No. 18-____

IN THE

Supreme Court of the United States

GLEN ST. ANDREW LIVING COMMUNITY, LLC, *et. al.*,

Petitioners,

v.

MARSHA WETZEL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a case of first impression and national importance affecting the entire United States housing industry. It concerns who can be held liable under the Fair Housing Act ("FHA"), and what kind of conduct is actionable *after* a dwelling has been purchased or leased. In this case, the Seventh Circuit broadly construed the FHA to eliminate what most courts have held to be an essential element of a claim under Sections 3604(b) and 3617—discriminatory intent. The effect is to dramatically expand the scope of the FHA and allow a new and unexpected duty to be imposed on housing providers to guarantee nondiscriminatory living environments, by intervening in known tenant-on-tenant harassment to end the unlawful acts of unrelated third parties over whom the housing provider has little or no control. The newly created duty lacks discernible limits; landlords can now be held strictly liable for unlawful conduct by others that they did not participate in or create.

The questions presented are:

1. By making it unlawful to discriminate because of a protected trait, did Congress require an FHA plaintiff to plead and prove discriminatory intent on the part of the actor sought to be held liable under Sections 3604(b) and 3617?
2. Whether the scope of the FHA can be expanded to impose a duty on housing providers to intervene in and end known discrimination committed by unrelated third-parties after a tenant has taken occupancy of her dwelling?

PARTIES TO THE PROCEEDING

Petitioners are Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll and Sandra Cubas.

Respondent is Marsha Wetzel.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Petitioners make the following disclosures:

(1) Glen Health & Home Management, Inc. does not have a parent company and no publicly held company owns 10% or more of Glen Health & Home Management, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carolyn Driscoll and Sandra Cubas (collectively, "Glen St. Andrew"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 901 F.3d 856 (7th Cir. 2018). *See* Pet. App. 1a-20a. The district court decision granting Petitioners' motion to dismiss the FHA claims with prejudice and declining supplemental jurisdiction over state law claims is available at No. 17C7598, 2017 U.S. Dist. LEXIS 6437 (N.D. Ill. Jan. 18, 2017). *See* Pet. App. 21a-27a.

JURISDICTION

The Court of Appeals entered its judgment on August 27, 2018. *See* Pet. App. 1a. The Petitioners timely filed this petition for a writ of certiorari on November 14, 2018. 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act provides, in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> * * *
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or

> rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(b).

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617.

INTRODUCTION

The aim of the Fair Housing Act is to ensure equality in access to housing. It is not a vehicle to regulate disputes among neighbors or guarantee their behavior. Yet the Seventh Circuit requires landlords to do exactly that. The court holds that landlords have a duty to intervene in known harassment perpetrated by others over whom they have little or no control or face liability under the Fair Housing Act.

This newly created duty places the impossible task of policing communications among tenants on landlords who do not have the means or skill to determine when speech is protected and when it is actionable, placing landlords in a trick box. If action is taken prematurely, landlords may be subject to suit by evicted tenants that face upheaval and homelessness. If landlords wait too long, they will be subject to suit for failing to intervene. Landlords that do intervene but are unable to control the harasser's behavior may

nonetheless be subject to suit for failing to stop the harassment.

A particularly difficult situation arises when a member of a protected class has a personal dispute with another tenant and the member of the protected class repeatedly antagonizes and goads the other tenant into arguments, some of which degenerate into foul language and sexual epithets. The landlord can take no action against the real antagonist because she is a member of a protected class. At the same time, there is not sufficient evidence to evict the other tenant who is drawn into disputes time and again. The landlord thus may have the appearance of doing nothing when in fact an investigation of the facts reveals otherwise. Like the present case, the landlord's hands are tied, but the landlord is subject to expensive and protracted litigation.

If left uncorrected, the decision will have far reaching effects. A cottage industry will spring forth that will inundate the federal court system with complaints alleging all manner of verbal indiscretions because the prize at the end of the day is attorney's fees, not fair housing. Tellingly, Respondent did not join any of the individuals that committed the harassment, or otherwise seek to directly enjoin their behavior.

To remain viable, landlords will need more insurance to cover baseless lawsuits, making insurance companies wealthier, but driving the costs of rentals higher for a segment of society that can least absorb the increase. The plaintiff and defense bars will benefit from increased litigation, but the judicial system will suffer with the backlog. In short, the interpretation given the FHA impermissibly extends the reach of the statute far beyond its intended purpose and stands to break the back of the statute.

STATEMENT

Respondent Marsha Wetzel, filed a complaint under Sections 3604(b) and 3617 of the federal Fair Housing Act against her landlords, the Petitioners. 42 U.S.C. §§ 3604(b), 3617. Subject matter jurisdiction was asserted pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. §3613.

