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, Eastern Div., No. 16-c-7598
Hon. Samuel Der-Yeghiayan, District Judge

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT

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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.

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(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):

AARP and AARP Foundation

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

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

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

n/a

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Attorney's Printed Name: Dara S. Smith

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Attorney's Printed Name: Susan A. Silverstein

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Attorney's Printed Name: William A. Rivera

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INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization, with a membership of approximately 38 million, which is dedicated to addressing the needs and interests of people age 50 and older. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals 50 and older secure the essentials. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. AARP and AARP Foundation litigate on behalf of plaintiffs to challenge practices that violate the Fair Housing Act (FHA), 42 U.S.C. §§ 3601 *et seq*. *See, e.g*., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013). AARP and AARP Foundation also participate in such cases as amici curiae. *See, e.g., Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys, Project, Inc.*, 135 S. Ct. 2507 (2015).

AARP and AARP Foundation have a strong interest in participating in this case because they are deeply concerned about the fair housing rights of AARP

[1] Amici curiae 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 amicus curiae, their members and their counsel) contributed money intended to fund the preparation or submission of the brief. Both parties consented to the filing of this brief.

members who desire to age in place in their homes and the ability of the oldest and most vulnerable portion of the population to have access to appropriate housing options in their community. AARP Foundation attorneys have litigated, written, and trained extensively on these issues to ensure that those who live in housing marketed to seniors are afforded all of the rights to which they are entitled under the law, including the FHA, so that they may retain their independence, safety, dignity, and be free from discrimination throughout their lifespan. *See, e.g.*, *Herriot v. Channing House*, 2008 U.S. Dist. LEXIS 65871 (N.D. Cal., Aug. 26, 2008), *reconsideration denied by, summary judgment granted by, judgment entered by Herriot v. Channing House*, 2009 U.S. Dist. LEXIS 6617 (N.D. Cal., Jan. 29, 2009) (housing provider required that resident move from independent living apartment to assisted living facility because she hired 24-hour care; subsequently settled by parties).

SUMMARY OF THE ARGUMENT

The district court seriously misconstrued the FHA when it held that landlords could not be held liable for discriminatory third-party harassment without a showing that the landlord had a discriminatory motive. Under the FHA, landlords are directly liable for failing to take prompt corrective action to stop tenant-on-tenant harassment where the landlord knew or should have known about the harassment, regardless of the landlord's intent. The FHA creates broad liability

for a wide variety of actions that create and perpetuate segregated housing, including discriminatory advertisements and statements, based on their discriminatory nature, not the individual's subjective intent. Like discriminatory advertisements, harassment is a powerful instrument for creating and enforcing segregation on any protected basis: harassment entrenches segregation based on sex, as it did for Ms. Wetzel, and race, as well as disability. Thus, liability for carrying out this segregation by tolerating harassment—whether intentionally or otherwise—is critical to effectuating the FHA's core purposes of ending segregation in housing and assuring equal housing opportunity.

Furthermore, holding landlords liable for failing to act as landlords by correcting and ending discriminatory harassment is not overly burdensome for landlords. As regulations of the U.S. Department of Housing and Urban Development (HUD) make clear, the extent of the landlord's responsibility to correct harassment is consistent with landlords' other legal obligations to their tenants. Under state law, landlords must take reasonable actions—typically pursuant to their ordinary business practices of lease enforcement—to ensure that tenants are safe from other tenants in and around their homes. This is not an additional, burdensome responsibility, but simply requires fulfilling preexisting obligations to correct and prevent known hazards to residents. Thus, holding that landlords are liable for their failure to act as landlords by correcting and ending

hostile housing environment harassment about which they knew or should have known is essential to effective enforcement of the FHA, necessary to protect vulnerable residents, and perfectly reasonable for landlords in light of their other legal obligations.

ARGUMENT

I. UNDER THE FAIR HOUSING ACT, A LANDLORD IS DIRECTLY LIABLE FOR FAILING TO TAKE ACTION TO CORRECT AND END TENANT-ON-TENANT HARASSMENT WHERE THE LANDLORD KNEW OR SHOULD HAVE KNOWN OF THE DISCRIMINATORY CONDUCT, REGARDLESS OF WHETHER THE LANDLORD WAS MOTIVATED BY DISCRIMINATORY INTENT.

A. Requiring a tenant to show a landlord's discriminatory motive before holding the landlord liable for not taking steps to stop the harassment of that tenant by a third party undermines the FHA's purposes to end segregation and create equal housing opportunity.

