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

Case No. 1:16-cv-07598

The Honorable Judge Samuel Der-Yeghiayan

REPLY BRIEF OF PLAINTIFF-APPELLANT MARSHA WETZEL

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Defendants' failure to put an end to the sex- and sexual orientation-based hostile housing environment experienced by Marsha Wetzel in the senior living community that Defendants own, manage, and operate constitutes a discriminatory action for which they can be held liable under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604(b) and 3617. Wetzel has brought these claims against them as the people and entities that have both the obligation to ensure her equal housing opportunity and the power to control the terms, conditions, and privileges of her tenancy. Defendants' conduct in allowing the hostile housing environment to persist in their facility constitutes sex discrimination and they can be held directly liable for it.

Defendants' attempt to diminish Wetzel's clear allegations of a targeted pattern of severe and pervasive animus-based harassment – recasting them as mere "squabbles" – is not only inappropriate on review of a motion to dismiss, but groundless. Wetzel's complaint more than sufficiently alleges every element of her hostile housing environment and retaliation claims, including the requisite intent. Her claims are supported by the Department of Housing and Urban Development's ("HUD") regulation on harassment and liability, an authorized, proper interpretation of the FHA by the agency charged with its enforcement. Defendants' attacks on the regulation cannot undermine Wetzel's statutory claims and should be rejected.

I. Wetzel's Allegations Are More Than Sufficient To Overcome A Motion To Dismiss.

Defendants offer an improper and irrelevant substitute account of Wetzel's allegations. Indeed, Defendants attempt to convince the Court that Wetzel's complaints concern nothing more than "squabbles" and "bickering" between "ornery," "cranky," "cantankerous," and "crotchety" senior citizens. (Defendants-Appellees' Brief ("DA Br.") at 2, 3, 4, 6, 8, 24, 45, 50) Offering facts not in the complaint and misconstruing and trivializing Wetzel's allegations, Defendants seek to distract the Court from the unassailable conclusion that Wetzel has more than met her burden of stating hostile housing environment and retaliation claims pursuant to §§ 3604(b) and 3617.

While agreeing that this Court's review is de novo (DA Br. 8), Defendants disregard the other parameters of an appeal of a motion to dismiss. Specifically, they ignore that this Court's review is limited to the sufficiency and plausibility of the complaint's allegations and that all well-pleaded facts and all reasonable inferences from them must be construed in the light most favorable to the Plaintiff-Appellant. *See Alamo v. Bliss*, 864 F.3d 541, 548 (7th Cir. 2017); *Huri v. Office of the Chief Judge of the Cir. Ct. of Cook Cty.*, 804 F.3d 826, 829 (7th Cir. 2015).

First, Defendants argue facts that are not in the Complaint.[1] Yet this Court has been clear that in reviewing a decision granting a motion to dismiss for failure

[1] For example, Wetzel alleges that another resident, Bob Herr, twice rammed his walker into her scooter. (App. 16, 18) Defendants, however, assert that Herr and Wetzel "rammed into each other" and "[e]ach alleged the other to be at fault." (DA Br. 3) There are simply no facts alleged in the complaint to support these assertions. Additional examples include Defendants' descriptions of other residents as "very senior" or "elderly" (DA Br. 3, 24); their

to state a claim, "[g]enerally, matters outside the pleadings may not be considered on such a motion." *Albany Bank & Tr. Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir. 2002). A Rule 12(b)(6) motion serves only to test the sufficiency of her claims and Defendants' introduction of additional facts is improper. *See Kinney v. Dominick's Finer Foods, Inc.*, 780 F. Supp. 1178, 1182 (N.D. Ill. 1991) (citing *Yeksigian v. Nappi,* 900 F.2d 101 (7th Cir.1990)).

Second, Defendants ignore the mandate that all reasonable inferences be drawn in Wetzel's favor. *See Huri*, 804 F.3d at 829. Defendants paint a demeaning, ageist[2] portrait of the older adults to whom they have committed to provide housing and care. Their depiction of the facts asks the Court to draw inferences in their favor rather than in Wetzel's favor.[3] Notwithstanding Defendants' attempt to

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description of Wetzel's seating arrangements in the dining room, both before another resident intentionally rammed the table while making homophobic and sexist comments and after the Administration moved Wetzel in response to the incident (DA Br. 5); and their description of the Administration's response to the incident. (DA Br. 4-5)

[2] *See* Howard Eglit, *Age Bias in the American Workplace--An Overview*, 3 J. Int'l Aging L. & Pol'y 99, 103 (2009) ("the English lexicon contains an array of negative epithets that are thoughtlessly used in everyday discourse to negatively label and/or describe older men and women: '*… cantankerous*, *… crank*, *crotchety*, *… ornery*").