Although Respondent does not allege that Petitioners acted, or failed to act, with discriminatory animus, she nonetheless seeks to hold them liable for failing to intervene in her arguments with the co-tenants whom she alleges harassed her on protected grounds.[1] The Seventh Circuit agreed. In order to create a new duty to intervene, the Court of Appeals eliminates discriminatory intent from Respondent's disparate-treatment claim—an element this Court has long held to be an essential element. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015). The court further holds a landlord can be held liable under §3604(b) for harassment that occurs both before and after occupancy begins. The decision widens the split in the circuits on both issues necessitating this Court's intervention and guidance.

A. Respondent's Grievances Have Nothing To Do With Access To Housing.

Respondent's grievances have nothing to do with her access to housing. Respondent brought this action primarily to resolve a personal dispute she was having with Robert Herr, an elderly male resident in the independent-living retirement community in which Respondent leased an apartment. Respondent does not

[1] Respondent also filed a retaliation claim under the same provisions which are not pertinent to the issues under consideration.

allege Petitioners were motivated by discriminatory intent in renting her the apartment or in providing services connected with her rental. Rather, she alleges all of the harassment arose during personal disputes with her co-tenants. Normally personal disputes among neighbors would not be actionable in federal court, but in this case Herr found out Respondent was a lesbian and began using sex-based language in his arguments with Respondent.

The issue of whether discrimination based on sexual orientation constitutes discrimination based on sex for purposes of Title VIII was not raised in the motion to dismiss and thus was not before the Seventh Circuit on appeal. The question before the court was a narrow one—whether a landlord who has no discriminatory animus can be held liable for failing to intervene to stop known tenant-on-tenant harassment on any protected ground.

The facts before the Court of Appeals were also narrow. It is Petitioners' position that the vast majority of allegations are not grounded in reality, but because the case arises on a motion to dismiss it must be assumed for purposes of deciding the legal issues that Herr regularly argued with Respondent and engaged in sex-based discrimination, and two elderly female residents subjected Respondent to sexual harassment on four isolated occasions.[2] For purposes of determining

[2] Stripped of their inflammatory verbiage, the complaint (Doc. 1) alleges the following incidents occurred during the period April 2015 and August 2016: April 2015 Herr verbally harassed Respondent (¶28); July 2015, Herr used a homophobic slur and "rammed" Respondent's scooter with his walker tipping her chair off a small ramp (¶30); continued verbal harassment by Herr (¶32); one of the females allegedly rammed her wheelchair into the dining table knocking it onto Respondent (¶33) and spat on Respondent's shirt on a separate occasion (¶34); another female made a dispar-

the legal issues the court was thus required to assume that Respondent was subject to harassment by her co-tenants because of her sex and that Petitioners were aware of the same. Most of the facts, however, serve only as background rather than the focal point because Respondent seeks no redress from her co-tenant harassers, despite the existence of a direct right of action against them under §3617 for their alleged unlawful threats and interference with her use and enjoyment of her apartment.

Instead, Respondent seeks redress from an unrelated deep-pocket, *i.e.*, Petitioners, *but not for any actions Petitioners took*. Rather, Respondent seeks to impose liability on Petitioners based on one fact—their failure to intervene in Respondent's arguments with her co-tenants. Importantly, Respondent does *not allege that Petitioners failed to act because of discriminatory animus*. To the contrary, Respondent alleges that when she first complained about Herr to Petitioners, they took action and Herr's harassment decreased for a time, prompting Respondent to send a thank you to Petitioners. (Doc. 1, ¶29). But their actions were not sufficient to keep Herr's behavior under control. As time went on, Respondent alleges Herr continued to harass her, but Petitioners took no action believing Respondent to be "a trouble maker who always lies and twists things." (Doc. 1, ¶32).

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aging statement about Respondent's sexual orientation (¶33) and made a homophobic slur on a different occasion (¶35); Herr hit Respondent's motorized scooter with his walker and one of the females reported Respondent had done the hitting (¶36); Respondent was allegedly pushed from behind by an unknown assailant in the mail room leaving her with a black eye from where she fell forward on her scooter (¶¶ 44-45, 47); Herr refused to allow Respondent entry into building after Respondent had been smoking (¶59).

It is no accident that Respondent did not allege Petitioners' failure to act was motivated by discriminatory intent. After nearly two years of public debate, 24 C.F.R. 100.7(a)(1)(iii) (the "Regulation"), promulgated by the Department of Housing and Urban Development ("HUD"), was set to take effect the month after Respondent filed her complaint. The Regulation impermissibly eliminates the statutory requirement of discriminatory intent and holds landlords liable under an even broader standard (used in agency contexts)—for "failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. 100.7(a)(1)(iii). Respondent relied, *inter alia*, on the Regulation in opposing the motion to dismiss.