The Supreme Court has long recognized that Congress enacted the FHA to create "truly integrated and balanced living patterns." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (*quoting* 114 Cong. Rec. 3422 (1968) (Statement of Sen. Mondale)). This goal reflects a "policy that Congress considered to be of the highest priority." *Id.* Consequently, the Supreme Court has recognized that "the language of the Act is broad and inclusive," *Id*. at 209, and has repeatedly stated that it can be "give[n] vitality . . . only by a generous construction." *Id.* at 212; *see also City of Edmonds v. Oxford House, Inc*., 514 U.S.

725, 731 (1995) (reading an exception to the FHA narrowly to preserve broad construction).

To achieve its explicit goal "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, Congress designed many provisions of the FHA to eradicate the comprehensive culture of discrimination and exclusion. Thus, rather than exclusively focusing on individual acts motivated by discriminatory animus, the FHA includes provisions addressing the obligations of all those engaged in activities in the national housing market that are necessary to further fair housing.

For instance, the FHA includes prohibitions against discriminatory publications, advertisements, notices, and statements. 42 U.S.C. § 3604(c). These prohibitions reach entities who are otherwise not engaged in housing practices, such as newspapers. *U.S. v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972). Having a community free from the badges of discrimination was so important to the FHA's drafters that even those housing providers exempted from the substantive provisions of the FHA were not exempted from the prohibition on making discriminatory advertisements and statements that broadcast discrimination to the public. The publisher of the statement, notice, or advertisement need not have the intent to discriminate to violate the FHA; rather, the entity is liable if its statement is made with respect to the sale or rental of a dwelling and indicates discrimination

to an ordinary reader or listener. Robert Schwemm, *Housing Discrimination Law and Litigation* § 15.1 (2015).

Appropriate landlord liability for failing to correct tenants who create discriminatory hostile environments, like liability for advertising, notices and statements, advances the goals of the FHA by regulating and restricting activities that create the "public impression that segregation in housing is legal." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990). Just as ads that use exclusionary and targeted language lead to the perception that discrimination in housing is acceptable and the norm, "thus facilitating discrimination by… other property owners," *id*,.—which violates the FHA's goals of inclusion and integration,—a landlord's toleration of harassment in and around a tenant's home leads to the inevitable conclusion that discrimination is acceptable and the norm. Thus, both equally run afoul of the FHA.

Liability that reaches these actions based on their discriminatory nature rather than the speaker's or landlord's motives is critical because protection from the emotional injury resulting from discriminatory statements and harassment was one of the core purposes behind the enactment of the FHA. For example, Senator Mondale remarked, "I still believe that one of the basic and most fundamental objections to discrimination in the sale or rental of housing is the fact that through public solicitation the [African-American] father, his wife and children are invited

to go up to a home and thereafter be insulted solely on the basis of race." 114 Cong. Rec. 5641 (1968). He added that the FHA "removes the ability to insult and discriminate against a fellow American because of his color[.]" *Id.* at 5643. Hostile discriminatory harassment not only causes emotional harm to the victim; it is the antithesis of Congress's goals of ensuring housing for all and fostering integration.

The district court contravened this Congressional purpose when it held that landlords are only liable for harassment in and around property that they manage if they themselves harbor discriminatory animus. *Wetzel v. Glen St. Andrew Living Community*, No. 16-c-7598, 2017 U.S. Dist. LEXIS 6437, *3-7 (N.D. Ill. Jan 18, 2017). The court took a narrow view of protections that Congress and the Supreme Court have repeatedly treated as broad, fixating on the housing provider's mental state rather than the discriminatory nature of its actions and their contribution to segregation in housing. *Id.* In doing so, the court also ignored the body of law that has held housing providers directly liable for tolerating hostile housing environment harassment created by other tenants. *See Neudecker v. Boisclair*, 351 F.3d 361, 364-65 (8th Cir. 2003) (FHA violated where tenants harassed and threatened plaintiff because of disability and management ignored complaints); *U.S. v. Applewood of Cross Plains, LLC*, No. 3:16-cv-00037-jdp, Consent Decree (W.D. Wis. Jan. 20, 2016) *available at* https://www.justice.gov/crt/case-document/

consent-decree-united-states-v-applewood-cross-plains-wd-wis (settling claim that apartment complex, its owner, and its manager discriminated against tenants "by failing to fulfill their duty to take prompt action to correct and end the disability-related harassment of [tenants] by other tenants"). *Hicks v. Makaha Valley Plantation Homeowners Ass'n,* Civ. No. 14-00254, 2015 WL 4041531, *11-12 (D. Haw. Jun. 30, 2015) (hostile environment claim stated by allegations that residents engaged in racial harassment and management company knew and failed to remedy); *Fahnbulleh v. GFZ Realty, LLC,* 795 F. Supp. 2d 360, 364 (D. Md. 2011) (landlord liable for hostile environment created by tenant's sexual harassment where "landlord knew or should have known of the harassment and took no effectual action to correct the situation" (quotation omitted)); *Martinez v. Cal. Investors XII,* No. CV 05-7608-JTL, 2007 WL 8435675, *5, *8 (C.D. Cal. Dec. 12, 2007) (allowing claim against management company that ratified racial harassment by other tenants).