[3] Examples of Defendants' misconstruing or mischaracterizing facts include the following:

- Mischaracterizing Wetzel and Herr as having "rammed each other" twice (DA Br. 3), when the Complaint states that Herr intentionally rammed her scooter while using a homophobic slur (App. 16) and deliberately hit her scooter in an elevator. (App. 18)

- Mischaracterizing the creation of an incident report involving Rivera's having intentionally rammed Wetzel's table and knocking it on top of her (App. 17, 18) as Rivera having been "written up for the incident." (DA Br. 3)

- Mischaracterizing the Administration's placing the blame on Wetzel for Rivera's and Chase's behavior (App. 18) as "not tak[ing] sides or interven[ing] in the quarrel." (DA Br. 4)

deflect the Court's attention from Wetzel's plain allegations of severe and pervasive discriminatory harassment, her regular complaints, Defendants' refusal to address the hostile environment, and their retaliation for her complaints, the properly construed facts establish that Wetzel has unquestionably met her burden of stating claims under §§ 3604(b) and 3617.

II. Wetzel Has Alleged A Hostile Housing Environment Claim Against Defendants.

A. Wetzel Has Alleged a Severe and Pervasive Pattern of Targeted, Discriminatory Harassment.

Contrary to Defendants' infantilizing portrayal of squabbling senior citizens, Wetzel has set forth straightforward allegations of a severe and pervasive pattern of targeted, discriminatory harassment. Indeed, before the District Court, Defendants did not dispute that Wetzel has made a sufficient complaint of hostile housing

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- Mischaracterizing changing Wetzel's seating in the dining room to less desirable locations in response to her complaints about Chase and Rivera (App. 18) as "separat[ing] the fighting women for the safety of everyone in the dining room where hot liquids, silverware and glassware abound." (DA Br. 4-5)

- Construing Defendant Flavin's alleged statement that she had received complaints about Wetzel (App. 18) as a fact that motivated Flavin's exclusion of Wetzel from the lobby. (DA Br. 5, 52)

- Suggesting that "there are no allegations that the smoking issues were related to discriminatory animus based on Plaintiff's sexual orientation, her complaints about other tenants made the year before, or that Plaintiff was treated differently from other residents based on her sexual orientation." (DA Br. 5-6) This suggestion is directly contradicted by (1) Wetzel having made additional complaints in the three prior months (App. 20, 22), (2) her direct statement to Defendants Cubas and Driscoll that the smoking issues were them "looking for a way to get rid of her because she is a lesbian" and that they "do not do anything when she is called 'faggot.'" (App. 23), and (3) her explicit allegations that the Administration's attempting to kick her out was a response to her complaints. (App. 18-21)

environment, and therefore they have waived any such argument. *See G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012).

In any event, Wetzel has plainly set forth allegations that Defendants allowed GSALC to be "'so pervaded by discrimination that the terms and conditions of [housing] are altered.'" *Alamo*, 864 F.3d at 549–50 (quoting *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013)).

Wetzel's claims directly parallel Mr. Alamo's, which this Court found to state a hostile work environment claim, reversing a motion to dismiss. Like Mr. Alamo, Wetzel "asserts that [s]he was subjected to 'name-calling, derogatory and [sexist and homophobic] comments' by [her] co-[tenants]" over the course of more than one year. 864 F.3d at 550. She alleged that multiple specific slurs "evinc[ing] a clear animus against a particular" protected category were directed at her on numerous occasions over the course of many months, the type of slurs this Court deemed "severe … even if the slurs were used only sporadically over the two-year period detailed in the complaint." *Id.* at 550. Her "complaint also describes [multiple] physical altercations that occurred in the [facility]" which she alleges "were motivated by" her sex and sexual orientation as all of which were accompanied by sexist, homophobic, and derogatory comments, profanity, and slurs. *Id.* at 551.

Like Mr. Alamo, Wetzel "was bothered enough by the comments, as well as other incidents in the [facility], that [s]he informed [the Administrators] 'on numerous occasions … of the harassment that [s]he endured from [her] fellow [tenants].'" *Id.* at 550. And like Mr. Alamo, "[d]espite these repeated complaints,

[the Administrators] did not ameliorate the conditions of [Wetzel's] [living environment]." *Id.* at 550.

Defendants' trivialize Wetzel's allegations as mere "quarrels with her fellow seniors" (DA Br. 2), attempting to cast them as the sort of casual incidents not covered by the Fair Housing Act. As this Court noted in *Alamo*, however, "that misunderstands the Supreme Court's standard, which requires that we consider the *totality* of [Wetzel's] factual allegations and the [housing] environment in which they happened." 864 F.3d at 551 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). The combination of verbal abuse, physical abuse, threats, and intimidation Wetzel suffered at the hands of other residents based on her sex and sexual orientation "contributed to a multifaceted effort to harass [her]." *Id.*

Finally, as in *Alamo*, the harassment Wetzel has endured occurred in a uniquely vulnerable setting. *Id.* at 551. "Harassment that intrudes upon the 'well-being, tranquility, and privacy of the home' is considered particularly invasive." *Revcock v. Cowpet Bay West Condo. Ass'n*, 853 F.3d 96, 113 (3d Cir. 2017) (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)). *See also* Brief For AARP And AARP Foundation As Amici Curiae Supporting Plaintiff-Appellant at 13-19 (addressing the unique harms of harassment in one's home, the prevalence of co-tenant harassment in senior living facilities, and the particular vulnerability of LGBT older adults to harassment in housing).

