No. 17-1322

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Marsha Wetzel,

Plaintiff-Appellant,

v.

Glen St. Andrew Living Community, LLC, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois, No. 16-cv-7598
Hon. Samuel Der-Yeghiayan, District Judge

BRIEF FOR NATIONAL FAIR HOUSING ALLIANCE, CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS, FAIR HOUSING COUNCIL OF CENTRAL INDIANA, HOPE FAIR HOUSING, INC., METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL, OPEN COMMUNITIES, AND SOUTH SUBURBAN HOUSING CENTER AS AMICI CURIAE SUPPORTING APPELLANT MARSHA WETZEL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1322

Short Caption: Wetzel v. Glen St. Andrew Living Community, LLC, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Fair Housing Alliance, Chicago Lawyers' Committee for Civil Rights, Fair Housing Council of Central Indiana, HOPE Fair Housing, Inc., Metropolitan Milwaukee Fair Housing Council, Open Communities, and South Suburban Housing Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Relman, Dane & Colfax PLLC

National Fair Housing Alliance

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Stephen Dane Date: 6/19/17

Attorney's Printed Name: Stephen Dane

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Sasha Samberg-Champion Date: 6/19/17

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Attorney's Signature: s/ Morgan Williams Date: 6/19/17

Attorney's Printed Name: Morgan Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Yiyang Wu Date: 6/19/17

Attorney's Printed Name: Yiyang Wu

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INTEREST OF AMICI CURIAE[1]

The National Fair Housing Alliance, Inc. ("NFHA") is a non-profit corporation that is dedicated to ending discrimination in housing. NFHA represents approximately 75 private, non-profit fair housing organizations throughout the country. NFHA and its members engage in efforts to end segregation and ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. On the front line in the fight against housing discrimination, NFHA and its members regularly rely on the weight of the Fair Housing Act ("FHA") to undertake important investigation, enforcement, and education initiatives in cities and states across the country, including on issues of housing harassment.

Six NFHA members located within the Seventh Circuit join NFHA as *amici curiae*. Chicago Lawyers' Committee for Civil Rights, Fair Housing Council of Central Indiana, HOPE Fair Housing, Inc., Metropolitan Milwaukee Fair Housing

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

In addition, pursuant to Appellate Rule 29(a)(4)(E), NFHA, Chicago Lawyers' Committee for Civil Rights, Fair Housing Council of Central Indiana, HOPE Fair Housing, Inc., Metropolitan Milwaukee Fair Housing Council, Open Communities, and South Suburban Housing Center certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than Amici, their members and their counsel) contributed money intended to fund the preparation or submission of the brief.

Council, Open Communities, and South Suburban Housing Center are non-profit, public interest fair housing agencies operating in the states of Indiana, Wisconsin, and Illinois. Each works to eliminate housing discrimination and to ensure equal housing opportunities for all people within their communities through leadership, education and advocacy, public policy initiatives, and enforcement. They regularly accept complaints alleging housing discrimination, investigate and educate housing-related industries for compliance with fair housing laws, and participate in federal and state court litigation brought under those laws.

The Supreme Court and appellate courts have for decades upheld the standing of fair housing organizations such as NFHA, Chicago Lawyers' Committee for Civil Rights, Fair Housing Council of Central Indiana, HOPE Fair Housing, Inc., Metropolitan Milwaukee Fair Housing Council, Open Communities, and South Suburban Housing Center (collectively, "Housing Amici") to bring suit under the FHA. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992). Although the fair housing organizations are not themselves usually the targets of discrimination, they nevertheless have standing under the FHA based on the injuries they suffer that are fairly traceable to a defendant's discriminatory housing practices.

Each of the Housing Amici routinely work with victims of housing harassment as well as with housing providers who seek a clearer understanding of their duties under the FHA. As such, Housing Amici's interests will be adversely affected by affirmance of the district court's holding that housing providers are not liable for their role in creating and perpetuating hostile housing environments. As discussed in greater detail below, the district court's decision significantly curtails the rights and protections afforded by the FHA to victims of housing harassment and casts doubt on longstanding precedent (in this Circuit and others) that has held that housing providers are directly liable for their failure to protect against hostile housing environments. Housing Amici thus have a strong interest in participating in this case and ensuring that this panel understands the necessity of sustaining the FHA's protections against housing harassment, the significance and reasonableness of the Rule promulgated by Department of Housing and Urban Development ("HUD") on harassment, and the relationship between the Seventh Circuit's FHA jurisprudence and the issues brought to bear by the instant appeal.