This view that liability does not require proof of discriminatory motive is also codified in recent regulations promulgated by HUD, the agency charged with enforcing the FHA. *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act*, 81 Fed. Reg. 63,054, 63,068. (Aug. 18, 2016) ("HUD Rule"); 24 C.F.R. § 100.7 (2016). These regulations specifically set forth a negligence standard of direct

liability for the actions of third parties "based on [HUD's] own experience in administering and enforcing the [FHA], the broad remedial purposes of the Act, relevant case law including the Supreme Court's recent ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, holding that the [FHA] is not limited to claims of intentional discrimination, and the views of the EEOC regarding title VII." HUD Rule, 81 Fed. Reg. at 63,068. The HUD regulations clarify that:

> (a) Direct Liability. (1) A person is directly liable for:
> …
>
> (iii) 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. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the third person's control or any other legal responsibility the person may have with respect to the conduct of such third party,[2]

24 C.F.R. § 100.7. As HUD recognized, "the housing provider's obligation to take prompt corrective action to correct and end a discriminatory housing practice by a third-party derives from the Fair Housing Act itself. . . ." HUD Rule, 81 Fed. Reg. at 63,067. Tenant-on-tenant harassment is the quintessential example of third-party discriminatory conduct for which a landlord is obligated to take prompt corrective

[2] *See infra*, Section II, for a discussion of the control and legal responsibility that a landlord or housing provider has with respect to the conduct of a tenant or resident who creates a hostile environment.

action and for which it will be liable if it does not. The regulations are consistent with Congress's intent to eradicate discrimination in housing; the district court's decision was not.

B. Holding landlords accountable for failing to take reasonable actions within their authority to correct tenant-on-tenant harassment is essential because harassment is a powerful tool for creating and perpetuating housing segregation.

More than forty-five years after the enactment of the FHA, discriminatory harassment remains pervasive, comprising about 15% of the complaints filed with HUD and state and local fair housing agencies.[3] Harassment cases also continue to be filed at private non-profit fair housing agencies; in fact, these complaints have increased sharply from 2014-16. Nat'l Fair Hous. Alliance, *The Case for Fair Housing: 2017 Fair Housing Trends Report*, 82 (2017), *available at* http://nationalfairhousing.org/wp-content/uploads/2017/05/TRENDS-REPORT-5-17-17-FINAL.pdf. However, rates of harassment are likely to be significantly underreported because harassment "tends to victimize persons with elevated

[3] Of all claims filed with HUD and state and local fair housing agencies in fiscal years 2010 - 2013, 15% were filed under 42 U.S.C. § 3617. U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing*, 22, *FY 2010-2013* (2014) (identified in chart as § 818 of FHA), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf. Because hostile housing environment claims violate 42 U.S.C. § 3617 (making it illegal to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right" granted or protected by the FHA), along with the far broader provision 42 U.S.C. § 3604(b) (prohibiting discrimination "against any person in the terms, conditions, or privileges of [the] rental of a dwelling"), the number of claims filed under Section 3617 is a rough correlate for the rate of hostile housing environment claims filed.

housing insecurity" such as "poor individuals and tenants of public housing, [who] may not report harassment due to fear of eviction or retribution." *Id.*

Harassment, threats, and violence have a long-established and continuing history in this country as a means to enforce segregation. *See generally* Jeannine Bell, *Hate Thy Neighbor: Move-In Violence and the Persistence of Racial Segregation in American Housing* (2013). To serve its function, much of this behavior occurs at or before move-in:

> Move-in violence directed at minorities who have just moved to neighborhoods is so threatening because it self-consciously invokes a well-known history of violence directed at minorities who "stepped out of line." … It is therefore not surprising that many minorities victimized by move-in violence leave the neighborhood.

Bell, *supra*, at 200-201.

Harassment not only thwarts efforts at integration on an individual level, but also ensures that communities remain separated– the exact problem that Congress enacted the FHA to overcome. *Trafficante*, 409 U.S. at 211. While harassment and hate crimes have frequently enforced segregation based on race and ethnicity, Bell, *supra*, at 74, they have served the same pernicious function with regard to other protected groups, including older individuals, persons with disabilities, and, as in this case, LGBT individuals.