Based on these parallel facts, this Court concluded that Mr. Alamo stated a hostile environment claim, noting that "the complaint details exactly the type of

'sever[e]' language and 'physically threatening' circumstances that the Supreme Court described as hostile." 864 F.3d at 552 (quoting *Harris*, 510 U.S. at 23). The same conclusion is warranted here.

B. Defendants Can Be Held Liable For The Hostile Housing Environment They Allowed To Persist In Their Facility.

Defendants err in insisting that the only way Wetzel can obtain relief from them is by alleging specific discriminatory intent on their part. Wetzel has amply alleged that the harassment she experienced was "because of sex" and has thereby satisfied the intent requirements of §§ 3604(b) and 3617. That the discriminatory intent belonged to the tenants does not absolve Defendants of liability for refusing to put an end to the hostile housing environment that harassment created. Defendants' negligence in failing to put an end to the severe and pervasive discriminatory harassment was the discriminatory act that deprived Wetzel of equal housing opportunity.

1. Wetzel's Hostile Housing Environment Claims Meet the Intent Requirements of §§ 3604(b) and 3617.

In setting forth her hostile housing environment claims, Wetzel has alleged the essential element of intent, for both §§ 3604(b) and 3617, by clearly identifying the discriminatory sex- and sexual orientation-based animus motivating and permeating the severe and pervasive harassment she has experienced. As addressed in Part I(A)(3) of her opening brief, the only discriminatory intent Wetzel was required to allege was that which motivated the severe and pervasive harassment she experienced.

Defendants urge that a plain reading of the text of §§ 3604(b) and 3617 requires "discriminatory intent or conduct by the actor charged" as an element of a cause of action thereunder. (DA Br. 27) Yet the Supreme Court's interpretation of language identical to § 3604(b)'s prohibition in the context of retaliation claims is instructive. In *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), the Court addressed whether discrimination "because of" a protected trait could encompass retaliation claims without specific allegations of discriminatory intent on the part of the retaliator. In those cases, the Court held that this language can impose liability for a defendant's *response* to another party's animus. The other party's discriminatory motives were sufficient to conclude that the retaliator's actions constituted "discrimination because of" the protected trait. *See Gomez-Perez*, 553 U.S. at 479-82; *Jackson*, 544 U.S. at 174.

Defendants' insistence that the "overall focus" of the FHA supports their interpretation of required intent rings hollow. (DA Br. 31) That they rely on Justice Alito's dissent in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2537 (2015), and Justice O'Connor's concurrence in *Smith v. City of Jackson*, 544 U.S. 228, 258 (2005), reflects that the majority of the Supreme Court has not embraced their position. On the contrary, the Court has made clear that the overarching purpose of the Act is much broader: to "provide[] a clear national policy against discrimination in housing, *Inclusive Cmtys.,* 135 S. Ct. at 2521. The Act embodies the "broad remedial intent of Congress," *Havens Realty*

Corp. v. Coleman, 455 U.S. 363, 380 (1982), and is "applicable to a broad range of discriminatory practices." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

2. Defendants Can Be Held Liable For Their Negligence In Failing To Remedy The Discriminatory Hostile Housing Environment They Allowed To Persist In Their Facility.

Defendants oversimplify Wetzel's claim in suggesting that her experience of severe and pervasive discriminatory harassment itself is the sole basis for her request for relief. (DA Br. 23) Wetzel does not argue that Defendants are liable for the harassing tenants' conduct per se; Defendants are liable for their own refusal to remedy the hostile housing environment caused by that conduct, of which they had been repeatedly made aware. Though Defendants suggest they have no control over their tenants, their initial intervention when the harassment first began illustrates otherwise (App. 16; DA Br. 51), and only serves to underscore the deliberate nature of their refusal to take action as the harassment escalated. That refusal discriminated against Wetzel in the terms, conditions, and privileges of her rental and in the provision of services and facilities in connection therewith under § 3604(b), and interfered with Wetzel's exercise or enjoyment of her right to equal housing opportunity under § 3617.