SUMMARY OF ARGUMENT

The Fair Housing Act and Title VII share virtually identical operative language and a common, broad purpose of eradicating discrimination within their respective sectors. It thus comes as no surprise that the Seventh Circuit has instructed that "a determination of what constitutes a hostile environment in the

housing context requires the same analysis courts have undertaken in the Title VII context." *DiCenso v. Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996). Under Title VII, the law is clear: an employer is responsible for taking reasonable action to combat hostile work environments, regardless of whether the harasser is an agent, employee, or third party, and the employer is liable for its negligence in failing to do so. It follows that the FHA imposes those same obligations on housing providers encountering hostile housing environments created by a tenant or other third party.

That is precisely the standard articulated by HUD in its Final Rule on harassment published last year. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054 (Sept. 14, 2016), codified at 24 CFR § 100.7, *et seq.* ("Harassment Rule"). Under HUD's interpretation of the FHA—which this Court has held in other contexts should be entitled to great weight—a defendant is liable for its role in perpetuating a hostile housing environment if: (1) the harassment is based on a protected class; (2) the harassment was sufficiently severe or pervasive as to interfere with the terms and conditions of the housing; and (3) the defendant knew or should have known of the discriminatory conduct and had the power to correct it. *See id.* §§ 100.7(a), 600. HUD's Harassment Rule thus formalized longstanding precedent, including from this Court, establishing that a

housing provider is obliged to take reasonable action to correct discriminatory harassment—even if the victim of the harassment remains in her apartment, and even if the housing provider did not act intentionally in failing to take those steps.

The district court's holding expressly contradicts this Court's precedent and HUD's Harassment Rule in two critical ways that, if affirmed, would threaten residents' right to enjoy housing free from discriminatory harassment. First, it held that a plaintiff must establish that the harassment caused her housing to be "uninhabitable" or that she was otherwise constructively evicted. Second, it held that a plaintiff must plead discriminatory intent on the part of the housing provider in addition to the harasser. These holdings misread this Court's FHA precedent and completely ignore its Title VII decisions articulating the correct standard for hostile environment liability. Housing providers, like employers, are responsible for their own failure to take reasonable steps to provide a non-discriminatory environment. Housing Amici respectfully request that the district court's decision be reversed.

ARGUMENT

I. The FHA Requires Housing Providers to Ameliorate Discriminatory Housing Harassment In Order to Achieve the Act's Purposes of Ending Segregation and Creating "Truly Integrated and Balanced Living Patterns."

The Supreme Court has consistently recognized the Fair Housing Act's "continuing role in moving the Nation toward a more integrated society." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507,

2525-26 (2015). The Act, which was passed the same month as Dr. Martin Luther King's assassination, was enacted with broad Congressional support and the express intent to create "truly integrated and balanced living patterns," and for those reason its provisions have always been broadly interpreted by the Supreme Court. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (*quoting* 114 Cong. Rec. 3422 (1968) (Statement of Senator Mondale)); *see also Alschuler v. Dep't of Hous. & Urban Dev.*, 686 F.2d 472, 477 (7th Cir. 1982) (same). Yet despite its passage almost fifty years ago and the dogged determination of housing advocates working to achieve its ideals, the "vestiges [of residential segregation] remain today, intertwined with the country's economic and social life."[2] *Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

For thousands of individuals across the nation (including many of Housing Amici's own clients and constituents), equal housing opportunity has been thwarted by severe or pervasive harassment within their apartment complex or

[2] Today, approximately half of the nation's Black population, and 40 percent of its Latino population, live in neighborhoods without a White presence. The average White person lives in a neighborhood that is 77 percent White, 7 percent Black, 10 percent Latino, and 4 percent Asian. For more information on why this matters, *see* NFHA, "The Case for Fair Housing: 2017 Fair Housing Trends Report, 25 (2017)", available at http://nationalfairhousing.org/wp-content/uploads/2017/05/TRENDS-REPORT-5-17-17-FINAL.pdf ("NFHA Trends Report") (citing Logan, John R. and Wenquan Zhang, "Global Neighborhoods: New Evidence from Census 2010" Brown University, November 2011, available at http://www.s4.brown.edu/us2010/Data/Report/globalfinal2.pdf).

neighborhood of choice. In 2016, approximately 23 percent of private fair housing organizations reported complaints of harassment or housing-related hate activity on the basis of national origin, religion, race, or sexual orientation. *See* NFHA Trends Report, at 97. One fair housing group based in Los Angeles reported receiving over 2,000 harassment-related complaints in recent years. *See* Housing Rights Center, Comment to Harassment Rule, Dec. 21, 2015, available at https://www.regulations.gov/document?D=HUD-2015-0095-0064.