People with disabilities have been subjected to their own historical system of segregation, violence, abuse and harassment based on their status—a system

designed to keep them out of the mainstream of society. Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 Md. L. Rev. 162, 166-173 (2004). Justice Thurgood Marshall exposed the "lengthy and tragic history" of legally enforced segregation of people with intellectual disabilities "that can only be called grotesque" in his partial dissent in *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part). In adding disability as a protected class to the FHA, Congress explicitly sought to rectify this history of exclusion for not only people with intellectual disabilities, but also all people with disabilities:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act, as amended [29 U.S.C. § 794] is a clear pronouncement of the national commitment to end the unnecessary exclusion of person[s] with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.R. Rep. No. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179. In particular, for people with disabilities:

> [h]arassment is a special case of exclusion. Harassment operates to perpetuate segregation. It prevents people from taking advantage of the right to work, to be educated, or to use public services in an integrated

> fashion. It induces people to rely on segregated settings in order to obtain respite from mistreatment.

Weber, *supra*, at 177.

For older people, unfortunately, harassment on the basis of disability often manifests in the form of bullying those in a senior community or long-term residential community who are most vulnerable or who choose not to hide the signs of aging-related impairments behind closed doors. Residents may take the lead in directly harassing other residents—such as, for instance, shunning neighbors from longstanding social activities once they find out that person uses a higher level of personal care,[4] Paula Span, *An Unexpected Bingo Call: You Can't Play*, N.Y. Times (Feb. 2, 2015), http://www.nytimes.com/2015/02/03/science/a-facilitys-bingo-call-you-cant-play.html?_r=0, which can lead to social isolation and a cycle of decline in physical and mental health. *See, e.g.*, Erin York Cornwell

[4] Of course, older people may also be harassed for their membership in other protected classes. For example, in Attleboro, Vermont, a resident of a senior citizen housing complex required a court-ordered intervention to prevent further harassment on the basis of her race. Rick Foster, *Bullying At Any Age*, Sun Chron. (May 13, 2013), *available at* http://www.thesunchronicle.com/news/local_news/bullying-at-any-age/article_aa7230ce-40ba-5a7b-896f-c8dfd9718161.html. According to the article, aging experts say that bullying among elders is becoming more common, "particularly where older people live together in nursing homes and senior housing and assisted living facilities." *Id.* Such senior residential facilities are covered dwellings under the FHA. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa L. Rev. 121, 150-155.

& Linda J. Waite, *Social Disconnectedness, Perceived Isolation, and Health Among Older Adults*, 50 J. Health & Soc. Behav. 31 (2009) (social disconnectedness is associated with worse physical health, whether or not it prompts a feeling of loneliness, whereas the feeling of loneliness is associated with worse mental health). Indeed, residents' discomfort with people who are unlike them –in particular, more disabled or more frail– not only creates harassing behavior, but forms the basis for senior housing landlord policies that discriminate against residents who use walkers or scooters and prohibit more disabled residents from premium dining rooms. *See, e.g., U.S. v. Covenant Ret. Comtys. W., Inc.*, No. 1:04-cv-06732-AWI-SMS (E.D. Cal. Aug. 27, 2007) (Consent Order), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2012/05/23/covenantsettle.pdf (housing provider settled case based on alleged discriminatory practices involving use of mobility aids, such as canes, walkers, and scooters, including prohibiting them in its dining rooms), *U.S. v. Fort Norfolk Ret. Comty., Inc.*, No. 2:15 CV 200 (E.D.Va. 2015) (Consent Order) *available at* https://www justice.gov/opa/pr/united-states-settles-disability-discrimination-case-involving-residents-continuing-care (housing provider settled case based on its practice of not allowing residents who lived in the Healthcare building to use the Residential Dining room or be present at marketing events with prospective residents that the U.S. challenged as violating the FHA without admitting liability).

Similarly, as LGBT people age, they often find themselves subject to specific challenges in the housing market and, in particular, the senior housing market. As of 2014, there were an estimated three million LGBT seniors aged 65 or older, and that number is projected to double to an estimated six million LGBT seniors by 2030. Equal Rights Center, *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples*, 7 n.10 (Feb. 2014) ("Opening Doors"), *available at* http://www.lgbtagingcenter.org/resources/pdfs/lgbtSeniorHousingreportFINAL.pdf. In a recent national study of senior housing that included independent living, assisted living, and continuing care facilities, in 48% of the matched pair tests conducted, the lesbian, gay, or bisexual tester experienced at least one type of discriminatory treatment as compared to the non-lesbian, gay or bisexual tester, such as not being offered a promotional incentive or being quoted a higher monthly rental. *Id.* at 14.