A landlord controls the terms and conditions, services, and privileges of renting and can establish rules and regulations for the housing facility. *See* 49 Am. Jur. 2d *Landlord and Tenant* §§ 384, 404-406. A landlord also has the obligation to ensure equal housing opportunity to the tenants to whom the landlord rents apartments. *See Bethishou v. Ridgeland Apartments*, No. 88-C-5256, 1989 WL 122434, at *1 (N.D. Ill. Oct. 2, 1989) ("The Fair Housing Act places on the owner of

rental property the responsibility for insuring that the property complies with the Act.") (quotation omitted); *Haws v. Norman*, No. 2:15–cv–00422–EJF, 2017 WL 4221064 (D. Utah Sept. 20, 2017) ("the Federal Fair Housing Act aims to govern the conduct of landlords in housing rentals."). Where a landlord has both the awareness of a hostile housing environment created by severe and pervasive harassment of a tenant, and the ability to rectify the situation, the failure to do so is a discriminatory action for which they can be held liable. *See Neudecker v. Boisclair*, 351 F.3d 361, 365 (8th Cir. 2003); cf. *Harris*, 510 U.S. at 21 (discrimination in the terms, conditions, or privileges of employment "includes requiring people to work in a discriminatorily hostile or abusive environment.").

Defendants refute that their control over the terms and conditions of Wetzel's rental and ability to regulate the facility is the source of their own liability, proposing instead that Wetzel sued them solely based on their "deep pockets." (DA Br. 6) Yet they simultaneously suggest that the other tenants cannot be held liable under §§ 3604(b) and 3617 because they do not have those powers.[4] (DA Br. 45) Under Defendants' premise, therefore, no one could be held liable for the severe and pervasive discriminatory housing environment Wetzel has experienced—a result wholly at odds with the FHA's purpose of ensuring fair and equal housing opportunities throughout the United States. *See* 42 U.S.C. § 3601.

Further, the notion that claims like Wetzel's are merely efforts to recoup attorney's fees from wealthy property owners treats this like a matter for tort

[4] Wetzel does not concede that no claim may lie against the perpetrator of severe or pervasive harassment under § 3617.

reform, ignoring the broader civil rights goals embodied in the FHA. *See id.* Seeking redress for severe and pervasive discriminatory harassment that deprives a tenant of equal housing opportunity is hardly the equivalent of a slip-and-fall. Rather, it is a matter of "hold[ing] those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law [so that] the goal of equal housing opportunity is to be reached." *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992).[5]

The cases cited by Defendants do not undermine these principles. Defendants' emphasis on and distortion of the factual outcomes of the cases in this Circuit do not change that none of them has rejected the principle that a housing provider may be liable for a hostile housing environment under a negligence theory. *See, e.g.*, *Smith v. Hous. Auth. of South Bend*, 867 F. Supp. 2d 1004, 1013 (N.D. Ind. 2012) (rejecting poorly pleaded bullying claim unconnected to any listed causes of action); *Krieman v. Crystal Lake Apartments Ltd. P'ship*, No. 05-C-0348, 2006 WL 1519320, at *11-12 (N.D. Ill. May 31, 2006) (citing negligence standard, *Neudecker*; concluding conduct was not severe or pervasive); *Scialabba v. Sierra Blanca Condo*

[5] Defendants' suggestion that a "cottage industry" will spring up to seek attorney's fees from landlords disregards both the purpose and the limits of lawyers' ability to recoup fees for successfully vindicating their client's civil rights under 42 U.S.C. § 1988. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotation omitted). The fees available under § 1988 "do[] not produce windfalls to attorneys," but merely provide an amount "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (quotations omitted). Defendants' suggestion that attorney's fees are "the prize at the end" of hostile housing environment claims against a landlord is particularly perverse in this case, in which Wetzel is represented pro bono by a not-for-profit law firm and their pro bono co-counsel.

No. One Ass'n, No. 00-C-5344, 2001 WL 803676, at *6 (N.D. Ill. July 16, 2001) (rejecting claim because defendants had no knowledge of harassment by other residents); *Wilstein v. San Tropai Condo. Master Ass'n*, No. 98-C-6211, 1999 WL 262145, at *11 (N.D. Ill. Apr. 22, 1999) (allegations of condo association's awareness of systemic harassment by other residents of the complex sufficed to state claim).

The only contrary case cited by Defendants is *Francis v. Kings Park Manor, Inc.*, 91 F. Supp. 3d 420 (E.D.N.Y. 2015), a complete outlier from the core body of case law on this issue, now on appeal to the Second Circuit, Docket No. 15-1823 (2d Cir., filed Jun. 4, 2015). *Francis* commits the same errors as Defendants here.[6] First, Defendants repeatedly misstate the type of liability the FHA imposes when a housing provider knows or should know about severe and pervasive harassment of a tenant by other tenants and fails to put an end to that harassment where they have the power to do so. Such a housing provider is *directly* liable for its own negligent discriminatory conduct, making Defendants' reliance on vicarious liability principles irrelevant.[7]

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[6] Neither of the cases relied on by *Francis* undermines FHA liability for a landlord's negligence in this context either. *Ohio Civil Rights Comm'n v. Akron Metro. Hous. Auth.*, 892 N.E.2d 415 (Ohio 2008), did not involve FHA claims, but Ohio law, and it rejected Title VII hostile environment principles this Court has already applied to FHA claims. *Compare id.* at 419-20 *with DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996). *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133 (S.D. Fla. 2004), turns on limits on post-acquisition claims rejected by this Court in *Bloch v. Frischholz*, 587 F.3d 771, 783 (7th Cir. 2009), the particular home owners association's lack of power to remedy the harassment, and factual disputes over the extent of the harassment.