Some recent examples of harassment reported to fair housing and other civil rights organizations include:

- In Chicago, Illinois, Puerto Rican homeowners were harassed by white neighbors, who repeatedly assailed them with derogatory language and, on more than one occasion, threatened to kill or rape them if they did not "move out and go back to [their] people."[3]
- In Cross Plains, Wisconsin, the owners and managers of an apartment complex failed to take action to stop several tenants from harassing a neighbor, who has cerebral palsy, and her daughter with Down's syndrome. When the victim reported the harassment, one manager began pressuring the woman to move, stating that he did not believe

[3] *See* Chicago Lawyers' Committee for Civil Rights, Comment to Harassment Rule, Dec. 17, 2015, available at https://www.regulations.gov/document?D=HUD-2015-0095-0063.

the woman's daughter was capable of living independently and that the two of them were causing too much trouble, without any factual basis for this assertion.[4]

- In rural Virginia, the only African-American resident of a trailer park was confronted with racially charged verbal abuse and threats of physical violence from his white neighbors on a regular basis. In one instance, his white neighbors gathered around his trailer and physically shook it while he was inside, causing him to flee barefoot from his home in fear for his life, taking refuge in the woods for the remainder of the night. Rather than proactively addressing the behavior of his white tenants, the landlord of the trailer park evicted the African-American tenant from his trailer, forcing him not only to vacate his home, but to forgo his personal possessions in the process.[5]

Indeed, Housing Amici anticipate that the number of harassment-related complaints will increase this year. The Southern Poverty Law Center reported receiving 1,094 complaints of bias-related crimes in December 2016 alone, 134 of

[4] *See* "Justice Department Files Proposed Settlement of Fair Housing Act Lawsuit Against Landlord for Housing Discrimination Based on Disability," Jan 15. 2016, available at https://www.justice.gov/opa/pr/justice-department-files-proposed-settlement-fair-housing-act-lawsuit-against-landord-housing.

[5] *See* Housing Opportunities Made Equal of Virginia, Comment to Harassment Rule, Dec. 21, 2015, available at https://www.regulations.gov/document?D=HUD-2015-0095-0060.

which were committed at private residences. *See* NFHA Trends Report, at 96, n.122.

Constant harassment of any kind serves as an attack on one's sense of security, safety, and belonging in one's own home. But such feelings are exacerbated when the harassment goes unchecked despite pleas for help: the victim is no longer simply the unlucky target of a single harasser, but must confront the reality that her own landlord, with ample control and power to remedy the situation, has instead chosen to look the other way—or worse, as in this case, retaliates against her for reporting the harassment. This combination of events often leaves victims with no choice but to vacate their residence in search of a more stable living environment.

When a landlord makes the concerted decision to let harassment go unchecked, that abuse also perpetuates the segregated and discriminatory housing patterns that the FHA is meant to overcome. As the drafters of the FHA well understood, private violence and other unofficial harassment has been one of the main mechanisms by which certain communities have enforced segregation. *See generally* Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 Ohio St. J. Crim. L. 47 (2007). Accordingly, the FHA imposes both civil and criminal sanctions on those whose harassing behavior interferes with accomplishment of the Act's objectives. *See* 42 U.S.C. § 3617

(making it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by" the FHA); *id.* § 3631 (imposing criminal sanctions for similar conduct).

Thus, harassment based on a protected classification, and the negligent tolerance of such harassment, is precisely the kind of conduct that the FHA intends to prevent. Housing harassment continues to stand as a painful and obvious barrier to the FHA's mission of ensuring equal access to housing for all and promoting diversity within living communities.

II. HUD's Harassment Rule Codifies Longstanding Principles of Hostile Housing Environment Liability, Including Against a Housing Provider That Fails to Take Reasonable Action Against Severe or Pervasive Housing Harassment.

In order to combat this epidemic of discriminatory housing harassment, courts have long recognized lawsuits against both the harassers and those who tolerate such harassment. A hostile housing environment cause of action contains three fundamental elements: (1) the harassment was based on a protected classification; (2) the harassment was sufficiently severe; and (3) there is reason to hold the defendant liable for it. *See generally Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003); *see also* Harassment Rule, 24 CFR § 100.7; § 100.600(a)(2).