B. The District Court Dismissed The Action For Failure to Plead Discriminatory Intent And Because the Actions Occurred *After* Respondent Began Occupying Her Apartment.

The district court granted Petitioners' motion to dismiss. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, No. 16C7598, 2017 U.S. Dist. LEXIS 6437 (N.D. Ill. Jan. 18, 2017). *See* Pet. App. 21a-27a. Upholding well-established precedent, the court ruled that discriminatory intent is an essential element of a §3617 claim. *Id.* at *3-4. *See* Pet. App. 23a-24a. *See Bloch v. Frischolz,* 587 F.3d 771, 783 (7th Cir. 2009); *East-Miller v. Lake Cty. Highway Dept.*, 421 F.3d 558, 563 (7th Cir. 2005). Relying on this Court's decision in *Inclusive Communities*, 135 S. Ct. 2507, 2518-19 (2015), the district court explained that while disparate-impact claims do not require discriminatory intent, disparate-treatment claims alleged under §3617 do.

Id. at *4. *See* Pet. App. 24a. Even in claims for hostile housing, courts require a finding of discriminatory intent or direct discriminatory conduct by the landlord or its agents before imposing liability on a landlord. *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (apartment owner/manager made sexual advances). *Accord Bloch,* 587 F.3d at 783 (condo board applied rules in discriminatory fashion).

The district court also dismissed Respondent's §3604(b) claims on the ground that §3604(b) covers only harassment claims that interfere with the initial rental; not claims that occur *after* a tenant occupies her apartment, *i.e.*, post-acquisition. *Id.* at *6-7. *See* Pet. App. 25a-26a. The court noted habitability is a pre-condition of rental, but Respondent did not allege she had been actually or constructively evicted. *Id.* To the contrary, she alleged she continued to reside in her apartment. *Id.* at *7. *See* Pet. App. 26a. Nor was a contractual connection to Respondent's lease asserted that would link the harassment to her initial rental. None of the rental terms were alleged to be discriminatory on their face or in application. Rather, Respondent alleged she experienced discrimination at the hands of other tenants who were not related to Petitioners and who had no authority or control over the terms, conditions or privileges contained in her rental agreement.[3]

[3] After dismissing the FHA claims, the court declined to exercise supplemental jurisdiction over the state law claims brought under the Illinois Human Rights Act.

C. The Court Of Appeals Reinstates Respondent's Complaint By Eliminating The Essential Element of Discriminatory Intent Thus Allowing The Court To Create And Impose A New Post-Acquisition Duty On Landlords.

The Seventh Circuit reversed. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018). *See* Pet. App. 1a-20a. Choosing to interpret the FHA "more broadly," the court construed the statute to reach even those who possess no discriminatory intent and have not created or engaged in any discriminatory conduct. *Id.* at 859. *See* Pet. App. 2a. Although the harassment here occurred *after* Respondent occupied her apartment, and was committed by unrelated third parties over whom Petitioners had little control, the court construed the FHA to impose a new post-acquisition duty on Petitioners to intervene and stop the known harassment.

1. The Court of Appeals Eliminated The Element Of Discriminatory Intent Without Analysis Or Precedent.

The bedrock principle of any disparate-treatment action is that the party charged must have acted with discriminatory intent before liability will be imposed. *Inclusive Communities*, 135 S. Ct. at 2513. Consistent therewith, the crux of the district court's decision was that the text of the statute and stare decisis require an FHA plaintiff to plead and prove discriminatory intent to prevail under Sections 3604(b) and 3617.

The Seventh Circuit, however, split with the majority of courts that hold discriminatory intent to be an essential element of a cause of action under Sections 3604(b) and 3617, and dismissed the element out of hand. The court simply states that discriminatory

intent is not a required element for a hostile housing claim under the FHA, citing *DiCenso, supra,* and *Honce v. Vigil,* 1 F.3d 1085, 1090 (10th Cir. 1993). Neither case, however, sanctions the elimination of discriminatory intent. In each case the landlord committed the acts of sexual harassment that gave rise to a hostile housing claim under the FHA.

2. The Court Of Appeals Expands the Scope of The Statute By Creating A New Duty For Housing Providers.

In construing the FHA, the court first looked to Title VII which governs discrimination in employment and has often been used for interpretative guidance. Recognizing that there are "salient differences between Title VII and the FHA," the court properly refused to apply the Regulation enacted by HUD that utilizes the broader standard governing an employer's liability for a hostile work environment, *i.e.*, know or should have known. *Wetzel*, 901 F.3d at 866. *See* Pet. App. 15a.