[7] Wetzel's only claims of vicarious liability in this case lie against the corporate entities, whose liability turns on the acts of their agents. Plaintiff-Appellant's Br. ("PA Br.") 38-39. The liability of the Administrators of GSALC is direct, rather than vicarious.

Second, although Defendants point to textual differences between the FHA and Title VII to dispute the applicability of this Court's Title VII jurisprudence (DA Br. 39-40), as this Court noted in *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009), the language of 3604(b) is identical to the language in Title VII underlying the liability of employers for failure to address discrimination caused by third parties—the general bar of discrimination in "terms, conditions, or privileges." 42 U.S.C. § 2000e-2(a)(1); §3604(b). Title VII's definition of employer and its invocation of agency principles bear on an employer's *vicarious* liability, but an employer's *direct* liability stems from the substantive prohibition in § 2000e-2. *See Nischan v. Stratosphere Quality LLC*, 865 F.3d 922, 931 (7th Cir. 2017) ("Under both Title VII and the IHRA, an employer is liable for the harassment of a nonemployee or nonsupervisory employee if it was negligent either in discovering or remedying the harassment.") (quotation omitted); *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689 (7th Cir. 2005).

3. Wetzel's Hostile Housing Environment Claim States A Permissible Post-Acquisition Claim.

Like the District Court, Defendants read this Court's post-acquisition jurisprudence too narrowly. Hostile housing environment claims are permissible post-acquisition claims under § 3604(b). *See Bloch*, 587 F.3d at 783; PA Br., Pt. I(B)).

Defendants attempt to shoehorn the ongoing landlord-tenant relationship between them and Wetzel into *Bloch*'s analysis of a condominium association's obligations. Doing so, however, ignores the critical differences between sale and

rental contexts, particularly in assessing Defendants' ability to affect the terms, conditions and privileges of Wetzel's tenancy.[8] Wetzel's allegations that Defendants' failure to address the hostile housing environment they allowed to persist in their facility discriminated against her in the terms, conditions, and privileges of her tenancy and its associated services and facilities meet the *Bloch* test for permissible post-acquisition claims.

C. The HUD Harassment Rule Is An Authorized, Appropriate Interpretation of the FHA And Supports Wetzel's Claims.

Defendants spend more than half of their brief attacking the validity and propriety of HUD's regulation, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63054 (Sept. 16, 2016) (to be codified at 24 C.F.R. 100) ("HUD Harassment Rule" or "the Regulation"). These attacks both misconstrue the extent of Wetzel's reliance on this regulation and ignore the Supreme Court's and this Court's direction that HUD's construction of the FHA be given deference. *See, e.g., Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) (HUD's interpretation of the FHA "ordinarily commands considerable deference");

[8] The Tenant's Agreement reflects the ongoing nature of the landlord-tenant relationship and Defendants' powers and obligations as a landlord. Contrary to Defendants' assertions (DA Br. 21-22), however, Wetzel does not argue that the Tenant's Agreement is the basis of her claim. Moreover, Defendants' suggestion that Wetzel's reliance on the primacy of the Tenant's Agreement is waived should be rejected. (DA Br. 21) The Complaint referenced multiple provisions of the Tenant's Agreement, and Defendants themselves attached the agreement to their reply in support of their Motion to Dismiss. The only way that was permissible is if it was referred to in the Complaint and central to Wetzel's claim. *See Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). Having recognized the Tenant's Agreement as central to Wetzel's claims, Defendants may not now suggest otherwise.

Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (HUD interpretations of the FHA are "entitled to great weight"); *Bloch*, 587 F.3d at 780-81; *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992). The Regulation properly fills the gap left by Congress for HUD to fill, and reasonably interprets the FHA to formalize standards for assessing claims of housing harassment.

1. The HUD Harassment Rule Supports Wetzel's Statutory Argument.

The HUD Harassment Rule states that, consistent with Wetzel's claims, a landlord is directly liable for failing to address a hostile environment caused by tenant-on-tenant harassment. *See* 81 Fed. Reg. at 63066-70; 24 C.F.R. § 100.7. The District Court entirely ignored the Regulation, and Defendants completely misapprehend the extent of Wetzel's reliance on the Regulation. They suggest that Wetzel has brought this case as a new cause of action imposing a duty on landlords created by the Regulation, and that Wetzel has waived the ability to rely on HUD's recognition of a landlord's duty under the FHA to intervene to end a hostile housing environment. (DA Br. 34, 36) These suggestions ignore two critical points: one, that the Complaint pre-dated the issuance of the Regulation, and two, that Wetzel has consistently alleged and argued that the FHA itself imposes the duty on Defendants to end the hostile housing environment to which she has been subjected. (App. 29-30; Dkt. 20 at 7, 13)[9] HUD's acknowledgement of that duty simply supports the application of the statute Wetzel urges the Court to adopt.