LGBT older adults also experience high levels of harassment in their homes. National Resource Center on LGBT Aging, *The Need for LGBT-Inclusive Housing* (April 2014), *available at* http://www.lgbtagingcenter.org/resources/resource.cfm?r=399. Older LGBT people are particularly vulnerable to the experience of a discriminatory hostile environment in senior housing, for multiple reasons. Both the perpetrators and victims come from a generation when rights for gays and lesbians were not accepted, making perpetrators bolder and victims unaware of or

afraid to assert their current rights. Moreover, victims of this harassment may have been traumatized in the past and thus be more easily traumatized in the present. Opening Doors at 10. Finally, LGBT senior housing residents' need for the services offered may be so great that it outweighs the pain of discrimination, so individuals may endure harassment because they cannot forfeit those services by moving. *Id*. at 8.

LGBT residents are at great risk from the harms of harassment by other residents because they already face additional obstacles that make aging more difficult. They generally have poorer health than their non-LGBT counterparts. One study found higher rates of diabetes, hypertension, disability, and general poor health, as well as delayed health access, in gay men as compared to straight men. Steven P. Wallace, Susan D. Cochran, Eva M. Durazo & Chandra L. Ford,*The Health of Aging Lesbian, Gay and Bisexual Adults in California*, UCLA Cent Health Policy Res. (0): 1–8. (March 2011), *available at* https://www.ncbi. nlm.nih.gov/pmc/articles/PMC3698220/. LGBT older adults are also less likely to have children to care for them, less likely to have someone to call on in time of need, and are at much greater risk for social isolation than their heterosexual peers. Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 Tex. J. of Women, Gender & L. 1, 8 n. 28, 29 (2014). LGBT individuals are particularly apprehensive that they will have to hide their

sexual identities if they moved to a retirement home. National Resource Center on LGBT Aging, *supra* at 17 (citing M.J. Johnson, J.K. Arnette, and S.D. Koffman, *Gay and Lesbian Perceptions of Discrimination in Retirement Care Facilities*, 49(2) J. of Homosexuality 83 (2005)). Because of their concerns about bias in the senior healthcare and housing system, "LGBT individuals who are approaching their senior years are more fearful of aging than their non LGBT peers." *Id*. at 14. [5]

When neighbor-on-neighbor harassment has these profound negative effects, "the powerlessness and lack of ability to get help from individuals who hold authority (*i.e*., the landlord/manager) is common," leading the victim "in many of the cases, if the harassment does not cease. . . to move (exclude themselves)." Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Probs. 49, 64 (2009). Even if the resident does not move, "the psychological research has demonstrated that targets of bias-motivated crimes suffer substantial harm." Bell, *supra,* at 85. Some

[5] Their fears are well founded. For example, in a study of LGBT adults living in senior housing where care services were provided, respondents complained that service providers: refused to provide basic services, such as bathing, toileting, and feeding, because they objected to touching an LGBT individual; denied admission or discharged LGBT applicants/residents based on their sexual orientation or gender identity, and; restricted medical care and refused to honor health care powers of attorney. Nat'l Senior Citizens L. Center, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*, , 11-16 (2011), *available at* http://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf. The most frequently reported problem was verbal abuse and harassment on the part of other residents. *Id.*

tenants do not have the option to move because of the cost or difficulty in getting out of a lease, so they must continue to be in direct contact with the offending co-tenant. Roscigno, *supra*, at 62.

Fortunately, landlords have the ability to take reasonable steps to address the harassment. If they do not, their failure to act can send the message that targeting tenants for hate crimes is a normal, acceptable means of enforcing segregation. Accordingly, holding them liable for inaction in these circumstances, regardless of whether they personally have animus toward the protected group, is critical to the Fair Housing Act's integration mandate.

II. HOLDING A LANDLORD LIABLE UNDER THE FAIR HOUSING ACT FOR FAILING TO TAKE PROMPT CORRECTIVE ACTION WHEN IT KNOWS THAT A TENANT IS HARASSING ANOTHER TENANT BASED ON A PROTECTED CLASS IS CONSISTENT WITH A LANDLORD'S LEGAL RESPONSIBILITIES AND IS NOT UNDULY BURDENSOME, ESPECIALLY FOR A SENIOR HOUSING PROVIDER.

The relationship between landlord and tenant is unique among contractual business relationships, in part because of the singular importance of the home in American society:

> Home is the ultimate refuge. For most of us, there is a need for a place where defenses can be down, where retreat can be had from both the offensiveness of others and offensiveness to others. And, for most of us, home is that place.