Turning to Title IX, which seeks to eradicate discrimination in education, the Seventh Circuit looked to this Court's decision in *Davis v. Monroe Cty. Bd. Of Education*, 526 U.S. 629 (1999). In *Davis*, liability was imposed on the school board for its decision to remain "'deliberately indifferent to known acts of student-on-student sexual harassment [when] the harasser is under the school's disciplinary authority.'" *Weztel*, 901 F.3d at 864, quoting *Davis*, 526 U.S. at 646-47. *See* Pet. App. 11a. Although the Court of Appeals acknowledges that in *Davis* this Court "'emphasized that the [school receiving federal funding] exercised substantial control over both the harasser and the premises on which the misconduct took place,'" the court nevertheless ignores the crucial distinction. *Weztel*, 901 F.3d at 864, quoting *Davis*, 526 U.S. at 645. *See* Pet. App. 11a.

In requiring landlords to intervene in tenant-on-tenant harassment, the court holds that "[c]ontrol in the absolute sense . . . is not required." *Wetzel*, 901 F.3d at 865. *See* Pet. App. 13a. The court reasoned that landlords can incentivize tenant behavior through the eviction process or by suspending privileges to common areas. *Id*. *See* Pet. App. 13a-14a.

3. The Seventh Circuit Widened The Circuit Split As To What Post-Acquisition Harassment Claims Are Actionable.

In dismissing Respondent's §3604(b) claims, the district court followed the *en banc* decision of the Seventh Circuit in *Bloch, supra,* because they occurred post-acquisition, *i.e.*, after Respondent took occupancy, and there were no allegations that Petitioners provided their services or facilities in a discriminatory manner. Rather, it was the *tenants that interfered* with the non-discriminatory services provided by Petitioners.

In *Bloch*, the *en banc* court acknowledged that §3604(b) was more narrow than the corresponding section in Title VII which provides relief from pre and post-hiring discrimination. *Bloch*, 587 F.3d at 779, construing *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004). The *Bloch* court held that *Halprin* "made it clear that §3604(b) is not broad enough to provide a blanket 'privilege' to be free from all discrimination from any source . . . As deplorable as it might have been, the defendants' alleged conduct in *Halprin* was not linked to any of the terms, conditions, or privileges that accompanied or were related to the plaintiffs' purchase of their property. *But that's what §3604(b) requires.*" *Bloch*, 587 F.3d at 780 (Emphasis added). The court also acknowledged that post-acquisition conduct that resulted in constructive eviction was

actionable under §3604(b), because habitability is a condition of sale. *Bloch*, 587 F.3d at 779. Thus, while not prohibiting all post-acquisition conduct, the *en banc* court in *Bloch* made clear that §3604(b) only applied to post-acquisition discrimination claims that can be linked to the initial sale or rental of property—the position adopted by the Fifth Circuit in *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005).

The Seventh Circuit in the present case distinguishes *Bloch* on the ground that *Bloch* did not provide an exhaustive set of circumstances that might give rise to a post-acquisition claim under §3604(b). "[W]e were addressing the case before us, and so we simply noted that those were 'two possibilities for relief in [the present] case.'" *Wetzel*, 901 F.3d at 866 (Internal citations omitted). *See* Pet. App. 16a-17a. The Seventh Circuit proceeds to adopt the position of the Ninth Circuit in *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009), which holds that §3604(b) broadly "'encompasses conduct that follows acquisition'" thereby widening the circuit split on the issue. *Wetzel*, 901 F.3d at 867. *See* Pet. App. 16a-17a.

The Court of Appeals further holds that the *tenants' interference* constitutes a violation of the *rental contract with Petitioners*, not because the tenants had any way to change or modify the provisions of the contract, but because Petitioners failed to intervene to stop the tenant-on-tenant harassment. *Id*.

REASONS FOR GRANTING THE WRIT

This case satisfies the standard criteria for certiorari: it presents pure legal issues that are the subject of well-recognized, entrenched disagreement, and that are outcome determinative in the case at hand. Therefore this Court should grant review.

Squarely at issue is who can be held liable under the FHA, and what kind of post-acquisition conduct is actionable. It is well-established that discriminatory intent is required for disparate-treatment claims like the ones brought by Respondent. It is required by the text of the provisions of the FHA. It limits the scope of the statute. And it provides the link between the injury and the injurious conduct to avoid baseless lawsuits.

Yet the Seventh Circuit in one fell swoop eliminates this essential element, which is required by other circuits, in order to create a new duty for landlords. Breach of the duty imposes strict liability on landlords if they fail to intervene and stop harassment by other, unrelated third parties over whom the landlord has little or no control.

Without discriminatory intent, fundamental principles of proximate cause are destroyed thereby allowing landlords, who have not created or engaged in any discriminatory conduct, to be held financially liable for the discriminatory acts of unrelated parties.