[9] Dkt. cites refer to the District Court document numbers for documents not included in the Appendix.

Defendants' argument as to the retroactive effect of the HUD Harassment Rule is similarly misplaced. The Regulation does not create a new cause of action or impose new obligations. It states directly and repeatedly that it "does not add any new forms of liability under the Act or create obligations that do not otherwise exist." 81 Fed. Reg. at 63068; *see also id.* at 63065 (Regulation's direct and vicarious liability standards "do not impose any new legal obligations or create or define new agency relationships or duties of care."). Instead, the Regulation "[i]dentif[ies] traditional principles of direct and vicarious liability applicable to all discriminatory housing practices under the Fair Housing Act, including quid pro quo and hostile environment harassment." *Id.* at 63055. As the Regulation creates no new liability, there is nothing to apply retroactively. Moreover, when a HUD regulation is issued after an action is commenced it may nonetheless be considered by the reviewing court. *See Inclusive Cmtys.*, 135 S. Ct. at 2522-23 (citing to HUD disparate impact regulation adopted during pendency of litigation); *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281 (1969) (applying HUD regulation on eviction safeguards to eviction proceeding pending prior to regulatory change; "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision.").

2. The HUD Harassment Rule is an Authorized, Reasonable Interpretation of the FHA by the Agency Charged with its Enforcement.

That HUD's regulatory interpretation of the FHA is owed deference is an uncontroversial point.[10] HUD has the "authority and responsibility for administering [the FHA]." 42 U.S.C. § 3608(a). Both this Court and the Supreme Court have repeatedly recognized this authority. *Gladstone*, 441 U.S. at 107; *Trafficante*, 409 U.S. at 210; *Bloch*, 587 F.3d at 780; *N.A.A.C.P.*, 978 F.2d at 300-01.

Defendants nonetheless question HUD's authority behind the HUD Harassment Rule. In doing so, their myopic focus on the role of intent unnecessarily narrows the precise question at issue in the Regulation. As the Supreme Court noted in *KMart Corp. v. Cartier, Inc.*, the proper inquiry in determining whether the regulation is valid is whether "the statute is silent or ambiguous with respect to the specific issue *addressed by the regulation*." 486 U.S. 281, 291 (1988) (emphasis added). The specific issue addressed by the HUD Harassment Rule is stated plainly in its title: *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act*. As the summary sets forth, the Regulation formalizes standards for harassment claims and clarifies the operation of traditional liability principles in harassment claims. *See* 81 Fed. Reg. 63054.

[10] Defendants' suggestion that she has waived her argument that the Regulation is owed deference must be rejected, as it patently misrepresents the arguments below. Wetzel's response to the motion to dismiss pointed to the Regulation as supporting her statutory argument, asserting that deference is due to the regulation under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). (Dkt. 20 at 7) Defendants' responsive brief explicitly recognized this and then proceeded to argue against that deference. (Dkt. 21 at 5)

This Court has recognized that the text of the FHA, including § 3604, is ambiguous with regard to the range of conduct prohibited or who may be held liable. In *N.A.A.C.P.*, 978 F.2d at 298, the Court attributed that ambiguity to the Act's lack of definitions for key terms and to these provisions having been written in passive voice, emphasizing that Congress was "banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence." *Id.* (emphasis in original). The legislative history of the FHA provides no clarification, as it is largely silent. *See id.* at 299; Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. L. Rev. 1, 27 (2008) (FHA came into being in an unconventional, rushed way, "was never considered by committee, and no formal reports explaining its terms exist."). And the central purpose of the FHA – "to eradicate discriminatory practices within a sector of our Nation's economy," *Inclusive Cmtys.,* 135 S. Ct. at 2521 – is sufficiently broad that it does not remove the ambiguity.

HUD's ability to fill the gap left by Congress on the issue of liability has long been recognized. The Supreme Court cited with approval HUD's regulation interpreting the FHA to encompass disparate-impact liability in *Inclusive Cmyts.*, 135 S. Ct. at 2525. In *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003), the Supreme Court deferred to HUD's regulations on vicarious liability to determine whether the FHA could impose liability on a corporate officer for the acts of a corporate employee.