John A. Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation,* 45 Fordham L. Rev. 223, 224 (1976). Because of the importance that we as individuals and as a society ascribe to a "home," harassment in one's home may cause even greater harm than being denied the home in the first instance. Someone who has been subject to repeated harassment where there is no physical injury may take longer to recover emotionally and in day-to-day activities than someone who suffered a major physical assault:

> If one is convinced that being a victim was a coincidence of time and place, at least one can try to avoid those circumstances. But correctly believing that one is being attacked for how one looks, or for one's identity in a given group, can create an ongoing level of fear that one is forever at risk.

Geoffrey L. Greif & Paul H. Ephross, *Group Work with Populations at Risk*, 237 (3d ed. 2010).

A. Landlords' Existing Legal Obligations to Their Tenants Already Create Significant Responsibility and Control That Both Requires And Empowers Them to Remedy Harassment On Their Properties.

Because of the paramount importance of a person's right to be secure in his or her home, relationships between landlords and tenants create significant responsibilities for landlords, giving them considerable authority and control over the property. Landlords' obligations derive from common law principles having their roots in feudal estates but are primarily determined by modern contract law,

with substantive and procedural rights further determined by statute. *See generally*, Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. Rev. 503 (1982). One of a landlord's most substantial obligations under the common law is the implied warranty of habitability. Acknowledged by the courts as early as 1931, it is a covenant that the leased premises will be fit to live in. *Id*. at 546. In Illinois, courts have recognized the implied warranty of habitability in every residential tenancy for over 40 years. *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 213 (1972). Today, forty-eight states and the District of Columbia have adopted a statutory warranty of habitability. Michael Brower, Comment, *Trial 2010: A Look Inside Our Nation's Courtrooms: Twentieth Annual DePaul Law Review Symposium: The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DePaul L. Rev. 849, 860-861 (2011) (Arkansas being the exception, and Illinois relying on its common law version).

Landlords also must comply with building, safety and other land use codes, as well as occupancy, environmental and civil rights laws and rules. Likewise, landlords are afforded rights that they may enforce even where they operate without the benefit of a written lease or even where the specific terms are not covered in a verbal agreement. Generally, they may terminate a tenant for non-payment of rent, for no reason at all if timely notice is given, for health and safety violations, or for violating the rights or quiet enjoyment of other tenants. *See, e.g.*,

Illinois Attorney General Landlord Tenant Rights Information, http://www.ag.state.il.us/consumers/landlordtenantrights0404.pdf. Thus, as HUD's regulations explain, every landlord has "[t]he power to take prompt action to correct and end a discriminatory housing practice," 24 C.F.R. § 100.7(a)(1)(iii), such as harassment, through issuing a lease violation notice, other type of written or verbal notice, or lease termination notice – or other appropriate action.

As HUD's regulations suggest, it makes sense to hold landlords to these obligations because they are within the landlord's control and part of landlords' preexisting legal obligations. *See* 24 C.F.R. § 100.7(a)(1)(iii) ("The power to take prompt action to correct a discriminatory housing practice by a third-party depends upon the extent of control or any other legal responsibility the person may have with respect to the conduct of such third-party.") In this case, the lease clearly obligated Ms. Wetzel's landlord to take action against her harassers and afforded the landlord the unambiguous contractual right to terminate the residence of those who had bullied, injured, spit on, and terrorized Ms. Wetzel.[6]

[6] Ms. Wetzel's Tenant Agreement stated that a tenant's engagement in "acts and omissions that constitute a direct threat to the health and safety of other individuals" or that "unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" are grounds for termination of the agreement. Compl. ¶ 17.

B. Senior Housing Providers That Provide Services Have Additional Legal Obligations to Their Tenants And Additional Resources for Taking Effective Action to Correct Harassment.

In the senior housing context of this case, not only does the landlord have the power to correct discriminatory harassment by other residents, but doing so is consistent with its existing business model and the other legal responsibilities it has to its residents. Senior residential housing like Ms. Wetzel's— whether labeled as independent living, assisted living, memory care, rehabilitation care, or a nursing home—functions within a contractual relationship and a regulatory framework.[7] A senior housing landlord, especially one that provides congregate meals, social programs, and other services, is more likely to have in place a system for prompt, appropriate intervention when one resident's behavior is inappropriate, interferes with another resident's well-being, or is outright dangerous. *See, e.g*. Paul Gordon, *Disruptive Residents and the Law*, Am. Seniors Housing Ass'n (2016), *available at* https://seniorshousing.org/filephotos/resourceLib/sib_su2016-disruptive_residents_and_the_law.pdf.