The duty is broad and encompassing. Holding that it arises not only under §3617, but also under §3604(b), widens the split in the circuits as to the reach of §3604(b) for post-acquisition conduct. The problem is further complicated because the duty was created without discernable limits, making landlords guarantors of tenant behavior. In so doing it dramatically expands the scope of the FHA far beyond what Congress intended. While the desire to eliminate discrimination in housing is the primary focus of the FHA, "'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" *Inclusive Communities*, 135 S. Ct. at 2551 (Alito, J., dissenting),

quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)(per curiam)(original emphasis).

I. This Court Should Grant Certiorari To Resolve The Conflict Between The Circuits Concerning Whether Discriminatory Intent Is An Essential Element of A Claim Under Sections 3604(b) and 3617.

A. Discriminatory Intent Is Required By Statute.

This Court has frequently observed that "[e]radicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all." *Inclusive Communities*, 135 S. Ct. at 2537, (Alito, J., dissenting). *See Smith v. City of Jackson*, 544 U.S. 228, 258 (2005)(O'Connor, J., concurring in judgment) ("the predominant focus of antidiscrimination law was on intentional discrimination."). The text of Sections 3604(b) and 3617 makes clear that the focus of these sections is to punish intentional discriminatory conduct.

Section 3604(b), aimed at housing providers like landlords, makes it unlawful "[*t*]*o discriminate* in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith *because of*" a protected trait. 42 U.S.C. §3604(b)(Emphasis added). The words "*to discriminate*" indicate the actor must intentionally engage in the prohibited conduct. There is no reference to passive behavior. Moreover, the intentional action must be motivated "*because of*" the person's protected characteristic, *i.e.*, the action must be motivated by discriminatory animus. The focus of §3604(b) is exclusively on the motivation of the actor and thus requires intentional discriminatory conduct by the actor sought to be charged. In so doing, it

imposes liability on landlords that create or participate in a hostile housing environment.

Section 3617 likewise is aimed at purposeful conduct motivated by discriminatory intent:

> It shall be unlawful *to coerce, intimidate, threaten or interfere* . . . with any person . . . *on account of* his having exercised or enjoyed . . . any right granted or protected by section 3603, 3604, 3605, or 3606.

42 U.S.C. §3617(Emphasis added). The words "coerce, intimidate, threaten or interfere" all connote intentional conduct of a threatening nature.[4] The phrase "*on account of*" is synonymous with the phrase "*because of*" and makes clear that the intentional conduct must be taken because of the protected trait. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009). Section 3617 imposes liability on anyone that intentionally interferes with the use or enjoyment of a dwelling because of a protected trait.

Respondent has asserted a disparate-treatment claim under Sections 3604(b) and 3617. She alleges Petitioners discriminated against her by failing to intervene and stop the harassment Respondent allegedly suffered at the hands of other tenants. Accordingly, to prevail on her claims under Sections 3604(b) or 3617, Respondent must plead and prove discriminatory

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[4] Because "coerce," "threaten" and "intimidate" all indicate deliberate conduct involving the use of threats or force, interference should likewise be construed to mean hinder or impede another by the use of threats or force under principles of *ejusdem generis*. Principles of *ejusdem generis* instruct that where a general word follows a series of specific words, the general word is construed to embrace only subjects similar in nature to the words that precede it. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001).

intent or conduct on the part of Petitioners. This Respondent deliberately has not done.

B. Discriminatory Intent Serves To Limit The Scope of The Statute And Provides The Necessary Causal Link Between The Offending Conduct And The Actor To Be Held Liable.

The requirement of intentional discrimination serves to limit the scope of the statute. This function is critical because, as numerous courts have observed, "[n]either the FHA's text nor its legislative history indicates an intent to make 'quarrels between neighbors . . . a routine basis for federal litigation.'" *Bloch,* 587 F.3d at 780 (Internal citation omitted). The FHA is thus distinguishable from other acts like Title VII, where the onus is put directly on the employer to control the work environment over which it exerts vast control.

The requirement of intentional discrimination also serves the essential function of providing the necessary causal link between the offending conduct and the actor to be held liable. As this Court recently observed in *Bank of Am. Corp. v. City of Miami*, "the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" 197 L. Ed. 2d 678, 690 (2017)(Internal citations omitted). The purpose of a strong causality requirement is to "protect[] defendants from being held liable for . . . disparities they did not create," and thereby protect against abusive claims. *Inclusive Communities*, 135 S. Ct. at 2523-24.