Furthermore, even if, *arguendo*, the Court were to find that Defendants properly defined the precise question at issue in the Regulation, the statutory ambiguity remains, as set forth in Part I(B)(1), *supra* and in PA Br. Pt. I(A)(1). Defendants' assertion that the Regulation seeks to overturn this Circuit's case law on intent ignores that, as amici point out, the question of landlord liability for tenant-on-tenant harassment is an issue of first impression for the Court. *See* Br. for National Fair Housing Alliance et al. as Amici Curiae Supporting Appellant Marsha Wetzel, at 23. Given that no judicial precedent of this Circuit has directly addressed whether the terms of the FHA unambiguously foreclose HUD's interpretation, the case law to which Defendants point cannot displace the Regulation. *See Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 758 (7th Cir. 2014) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005)). Moreover, Defendants' portrayal of the Regulation as unilaterally amending the statute strains credulity. By its plain terms, 24 C.F.R. § 100.7(a)(1)(iii) addresses liability for a third party's "discriminatory housing practice" when a person with the power to correct it knows or should have known and fails to do so. "Discriminatory housing practice" is defined by both 42 U.S.C. § 3602 and 24 CFR § 100.20 as "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." The Regulation therefore applies those sections' mandates that the acts occur "because of" the protected characteristics, thereby satisfying the discriminatory intent requirement.

Finally, the Regulation, which was the product of notice and comment rulemaking, is a reasonable interpretation of the FHA by the agency to which Congress has delegated the power to make substantive rules to which deference is due. *N.A.A.C.P.*, 978 F.2d at 300. As discussed in Pt. II(B)(2), *supra,* and PA Br. Pt. I(A), holding landlords directly liable for the discriminatory hostile housing environment created by the severe and pervasive harassment of other tenants is a proper interpretation of the statute, furthers its underlying purposes, and is consistent with both tort principles and Title VII case law. Other courts have recognized that the Regulation is "fully consistent" with the statute's prohibition of hostile housing environment discrimination. *Revcock*, 853 F.3d 96; *see also West v. DJ Mortg. LLC*, No. 1:15-cv-397-AT, 2017 WL 4278348 at *11, 16-17 (N.D. Ga. Sept. 14, 2017) (citing regulation as "persuasive authority" that sexual harassment is actionable under the FHA and for proper liability standards).

3. The HUD Harassment Rule Does Not Infringe on the First Amendment.

Defendants' argument about the First Amendment implications of the regulation should also be rejected.[11] A third party whose discriminatory harassment is sufficiently severe or pervasive as to create a hostile housing environment has engaged in a discriminatory housing practice in violation of § 3617. *See Bloch*, 587 F.3d at 783 (a "'pattern of harassment, invidiously motivated'" may state a claim under § 3617's prohibition of coercion, intimidation, threats, or interference with the

[11] Defendants' argument that the Regulation should be "struck down" (DA Br. 44) is inappropriate as they have not challenged the validity of the Regulation, whether under the First Amendment, U.S. Const. amend. I, or the Administrative Procedures Act, 5 U.S.C. § 500 et seq.

exercise or enjoyment of fair housing rights.) (quoting *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004); citing *DiCenso v. Cisneros*, 96 F.3d 1004, 1006 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir.1993)). Although First Amendment concerns have been invoked in § 3617 cases involving litigation or comments to public bodies opposing housing-related decisions, no court has held that speech constituting severe or pervasive harassment is protected by the First Amendment. *See* Robert G. Schwemm, *Housing Discrimination Law & Litig.* § 20:6 (2017) (collecting cases). *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), cited by Defendants, supports the same principle. *White* addressed the First Amendment implications of protest activities against a housing development, and not a harassment-based § 3617 claim. That court was clear however, that "[t]hreats of violence and other forms of coercion and intimidation directed against individuals or groups are, however, not advocacy, and are subject to regulation or prohibition." 227 F.3d at 1230.[12]

III. Wetzel Has Alleged A Retaliation Claim Against Defendants.

As addressed in depth in her opening brief, Wetzel has also stated a claim for retaliation under § 3617. Specifically, she alleged that she engaged in the protected activity of complaining about discriminatory sex- and sexual orientation-based harassment, and as a result, Defendants took adverse actions against her, including limiting her access to facilities and services and threatening and attempting to evict

[12] The other case cited by Defendants, *Sheikh v. Rabin*, 565 F. App'x 512 (7th Cir. 2014), does not mention the First Amendment with regard to § 3617 at all. It simply concluded that comments about race, religion, and national origin during a zoning dispute were sufficiently isolated that they did not amount to an interference claim. *Id.* at 518.

her. This amounts to a "traditional retaliation claim." *H.O.P.E., Inc. v. Lake Greenfield Homeowners Ass'n*, No. 16-CV-5422, 2017 WL 1493708, at *6 (N.D. Ill. Apr. 26, 2017).

