 (tenant's affidavit referring to "the terrible conditions of the building"), 396 (reference to housing code violations found by a D.C. government inspector).

According to the Census Bureau's last *American Housing Survey for the Washington Metropolitan Area*, which was published in 2000, more than 50,000 renter households in the metropolitan area reported insufficient heat in the winter. *Id.* at 97.[9] More than 25,000 renter households lacked complete kitchen facilities, and nearly 7,000 lacked some or all plumbing facilities. *Id.* at 94. Among households below the poverty line, approximately 18,000 reported that their buildings were inadequately maintained, 13,000 reported water leakage, 11,000 reported mice or rats, 9,000 reported open cracks or holes in the interior, and 5,000 reported holes in the floors. *Id.* at 98. In 2002, the District government conducted more than 100,000 housing inspections, including 27,800 in response to complaints from residents. *See* Urban Institute and Fannie Mae Foundation, *Housing in the Nation's Capital (2003)*, at 23.[10]

Second, low-income tenants are particularly vulnerable to even the hint of retaliation, given the power and resource disparities between themselves and their landlords. *See Edwards*, 397 F.2d at 701 (noting "the inequity of bargaining power between tenant and landlord"). In *amici*'s experience, many low-income tenants have little, if any, understanding of their legal rights, often as a result of their limited education, limited English-language proficiency, or men-

[9] The document is available at http://www.census.gov/prod/2000pubs/h170-98-18.pdf (last visited April 20, 2006).

[10] The document is available at http://content.knowledgeplex.org/kp2/cache/kp/5569.pdf (last visited April 20, 2006).

tal disability. Such tenants may not even question an unscrupulous landlord's threats that, if they dare to assert their right to a safe and sanitary home, they will be subjected to harassment, or reported to the authorities, or put out onto the street. (Those threats may be particularly intimidating to a tenant who has occasionally fallen behind in his rent payment or has committed an arguable lease violation that the landlord has been willing to overlook so long as the tenant docilely accepts his substandard living conditions.) A strong retaliation defense can operate as a counterweight for tenants to deter and penalize this sort of reprehensible landlord behavior.

Finally, in contrast to more affluent tenants, who can afford to move elsewhere if they are dissatisfied with their housing conditions, low-income tenants often have little choice but to remain where they are. According to a 2003 study, "the region's supply of affordable housing is woefully inadequate," "meet[ing] the needs of less than 50 percent of the area's neediest renters," those with incomes below $10,000. *Housing in the Nation's Capital (2003)*, at 3; *see* D.C. Fiscal Policy Institute, *New Census Data Show DC's Affordable Housing Crisis Is Worsening*, at 1 (Sept. 13, 2005) (concluding that the number of "affordable rental units" in the District -- defined as those with rent and utility costs below $500 -- "has declined steadily since 2000, with some 7,500 units lost between 2000 and 2004").[11] A follow-up study in 2005 predicted that, "if recent trends continue, the inventory [of affordable housing] is likely to decline even further." Urban Institute and Fannie Mae Foundation, *Housing in the Nation's Capital (2005)*, at 42.[12] Even aside from the shortage of affordable housing, low-income tenants may have difficulty coming up with the money for the security deposit, the installation of utilities, or moving ex-

[11] The document is available at http://www.dcfpi.org/9-13-05hous.pdf (last visited April 20, 2006).

[12] The document is available at http://www.knowledgeplex.org/kp2/cache/documents/127805.pdf (last visited April 20, 2006).

penses. Accordingly, if low-income tenants are to attempt to improve their housing conditions, they must engage in the sort of activity that may induce an unscrupulous landlord to retaliate, such as reporting the landlord to the authorities, withholding rent to force repairs, participating in a tenants association, or engaging in litigation against the landlord

CONCLUSION

The trial court's judgment should be reversed and the case should be remanded for a trial that includes consideration of the merits of the tenants' retaliation defense.

Respectfully submitted.

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