In a case like the present one, the requirement of intentional discrimination serves the same purposes. It provides the causal link between the injury and the

Petitioners charged and protects Petitioners from being held liable for discrimination they did not engage in or create. By eliminating discriminatory intent, the Seventh Circuit has turned this principle on its head and broken the causal link required by the Act. Landlords who have not engaged in any discriminatory conduct can now be held liable for others' wrongful acts, over whom they have little or no control.

C. The Seventh Circuit's Decision Imposes Liability Without Discernable Limits In Contravention Of The FHA.

The scope of the FHA is also limited by a second factor. In addition to discriminatory intent, the Court of Appeals acknowledged that the statute is limited by the requirement that the harassment be severe or pervasive before liability will attach. *Wetzel*, 901 F.3d at 862. *See* Pet. App. 7a. Indeed, this concept is recognized in other anti-discrimination statutes. *E.g.*, *Davis,* 526 U.S. at 650 (liability under Title IX imposed where sexual harassment is "severe, pervasive, and objectively offensive"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)(hostile work environment under Title VII requires harassment that is severe or pervasive). The newly created duty, however, possesses none of these limits. A landlord can be held liable for failing to intervene in in *any* known harassment, regardless of how trivial.

The only limiting factor identified by the court is whether the landlord has "remedial tools" that can be used to stop the discriminatory conduct. *Wetzel*, 901 F.3d at 865 ("We have no quarrel with the idea that direct liability for inaction makes sense only if defendants had, but failed to deploy, available remedial tools."). *See* Pet. App. 13a. The court identifies eviction, or the threat of eviction, as the primary remedial tool at the

landlord's disposal. *Id.* *See* Pet. App. 13a-14a. In theory this option—at least the threat of eviction—is always available rendering the limit illusory. In short, the duty imposed by the Court of Appeals is without limits and subjects landlords to strict liability.

D. The Circuits Are Split As To Whether Discriminatory Intent Is A Required Element Under Sections 3604(b) and 3617.

Respondent alleges a disparate-treatment claim against Petitioners. She alleges Petitioners treated her in a discriminatory fashion by failing to intervene to stop the tenant-on-tenant harassment. Respondent must thus "establish that the [Petitioners] had a discriminatory intent or motive'" as the Second, Sixth and Eleventh Circuits have held and this Court recently affirmed in *Inclusive Communities,* 135 S. Ct. at 2513. *E.g.*, *Linkletter v. W. & S. Fin. Grp., Inc.,* 851 F.3d 632, 639 (6th Cir. 2017)("showing of 'discriminatory animus' for §3617 claims"); *Austin v. Town of Farmington*, 826 F.3d 622, 630 (2d Cir. 2016)("plaintiff must demonstrate that intentional discrimination motivated defendants' conduct, at least in part" for §3617); *Sofarelli v. Pinellas Cty.*, 931 F.2d 718, 723 (11th Cir. 1991) (dismissal where no showing of racial animus).

In the context of a hostile housing environment specifically, the Tenth Circuit in *Honce*, *supra*, permitted a hostile housing claim where the *landlord* committed the sexual harassment that interfered with the tenant's use and enjoyment of the property. The landlord's conduct thus satisfied the element of discriminatory intent. Direct discriminatory conduct was also present in the Seventh Circuit case of *DiCenso*, *supra,* where, like *Honce*, the *landlord* created the hostile housing environment by propositioning the

tenant. Neither court held discriminatory intent was unnecessary. Indeed, there was no need to address the issue since discriminatory conduct by the actor sought to be held liable was factually alleged in each case. Though labeled hostile housing, the actions were for disparate treatment because they sought to hold the landlord liable for its treatment of the FHA plaintiff.

Standing in opposition is the Eighth, and now the Seventh Circuit. In *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003), the Eighth Circuit permitted a hostile disability-harassment environment claim to proceed under §3604(f) where there were no specific allegations of discriminatory intent or conduct by the landlord *per se*. 42 U.S.C. §3604(f). The harassing conduct, however, was committed by the children of the landlord's management team who were also tenants in the building. The Eighth Circuit grounded its decision on concepts borrowed from Title VII involving the employer-employee relationship. But a distinguishing feature of Title VII is that liability is statutorily imposed on the employer and its agents. No such parallel provision exists under Title VIII.

Rejecting the Eighth Circuit's approach, the Seventh Circuit correctly recognized "that there are some potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord. We thus refrain from reflexively adopting the Title VII standard and continue our search for comparable situations." *Wetzel*, 901 F.3d at 863. *See* Pet. App. 10a.

In an attempt to justify holding a landlord liable for the co-tenants' misconduct, the Seventh Circuit looks instead to Title IX and this Court's decision in

Davis. First the court creates a duty (where none had previously existed), for the landlord to intervene when made aware of the harassment. Having created the duty, liability can be imposed for its breach. Namely, where a landlord knows of the harassment and deliberately choses to ignore it, liability can be imposed for the landlord's own negligence. *Wetzel*, 901 F.3d at 864. *See* Pet. App. 11a-12a.