First, the harassment must be based on a protected classification. *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 946-47 (8th Cir. 2010); *see also* Harassment

Rule, 24 CFR § 100.600(a). If the underlying action was not taken because of the victim's race, color, religion, sex, familial status, national origin, or handicap, there is no FHA liability.

Second, the harassment must be unwelcome conduct that is "sufficiently severe or pervasive as to interfere with: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction." *Id.* § 100.600(a)(2); *see also, e.g.*, *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 113 (3d Cir. 2017). As discussed in greater detail in Section II.A, this standard mirrors in housing that of Title VII of the Civil Rights Act of 1964 in employment.

Whether harassment is "severe or pervasive" depends upon the totality of the circumstances. *See DiCenso*, 96 F.3d at 1008; *see also* 24 CFR § 100.600(a)(2)(i). "Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of a reasonable person in the aggrieved person's position." *Id.* § 100.600(a)(2)(i)(C). "Harassment that intrudes upon the 'well-being, tranquility, and privacy of the home' is considered particularly invasive." *Revock*, 853 F.3d at 113 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

Finally, there must be a basis for holding a housing provider liable for harassment. Courts have recognized two distinct forms of such liability. The first, vicarious liability, is based on agency and the imputation of the harasser's conduct to the housing provider. The other, direct liability, is based instead on the housing provider's own actions (or lack thereof). That is, a housing provider is directly liable for "failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the [provider] knew or should have known of the discriminatory conduct and had the power to correct it." 24 CFR § 100.7(a)(iii); *see also Neudecker*, 351 F.3d at 365.

These three components of a hostile housing environment claim are clearly articulated in HUD's Harassment Rule, and Housing Amici encourage this Court to afford HUD's interpretation *Chevron* deference or great weight. *See Trafficante*, 409 U.S. at 210; *see also Bloch v. Frischholz*, 587 F.3d 771, 780-81 (7th Cir. 2009). However, as HUD itself stated, the Harassment Rule does not create new law or any new forms of liability. *See* 81 Fed. Reg. 63054, 63055. Rather, the Rule simply serves to "formali[ze] clear and consistent standards for evaluating harassment claims under the Act" in a manner that is "consistent with traditional tort liability principles, as well as current federal Fair Housing Act jurisprudence." *Id.* at 63070. As set forth below, the Harassment Rule is consistent with existing Seventh Circuit jurisprudence, as well.

III. This Court's Precedent is Consistent With, and Indeed Helped Inform, the Harassment Rule's Standards Regarding Hostile Housing Environment Liability.

The Harassment Rule simply codified the long-standing principle, recognized by this Court and others, that the standard for liability for hostile environments under the FHA must be informed by the corresponding standard under Title VII. This Court has regularly construed Title VII and the FHA *in pari materia*, in recognition of the statutes' similar text and complementary purposes, each broadly aiming to eradicate discrimination from a sector of the economy. *See DiCenso*, 96 F.3d at 1007 ("[A] determination of what constitutes a hostile environment in the housing context requires the same analysis courts have undertaken in the Title VII context.").

In the Title VII context, it is well settled that an employer is responsible for its own actions if it fails to adequately respond to harassment at the hands of a third party or otherwise fails to take reasonable steps to provide a nondiscriminatory workplace. *See generally Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005). This is so regardless of whether the harasser is an agent, an employee, or even an independent third party; so long as the employer has sufficient authority to act, it can be considered negligent for failing to address the harassment. *Id.*

A. The Seventh Circuit Has Expressly Held that the FHA Protects Against Hostile Housing Environments, and that the FHA Imposes the Same Obligations on Housing Providers That Title VII Imposes on Employers.

This Court has long held that a plaintiff may bring a hostile housing environment claim under the FHA using the same or similar analysis that applies to a hostile work environment claim under Title VII. In fact, the Seventh Circuit was one of the first appellate courts to recognize a hostile housing environment cause of action, over twenty years ago. *See DiCenso*, 96 F.3d at 1008.

The *DiCenso* decision rested on its analysis of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Supreme Court case pertaining to harassment in the Title VII context. In *Meritor*, the Supreme Court analyzed 42 U.S.C. § 2000e-2(a)(1) and concluded that its protection against discrimination "with respect to . . . [the] terms, conditions, or privileges of employment" was "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 66 (internal quotation omitted).