In addition, Illinois law already requires landlords to fulfill the same responsibilities that FHA liability entails. State law requires that each resident and

[7] The services Ms. Wetzel currently receives include three meals a day and health consultations. Id. at ¶ 26. Glen St. Andrew Living Community provides a range of services and health care to its residents that qualify as independent living, assisted living, nursing home, or rehabilitation, levels of care. *The Glen Healthcare Network, Clinical Services*, http://glensaintandrew.com/ourfacilities.html.

provider enter into a care plan and service delivery contract. 210 Ill. Comp. Stat. 9/15 (2001); Ill. Admin. Code tit. 77, § 295.2030 (2001). Thus, the harasser has engaged in rule-violating behavior that triggers the landlord's legal responsibility for enforcement of the agreement and regulations. Where the harassment of one resident by another causes serious harm – such as the physical and emotional bullying encountered in this case, including physically ramming Ms. Wetzel's scooter and the creation of a serious and persistent hostile discriminatory environment – the assisted living or shared housing provider is authorized to terminate the harasser's residency. 210 Ill. Comp. Stat. 9/80 (a)(3) (2001) ("failure to substantially comply with the terms and conditions of the lease agreement"). Of course, where the threat of harm is imminent, the housing provider's prompt corrective action may be to contact law enforcement or other emergency services. Just as in a more traditional landlord-tenant setting, the housing provider may take any action that it deems suitable, so long as it corrects and ends the discriminatory behavior. *See* 81 Fed. Reg. at 63,071 (describing enforcement methods short of eviction that landlords may use, including "Creating and posting policy statements against harassment and establishing complaint procedures, offering fair housing training to residents and mediating disputes before they escalate, issuing verbal and written warnings and notices of rule violations . . . .").

By operating most types of senior housing where congregate meals and health related services are provided, a landlord is already subject to state law that holds it to a similar standard as the FHA, to take action to correct known severe and persistent harassment. Assisted living facilities and shared housing "shall be operated in a manner that provides the least restrictive and most homelike environment and that promotes independence, autonomy, individuality, privacy, dignity[.]" 210 Ill. Comp. Stat. 9/5 (2001). Residents who live in such housing are also protected by a Residents Bill of Rights that their landlords are obligated to fulfill. For instance, a housing provider must ensure that its residents enjoy:

> The right to live in an environment that promotes and supports each resident's dignity, individuality, independence, self-determination, privacy, and choice and to be treated with consideration and respect; *[and]*
>
> *The right to be free of retaliation for or constraint from criticizing the establishment or making complaints to appropriate agencies* or any agency or individual[.]

Ill. Admin. Code tit. 77, § 295.6000 (emphasis added).

To fulfill these regulatory obligations, assumed under its day-to-day operations, a housing provider must address discriminatory harassment rather than allowing a hostile discriminatory environment to persist on its premises. The State Residents' Bill of Rights does not limit itself to guaranteeing the resident that the owner, manager, and staff will treat her with respect; it guarantees the resident an *environment* that provides dignity and respect. *Id.* The housing provider has the

power—both positive, through services or other help, and negative, through notice of termination—to take corrective action when other residents destroy such an environment.

Even further, state law imposes on these providers an affirmative obligation to investigate and report instances of physical or emotional abuse to the proper state agency. Ill. Admin. Code tit. 77, § 295.6010. Guidance and best practices on handling abusive residents in senior living facilities is readily available through reliable sources on the internet. *See, e.g.*, Gordon, *supra*, at 3-4, and that guidance is consistent with a housing provider's liability under the FHA for failing to correct known harassment. Even in a nursing home, where residents have the greatest protections from discharge, providers must take action when it becomes aware of a resident's harassing behavior. *Cf.* Ted Boehm, *Harassment By Resident: Employers will be held liable if they do not protect employees from sexual harassment by a resident*, http://www.providermagazine.com/archives/2013_Archives/Pages/0113/Harassment-By-Resident.aspx (holding housing provider liable for failing to correct resident's harassment of employee because such correction was within the landlord's authority). As a result, industry practitioners have been urged to use best practices to ensure the safety of their employees, *id*., all of which would both protect other residents and ensure compliance with the FHA.

C. A Landlord's FHA Obligation to Correct and Stop Discriminatory Harassment is Part of Its Day-to-Day Business Operations.