But the Court misapplies *Davis*. *Davis* involved a private right of action for damages against a school board for student-on-student harassment under Title IX. 20 U.S.C. § 1681 *et seq*. The parameters of Title IX are far different from Title VIII. Title IX prohibits recipients of federal funding from discriminating on the basis of protected traits in any educational program or activity and the regulatory scheme "has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents." 526 U.S. at 643. In *Davis*, limiting parameters existed. The funding recipient was found liable for its failure to intervene because it "exercises *substantial control* over *both* the harasser *and* the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs." *Id.* at 645 (Emphasis added).

These essential elements are absent in the landlord-tenant context. Landlords, unlike an education funding recipient or an employer, exercise only limited control over their tenants. Although a landlord possesses the power to evict, courts have held the "power of eviction alone . . . is insufficient to hold a landlord liable for his tenant's tortious actions against another." *Ohio Civil Rights Comm. v. Akron Metro Hous. Auth.,* 119 Ohio

St. 3d 77, 82 (2008). *See also, Britt v. N.Y. City Hous. Auth.*, 3 A.D.3d 514 (2004)(control does not arise from power to evict). Moreover, the incidents in the present case occurred in Illinois where the law provides that a landlord is not an insurer against the acts of others, even when the risk of injury is known. *Trice v. Chicago Housing Authority*, 14 Ill. App. 3d 97, 100 (1973).

The statutory requirement of discriminatory intent confines the scope of the statute and sets limits on who can be held liable. By eliminating discriminatory intent, the Seventh and Eighth Circuits have subjected landlords to strict liability for the discriminatory acts of unrelated third-parties. In essence, the landlord becomes the guarantor of discriminatory-free housing.

While discriminatory-free housing is the aim of all, Congress never intended landlords to be guarantors of tenant conduct. The structure of the Act demonstrates that Congress' intent was to bifurcate responsibility for eliminating discrimination. Sections 3604(a) and (b) address discrimination in access to housing. Section 3617 is aimed at those who discriminate after occupancy commences. A landlord that obstructs access to housing can be held liable under §3604. The same landlord can also be held liable under §3617 for acts of discrimination during occupancy. But before liability can be imposed, there must be a showing of discriminatory intent *by the landlord*. There is nothing in the text that allows for shifting liability from one party to another. The goal is to stop the harassment by imposing liability directly on the harasser; not to make landlords the guardians of their tenants. As this Court held in *Curtis v. Loether*, the statute authorizes compensation for discrimination "caused by *the defendant's* wrongful breach." 415 U.S. 189, 195 (1974)(Emphasis added).

Only this Court can resolve the split in the circuits and restore the proper interpretation to the statute. The Court's ruling, moreover, will be outcome determinative because Respondent carefully chose not to make any allegation that Petitioners *acted, or failed to act*, because of discriminatory animus.

II. This Court Should Grant Certiorari To Resolve the Circuit Split Concerning Whether Section 3604(b) Is Limited To Pre-Sale Harassment Claims.

Section 3604(b) provides that it shall be unlawful "[t]o discriminate against any person in the terms, conditions, or privileges *of a sale or rental of a dwelling*, or in the *provision of services or facilities in connection therewith*, because of" a protected trait. 42 U.S.C. §3604(b)(Emphasis added). At issue is whether the reach of §3604(b) is limited to discrimination in the provision of services in connection with the acquisition or rental of a dwelling, or whether its reach is broader, covering discrimination in the provision of services after occupancy commences.

Taking a textual approach, the Fifth Circuit opined the statute does not cover post-acquisition/rental claims. *Cox, supra.* In *Cox*, the plaintiffs alleged that the City of Dallas had "discriminated against them in the provision of a service—the enforcement of zoning laws." 430 F.3d at 745. The Fifth Circuit held that grammatically, the words "in connection therewith" must refer to the "sale or rental of a dwelling," and not a dwelling generally. *Id.* ("This reading is grammatically superior and supported by the decisions of many courts."). The court explained that "[a]lthough the FHA is meant to have a broad reach, unmooring the 'services' language from the 'sale or rental' language pushes the FHA into a general anti-discrimination

pose, creating rights for any discriminatory act which impacts property." *Id.* at 746. Accordingly, the court concluded that "services" subject to claims of discrimination must be "in connection" with the "sale or rental of a dwelling." *Id*. The Fifth Circuit's construction is bolstered by the overall structure of the Act, which provides for post-acquisition discrimination under §3617. Section 3617 makes it unlawful to "coerce, intimidate, threaten or interfere . . . with any person . . . on account of his having exercised or enjoyed . . . any right granted or protected" by the FHA. 42 U.S.C. §3617.