The FHA contains the same exact operative language as that analyzed in *Meritor*. Both statutes make it "unlawful" to "discriminate against" an individual "in the terms, conditions, or privileges" of housing/employment "because of" the individual's race or other protected class. *See* 42 U.S.C. § 3604(b) (FHA); 42

U.S.C. § 2000e-2(a)(1) (Title VII).[6] Moreover, as their textual similarity suggests, both statutes have similar and complementary purposes: both were "enacted to eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Cmtys. Project*, 135 S. Ct. at 2521; *see also Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000).

In light of the similarity in the two statutes' text and purpose, it is no surprise that *DiCenso* found the analysis undertaken by *Meritor* and its Title VII progeny to be directly applicable to its FHA analysis. As this Court emphasized, "a determination of what constitutes a hostile environment in the housing context *requires the same analysis* courts have undertaken in the Title VII context." *DiCenso*, 96 F.3d at 1007 (emphasis added). As a result, this Court held that Title

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[6] The full statutory language of 42 U.S.C. § 3604(b) reads:

> [I]t shall be **unlawful**—
> (b) To **discriminate against** any person **in the terms, conditions, or privileges** of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, **because of race, color, religion, sex, familial status, or national origin** (emphasis added).

And 42 U.S.C. § 2000e-2(a)(1) states:

> It shall be an **unlawful** employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against** any individual with respect to his compensation, **terms, conditions, or privileges** of employment, **because of such individual's race, color, religion, sex, or national origin** (emphasis added).

VII's standards with regard to whether an environment is sufficiently hostile were imputed, in their entirety, to the FHA. *Id.* at 1008.

Since *DiCenso*, this Court has reaffirmed the viability of hostile housing environment claims under Sections 3604 and 3617. *See Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) (en banc); *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997). Moreover, those same cases have *expressly instructed* lower courts to apply Title VII jurisprudence to harassment cases under the FHA.[7] As *Bloch* emphasized, "[The FHA] is the functional equivalent of Title VII, and so the provisions of these two statutes are given like construction and application." 587 F.3d at 779 (internal quotation omitted); *see also id.* (noting that Section 3604(b) of the FHA is "broad, mirroring Title VII").

As of the filing of this brief, the Eighth and Tenth Circuits have joined the Seventh in recognizing the hostile housing environment cause of action under the FHA; the Second and Ninth Circuits have issued unpublished opinions suggesting they would do the same. *See Neudecker*, 351 F.3d at 364 (8th Cir. 2003); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993); *see also Khalil v. Farash Corp.*, 277 F.

[7] The single case to have suggested otherwise is *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004), which suggested that Title VII covered both job-seekers and employees whereas the FHA only covered home-seekers pre-acquisition. But *Halprin*'s holding has since been relegated to 3604(a) claims only, which are not implicated in the instant case. *See Bloch*, 587 F.3d at 779 (reading *Halprin* narrowly and rejecting defendants' argument that FHA does not reach any claims of post-acquisition discrimination).

App'x 81, 84 (2d Cir. 2008) (citing with approval to *Neudecker* and *DiCenso*); *Hall v. Meadowood Ltd. P'ship*, 7 F. App'x 687, 689 (9th Cir. 2001). Each of these opinions expressly applied Title VII jurisprudence to FHA cases alleging discriminatory harassment.

B. Just as Employers are Responsible for Failing to Take Reasonable Action Against Harassment in the Workplace, Housing Providers are Responsible for Failing to Take Reasonable Action Against Harassment at Home.

On questions regarding the interpretation of a harassment claim under the FHA, this Court has repeatedly looked to its Title VII jurisprudence. That Title VII precedent is clear that an employer's duty to protect against a hostile environment extends to harassment at the hands of third parties.

In *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005), this Court considered a nurse's allegation that she was sexually harassed by an independent contractor working at the hospital. Judge Easterbrook explained that the hospital could be held liable under Title VII if it failed to properly intercede upon learning of the harassment:

> The employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem. . . . Dunn alleges that the Hospital knew that Coy made life miserable for women (but not men) and did nothing in response. That states a claim of sex discrimination under Title VII.

Dunn, 429 F.3d at 691. This Court continued:

> Indeed, it makes no difference whether the actor is human. Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

Id.; *see also Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 770 (7th Cir. 2007); *Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chicago*, 488 F.3d 739, 746 (7th Cir. 2007) ("An employer is obliged to deal reasonably with unlawful harassment in the workplace regardless of who perpetrates it").