Most fundamentally, the landlord's liability for third-party harassment under the FHA dovetails with its ordinary business practices. *See* 81 Fed. Reg. at 63,067 ("For example, when a housing provider enters into a lease agreement with a tenant, the lease typically obligates the housing provider to exercise reasonable care to protect the residents' safety and curtail unlawful conduct in areas under the housing provider's control . . . "). It is entirely part of the normal course of residential management for tenants to make complaints – the quotidian mechanism that tenants use to enforce the lease – and that the landlord relies on to maintain the value of its property. Fannie Mae, *Becoming a Landlord: Rewards, Risks and Responsibilities*, 27-30 (Oct. 2008) https://www.fanniemae.com/content/tool/landlord-guidance.pdf. To address these reciprocal responsibilities, Fannie Mae suggests a system of written action requests and responses and cautions the landlord, more than once, to respond promptly to tenant complaints. *Id*. at 30.

In senior housing in particular, a complaint may be about a service included in the tenant agreement. As an example, if a resident notifies the landlord that she found glass in her tuna sandwich and the landlord takes no action, if the next time the resident is served a tuna sandwich her esophagus is sliced by glass from the tinned tuna, the landlord will likely be liable for not taking corrective action to

safeguard the resident from a known hazard. (The housing provider will not be liable for the glass being in the cans in the first place, and therefore not for any injuries that might occur before it knew or could have known about the danger.) Likewise, if a resident complains of harassment, the landlord must take prompt corrective action. If he fails to, the landlord's liability arises precisely out of the responsibility of the landlord to act *as a landlord*: just as the landlord would be responsible for warning of and taking precautions to clean up a slippery area created by snow, once the landlord knows of discrimination-based harassment, he has a duty to take reasonable corrective steps, such as sending out a notice of lease under the lease, the first step towards eviction. *See* Cassia Pangas, Comment, *Making the Home More Like A Castle: Why Landlords Should Be Held Liable for Co-Tenant Harassment*, 42 U. Tol. L. Rev. 561, 584-85 (2011).

Through the threat of eviction, landlords are capable of ending harassment. *Id.* at 589. Of course, landlords are free to use remedies other than eviction so long as they are reasonably calculated to end the harassment, and depending on what is available under the lease and in their jurisdiction, such as the equitable relief of an injunction, conditional stays, and even moving the harasser or resident to another location, and rent abatement—or other creative responses that satisfy the complaining tenant. Humbach, *supra,* at 263; *see also* 81 Fed. Reg. at 63,071 (describing methods of enforcement at landlords' disposal). Regardless of

methods, the landlord is responsible for taking measures within their control to stop harassment in the property for which the landlord is responsible. 81 Fed. Reg. at 63,067 ("liability for not correcting the discriminatory conduct of which it knew or should have known depends upon the extent of the housing provider's control or any other legal responsibility the provider may have with respect to the conduct of such third-party"). Without the protection provided by holding landlords accountable for their own operational responsibilities, the FHA's goals could never come to fruition. Those protected by the FHA might be given the illusion of housing choice, but made to suffer harassment without practical recourse if they stay or to give up and move from a hostile community. To fulfill Congress's purpose, a landlord's failure to take reasonable corrective action when it learns of such harassment must be actionable under the FHA.

CONCLUSION

By reversing and remanding, this court would not endorse a rule that would hold a landlord responsible for the homophobic prejudices, racist opinions, sexist standards or disability stereotypes held by its tenants. Nor would such a ruling hold landlords liable for the actions taken by the tenants based on the tenants' personal beliefs or discriminatory motives or require landlords to become involved in every

dispute between neighbors.[8] Rather, it would hold a landlord accountable for the failure to do its job, for its failure to investigate and resolve the complaint of harassment, for tolerating the harassment and failing to remedy it—actions that "fit squarely within the statutory prescription against discrimination in 'the provision of services in connection' with [a resident's] rental of one of their dwellings." Pangas, 42 U. Tol. L. Rev. at 578 (citing *Bradley v. Carydale Enterprises*, 707 F. Supp. 217, 224 (E.D. Va. 1989). Thus, the Court should reverse the judgment of the district court and remand the case for further proceedings.

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Respectfully submitted,

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[8] Housing providers are not subject to liability under the FHA for words said in passing or isolated, minor incidents; plaintiffs must demonstrate all elements of a hostile environment harassment case, including that the conduct was severe and pervasive enough to interfere with their housing rights. *See DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (setting out standards for severe or pervasive conduct creating hostile housing environment); 24 C.F.R. §100.600 (a)(2) (same).

CERTIFICATE OF COMPLIANCE

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Dated: June 19, 2017

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CERTIFICATE OF SERVICE

I, Dara S. Smith, hereby certify under penalty of perjury that on June 19, 2017, I served a copy of Brief for AARP and AARP Foundation 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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