Defendants' argument that even traditional retaliation claims require a demonstration of discriminatory intent should be rejected. The only ruling of this Court to which they cite for this principle, *Echemendia v. Gene B. Glick Mgmt. Corp.*, 199 F. App'x 544 (7th Cir. 2006), is not binding precedent[13] and relies on cases that did not address retaliation claims at all. *See id.* at 547 (citing *East-Miller v. Lake Cty. Highway Dep't*, 421 F.3d 558 (7th Cir. 2005); *Sofarelli v. Pinellas Cty.*, 931 F.2d 718 (11th Cir. 1991)). Subsequent rulings of this Court have been clear that a plaintiff need only assert that she was engaged in protected activity and suffered an adverse action as a result of that activity. *See Davis v. Fenton*, 857 F.3d 961 (7th Cir. 2017);[14] *Herndon v. Hous. Auth. of S. Bend, Ind.*, 670 F. App'x 417 (7th Cir. 2016); *Mehta v. Beaconridge Improvement Ass'n*, 432 F. App'x 614 (7th Cir. 2011); *cf. Alamo*, 864 F.3d at 555 (quoting *Huri*, 804 F.3d at 833) (same standard under Title VII). *See also* Schwemm, *supra*, § 20:5 ("'causal connection' element requires an analysis of the defendant's intent; that is, of whether the defendant

[13] *See* 7th Cir. R. 32.1. Defendants' citation to this Order violated Circuit Rule 32.1(d).

[14] Defendants cite to the district court opinion in *Davis* for the proposition that a retaliation claim requires allegations of discriminatory intent. (DA Br. 11 (citing *Davis v. Fenton*, 2016 WL 4158932 (N.D. Ill. Aug. 5, 2016)) This Court did not reaffirm that requirement, however, stating simply that "[t]he Act does prohibit retaliation against a person for exercising his or her rights under the Act." 857 F.3d at 963.

acted the way he did as a response to the plaintiff's protected activity or for some other reason.")

Like its Title VII counterpart, the lack of a discriminatory intent requirement for retaliation claims furthers the goal of ensuring robust enforcement of the FHA's substantive discrimination provisions.

> The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.,* their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.,* their conduct.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006). As the district court recently recognized in *Haws v. Norman*,

> A landlord could well wish to retaliate for such advocacy for reasons other than discrimination, such as for the expense the advocacy caused or to discourage others from similarly advocating for their perceived rights in the future because the advocacy is bothersome. These motives do not reflect an intent to discriminate based on [a protected trait] but do violate the Fair Housing Act if acted upon.

Haws, 2017 WL 4221064 at *10. *See also* 24 C.F.R. § 100.400 (§ 3617 prohibits "[r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act" and "[r]etaliating against any person because that person reported a discriminatory housing practice to a housing provider or other authority").

Defendants misconstrue Wetzel's arguments to the District Court regarding the interconnectedness of her hostile environment claims and her retaliation claim. (DA Br. 50) The only element of Wetzel's retaliation claim that Defendants

challenged before the District Court was its lack of intent allegations. (Dkt. 15 at 5-6) The excerpt of Wetzel's trial brief they cite argued solely that, to the extent any intent requirement could be imported into a retaliation claim, the Defendants' endorsement and condonation of the residents' animus in the context of a hostile environment claim was sufficient for the retaliation claim as well. This principle has been recognized by the Supreme Court under most major civil rights statutes. *See, e.g., Gomez-Perez*, 553 U.S. at 481 (under Age Discrimination in Employment Act, 42 U.S.C. § 633a, retaliation for filing age discrimination complaint constituted "discrimination based on age"); *Jackson*, 544 U.S. at 174, (under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (claim for retaliation brought by white man "for trying to vindicate the rights of minorities" lies under 42 U.S.C. § 1982's general prohibition of race discrimination). The same is true here.

Despite their failure to challenge the other elements of Wetzel's retaliation claim below, Defendants now assert that she has not sufficiently alleged either adverse actions or a causal connection to her harassment complaints. (DA Br. 51-56) These arguments are waived. *See G & S Holdings LLC*, 697 F.3d at 538. They are also baseless. Defendants introduce additional facts and urge the Court to view the complaint's allegations in their favor, neither of which is permissible on review of a motion to dismiss. *See Alamo*, 864 F.3d at 548; *Albany Bank & Tr. Co.*, 310 F.3d at

971. Whether they are able to dispute Wetzel's claims of retaliatory adverse actions in response to her discrimination complaints at trial has no bearing on whether her allegations are sufficient at this stage. As set forth in her opening brief, Wetzel has met that test.

CONCLUSION

Ms. Wetzel respectfully requests that the District Court's judgment be reversed, her claims pursuant to both the Fair Housing Act and the Illinois Human Rights Act be reinstated, and the matter be remanded for further proceedings.

Dated: November 15, 2017

Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the stated type-volume limitations. The text of this brief was prepared in Century Schoolbook 12 point font, with footnotes in Century Schoolbook 11 point font. All portions of the brief, other than the Table of Contents, Table of Authorities, and the Certificates of Counsel, contain 6981 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.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, I caused a true and correct copy of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT to be electronically filed 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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