Every other circuit to consider the question has agreed that employers may be held liable for their negligent failure to address a discriminatory environment within the employer's control, even when it is created by non-employees who are not the employer's agents. *See*, *e.g.*, *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-24 (4th Cir. 2014) (employer liable for not taking appropriate action to prevent client harasser); *Summa v. Hofstra University*, 708 F.3d 115, 124 (2d Cir. 2013) (university liable for harassment by students on the school football team); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-12 (8th Cir. 1997) (operator of home for individuals with developmental disabilities may be liable for hostile environment created by a resident).

The FHA should be applied in the same manner. A landlord is vicariously and strictly liable for the discriminatory actions of its agent. It is in that context

that the liability of the agent can and must be imputed to the landlord in order for a FHA claim to be proper. *See Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985). But a landlord is *also* responsible for its own negligent failure to remedy a hostile and discriminatory environment created by a non-agent. In other words, a FHA claim is proper if the landlord knew or should have known of the harassment, but took no reasonable action to correct the situation. *See* 24 CFR § 100.7(a)(iii).

The Eighth Circuit, along with numerous lower courts across the country, has applied Title VII precedent to FHA harassment claims in this manner. In *Neudecker*, a landlord failed to intervene when its tenant reported that several co-tenants were harassing him based on his disability. 351 F.3d at 364-65. Analogizing to Title VII jurisprudence providing that employers could be liable if a customer or stranger harassed an employee and the employer failed to respond appropriately, it concluded that the plaintiff's allegations of a housing provider's failure to address discrimination were similarly sufficient to establish a cause of action under the FHA. *Id.*; *see also, e.g.*, *Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Bradley v. Careydale Enters.*, 707 F. Supp. 217, 223 (E.D. Va. 1989); *Martinez v. California Inv'rs XII*, No. CV 05-7608-JTL, 2007 WL 8435675, at *5 (C.D. Cal. Dec. 12, 2007); *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No. 96-CV-2495, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997).

IV. The District Court Erred in Dismissing Ms. Wetzel's Claims Because Constructive Eviction is Not a Requirement Under a Hostile Environment Theory and She Adequately Pled Discriminatory Intent.

HUD's Harassment Rule, as well as FHA and Title VII precedent from this Circuit, make plain that Ms. Wetzel has properly pled a hostile housing environment cause of action against her housing provider. Ms. Wetzel has alleged that (1) she was harassed on the basis of her gender, *see* App. at 29, (2) the harassment was severe and pervasive as to interfere with the terms and conditions of her housing, *see* App. at 25-26, and (3) her housing provider knew of the harassment but failed to respond in any way to remedy it, *see* App. at 27. The inquiry should end there.

Instead, the district court imposed additional requirements on Ms. Wetzel that have no place in a hostile environment analysis. Nothing in this Circuit's decisions on post-acquisition restrictions (including *Halprin* and *Bloch*) can reasonably be read as requiring any sort of departure from the hostile environment standards set forth above.

A. The District Court Erred in Dismissing Ms. Wetzel's Claims Because the FHA Does Not Require the Plaintiff to be Constructively Evicted.

The district court held that Ms. Wetzel failed to state a claim under 42 U.S.C. § 3604(b) because she did not allege that the harassment rendered her apartment "uninhabitable" and she was therefore not constructively evicted from the apartment. *See* App. at 7. An FHA claim does not require such a showing.

The district court's holding misread *Bloch*, which in fact expressly held that constructive eviction is "*not the only* aspect of § 3604(b) that this case implicates." *Bloch*, 587 F.3d at 779 (emphasis added). Consistent with the plain statutory language of 42 U.S.C. § 3604(b), *Bloch* held that a plaintiff who owned property (as was the case in *Bloch*) need only make allegations linking defendants' conduct to "the terms, conditions, or privileges that accompanied or were related to the plaintiffs' purchase of their property." *Id.* at 780. Similarly, a plaintiff who rents (like Ms. Wetzel here) need only establish that discriminatory conduct affects the terms, conditions, or privileges accompanying or related to her rental.

It is absolutely clear that Ms. Wetzel's allegations linked the housing provider's alleged conduct to the terms and conditions under which she agreed to rent the property. Ms. Wetzel signed a Tenant's Agreement that conditioned her tenancy on her submission to the rules of Glen St. Andrew, including a rule against "engag[ing] in any act or omission that constitutes a direct threat to the health and safety of other individuals." App. at 39. In exchange, Appellees contracted to provide her with room, board, and access to community rooms "in accordance with the rules and regulations promulgated by Owner." App. at 38; *see also id.* (use of premises deemed inappropriate if it "unreasonably interferes with the peaceful use and enjoyment of the community by other tenants"). Appellees' subsequent non-action in the face of known harassment clearly interfered with the terms and

conditions set forth in the Tenant's Agreement—not least of all in the fact that Ms. Wetzel was denied access to public areas out of fear of the continued harassment. Just as the condo association in *Bloch* was held liable under § 3604(b) because the implicated conduct related to terms and conditions set forth as part of the housing acquisition, so too should Appellees in this case.

The correct standard for evaluating the severity of the harasser's conduct is articulated in HUD's harassment rule: "Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is evaluated from the perspective of *a reasonable person* in the aggrieved person's position." 24 CFR § 100.600(a)(2)(i)(C) (emphasis added). This concept is consistent with this Circuit's Title VII precedent, which does not require that an employee be constructively discharged from her employment to sustain a claim under 42 U.S.C. § 2000e-2(a)(1). In fact, in Title VII hostile work environment cases, "[the] employee is expected to remain employed while seeking redress." *See Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir. 2000) (internal quotations omitted). Construing the FHA similarly is wholly consistent with the court's previous instruction to construe the FHA and Title VII to work similarly.[8] *See DiCenso*, 96 F.3d at 1008.

[8] If anything, the preamble to the Harassment Rule notes that "unwelcome conduct in or around the home can be particularly intrusive and threatening[,] and may

For all these reasons, contrary to the district court's conclusion, a hostile living environment is an entirely separate cause of action, in addition to constructive eviction, that is cognizable under § 3604(b).[9]

B. The District Court Erred in Dismissing Ms. Wetzel's Claims Because the FHA Does Not Require the Housing Provider Who Negligently Tolerates Discriminatory Harassment to Have Discriminatory Intent.

The district court also erred in holding that Ms. Wetzel failed to state a claim under 42 U.S.C. § 3617 of the FHA because she did not allege the requisite intent on the part of Glen St. Andrew. *See* App. at 5-6. Contrary to the district court's ruling, Ms. Wetzel did allege the requisite intent: intentional discrimination on the part of the harassers, and negligence on the part of the housing provider.

There is no basis for the district court's holding that a landlord is responsible for failing to address discriminatory harassment if and only if the landlord, in addition to the harasser, has discriminatory intent.[10] As previously discussed, it is

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violate the Fair Housing Act even though the same or similar conduct in an employment setting may not violate Title VII." 81 Fed. Reg. at 63063.

[9] It is worth noting that *Bloch* merely states that there are two possibilities for relief on the facts of the case before it, reserving the possibility that more theories exist. *See* 587 F.3d at 779; *see also id.* at 780 (holding that "certain" claims for post-acquisition discrimination may proceed under § 3604(b)).

[10] Although the statutory language itself does not require it, the Seventh Circuit has suggested that claims under 42 U.S.C. § 3617 must be grounded in either discriminatory intent or disparate impact. *See Bloch*, 587 F.3d at 783; *East-Miller v. Lake County Highway Dept.*, 421 F.3d 558, 563 (7th Cir. 2005). But whether negligence is an acceptable standard of liability for hostile environment claims under the FHA—just as it is under Title VII—is an issue of first impression for this Court.

well-settled that liability under a hostile environment theory does not require that the defendant have acted with discriminatory motive in failing to take reasonable action against harassment in the workplace. Rather, a plaintiff need only prove that a housing provider acted in negligently in "failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it." 24 CFR § 100.7(a)(1)(iii); *see also Neudecker*, 351 F.3d at 365; *Revock*, 853 F.3d at 112 (§ 3617 interference claims do not include intentional discrimination requirement); Section II.B *supra* (citing Title VII cases stating same).

Of course, hostile environment claims (whether in the workplace or at a residence) *do* involve allegations of discrimination—by the harasser. Here, Ms. Wetzel could not bring a Fair Housing Act case against Appellees for tolerating a neighboring tenant's loud music or drug-dealing. *See, e.g.*, *Quigley, v. Winter*, 598 F.3d at 946-47 (requiring, *inter alia*, that harassment be based on the victim's membership in a protected class). The district court thus would require proof of a *second* layer of discrimination that is not required under Title VII and should not be required under the FHA.

A showing that the housing provider's agents acted with negligence should be sufficient to hold it liable under the FHA, but even if it is not, Appellant has adequately pled facts indicating that those agents acted with deliberate

indifference. In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court found deliberate indifference sufficient to meet the requirements of Title IX of the Education Amendments of 1973, a provision that generally requires a showing of intentional discrimination for a private plaintiff to prevail. The Court observed that the Board's liability was not based on imputing the classmate's harassing behavior to the school; rather, the Board was liable "for its *own* decision to remain idle[.]" *Davis*, 526 U.S. at 641 (emphasis in original).

Here, Ms. Wetzel's pleadings establish the knowledge, control, and clearly unreasonable response requirements for deliberate indifference. As described in Ms. Wetzel's Opening Brief, the Appellees were put on actual notice of the harassment on multiple occasions. The harassing behavior took place in a building owned and managed by the Appellees. It was perpetrated by tenants over which the defendants had control, including but not limited to the authority to evict. The defendants affirmatively chose to do nothing. At a very minimum, Ms. Wetzel's allegations support a finding that the Appellees' agents acted with deliberate indifference, which is sufficient to support a finding of liability.

V. HUD's Harassment Rule is Reasonable and Should be Entitled to Deference.

Finally, the standards for hostile housing environment claims are clearly articulated in HUD's Harassment Rule, and this Court should defer to the agency's

interpretation of the FHA, or at minimum give the Rule's interpretation the great weight to which it is entitled.

Under the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d), HUD has general rulemaking authority to enact such rules and regulations as may be necessary to carry out its function, power, and duties. Thus, HUD's Harassment Rule, as a reasonable interpretation of the FHA's substantive law, is entitled to deference under *Chevron*. *See Meyer v. Holley*, 537 U.S. 280, 287-288 (2003) (stating that "we ordinarily defer to an administrative agency's reasonable interpretation of a statute"). "Courts often will defer to an agency's reasonable interpretation of an ambiguous provision within the agency's own organic statute." *U.S. v. 25 Cases, More or Less, of an Article of Device*, 942 F.2d 1179, 1182 (7th Cir. 1991).

Here, the Harassment Rule is a reasonable interpretation of the Fair Housing Act because it is in accordance with the approach taken by the majority of federal courts that have considered the issue—including this one—and with HUD's own longstanding interpretation of the FHA. Among other things, the Rule:
(1) formalizes standards involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability; (2) defines "quid pro quo" and "hostile environment harassment"; and (3) "clarifies the operation of traditional principles of direct and vicarious liability" under the FHA. 81 Fed. Reg.

at 63054. These clarifications are eminently reasonable because they formalize existing law and do not create new theories of liability. *See id.* at 63,068 (the new regulation "does not add any new forms of liability under the [Fair Housing] Act or create obligations that do not otherwise exist."); *id*. at 63055, 63069-63070; *see also Godbole v. Ries*, 2017 WL 1197101 at *3 (N.D. Ill. Mar. 31, 2017) (finding that the Harassment Rule does not constitute a significant change in the law because it formalizes existing standards and does not create new forms of liability). Accordingly, the Harassment Rule is entitled to the broad deference described in *Chevron*, *see Meyer*, 537 U.S. at 287-88, or at the very least, it is entitled to "'great weight,'" *Bloch*, 587 F.3d at 781 (*quoting Trafficante*, 409 U.S. at 210).

CONCLUSION

For the reasons set forth above, the district court's holding is at odds with Seventh Circuit precedent, that of the majority of courts across this country, and HUD's authoritative interpretation of the FHA. Amici respectfully request that this Court reverse the judgment of the district court and remand the case for further proceedings.

Dated: June 19, 2017

Respectfully Submitted,

/s/ Yiyang Wu_____

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1. This brief complies with the type-volume limitation of Circuit Rule 29 because all portions of the brief, other than the Disclosure Statements, Table of Contents, Table of Authorities, and the Certificates of Counsel, contain 6,539 words. This certification is based on the word count function of the Microsoft Office Word word processing software, which was used in preparing this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 for Windows in Times New Roman 14 point font.

Dated: June 19, 2017

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CERTIFICATE OF SERVICE

I, Yiyang Wu, hereby certify under penalty of perjury that on June 19, 2017, I served a copy of Brief for National Fair Housing Alliance, Chicago Lawyers' Committee for Civil Rights, Fair Housing Council of Central Indiana, HOPE Fair Housing, Inc., Metropolitan Milwaukee Fair Housing Council, Open Communities, and South Suburban Housing Center as Amici Curiae Supporting Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 19, 2017

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