The Ninth Circuit has taken the opposite approach, concluding that §3604(b) reaches both pre and post-acquisition discrimination claims. In *City of Modesto*, the Ninth Circuit reasoned that "[t]here are few 'services or facilities' provided at the moment of sale, but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling. Under this natural reading, the reach of the statute encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling." 583 F.3d at 713. The Seventh Circuit adopts the position of the Ninth Circuit in the present case.

Only this Court can resolve the split between the circuits and accord the FHA its proper interpretation. The Court's ruling, moreover, will be outcome determinative because the harassment for which Respondent seeks redress occurred approximately five months after she took occupancy and does not involve the provision of services by Petitioners. Rather, Respondent alleges that her co-tenants harassed her by interfering with her use and enjoyment of the common areas of the

retirement facility. Respondent's claim should properly be brought under Section 3617 against her co-tenants.

III. The Need For This Court's Guidance Is Particularly Acute Given the Tension Created By HUD's New Regulation and the Court Of Appeals' Decision.

While the statutory interpretation of any federal statute is important, the FHA is of particular national significance because Congress has chosen the FHA as the primary vehicle to help eradicate discrimination in our nation's housing. As such, the scope and contours of the Act are of particular importance on a national level to achieve uniformity in housing decisions.

The present case presents novel issues that this Court has not yet addressed, but on which the lower courts are in need of guidance because the issues are continuing and affect far more than the individual litigants in this case. By way of example, a similar suit is pending in the Second Circuit. *Donahue Francis v. Kings Park Manor, Inc.*, No. 15-1823 (2d Cir.). If left uncorrected, the Seventh Circuit's decision will open the gates to a flood of litigation. The need for definitive and speedy guidance is especially critical for landlords since the Court of Appeals' decision imposes a new duty on housing providers the contours of which are ill-defined.

Adding to the confusion is the Department of Housing and Urban Development's ("HUD") new regulation that had been subject to public debate for nearly two years and became final approximately one month after Respondent filed suit, and upon which Respondent relied in part below. 24 C.F.R. 100.7(a)(1)(iii). The Regulation "mirrors the scope of employee liability under Title VII for employee-on-employee harassment,"

and imposes liability where the housing provider knew or should have known of the harassment. *Wetzel*, 901 F.3d at 866. *See* Pet. App. 15a. The Seventh Circuit, however, refused to apply the overbroad Regulation because of "salient differences between Title VII and the FHA." *Id*. Noting that while it might be possible to overcome the differences between the two statutes, "more analysis than HUD was able to offer is necessary before we can take that step. It is enough for present purposes to say that nothing in the HUD rule stands in the way of recognizing Wetzel's theory." *Id*. The court thus side-stepped the new Regulation, leaving its validity in question, but not making the law under which housing providers must operate any more clear.

The Court of Appeals effectively modified the Regulation for HUD, imposing liability on housing providers for failing to intervene in known tenant-on-tenant harassment. But neither a court nor an administrative agency may "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014). Courts and housing providers across the county will be faced with trying to figure out whether to apply the HUD Regulation or the Seventh Circuit's court-made modification. The state of the law should not be left in flux. This Court needs to provide guidance as to the correct interpretation of the FHA before the housing market becomes embroiled in unreasonable and unfounded litigation.

This case is particularly well positioned to allow the Court to focus exclusively on the legal issues at hand because it is undisputed that the alleged tenant-on-tenant harassment occurred post-sale and the Petitioners did not act with discriminatory animus.

Petitioners submit that the individuals engaged in the harassing conduct must answer for their misdeeds, not unrelated parties. That is the intent of the FHA and it is manifest in its text. Section 3631, moreover, imposes penalties of fine and imprisonment for acts of willful discrimination under §3617. 42 U.S.C. §3631. A landlord that does not create or engage in any discriminatory conduct should not serve time or be held financially responsible for tenants or their invitees over whom the landlord may little or no control.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-1322

MARSHA WETZEL,

Plaintiff-Appellant,

v.

GLEN ST. ANDREW LIVING COMMUNITY, LLC, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 16 C 7598 — Samuel Der-Yeghiayan, *Judge*.

ARGUED FEBRUARY 6, 2018 —
DECIDED AUGUST 27, 2018

Before WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. Within months of her arrival at Glen St. Andrew Living Community ("St. Andrew"), Marsha Wetzel faced a torrent of physical and verbal abuse from other residents because she is openly lesbian. Time and again, she implored St. Andrew's staff to help her. The staff's response was to limit her use of facilities and build a case for her eviction.

Wetzel sued St. Andrew, alleging that it failed to provide her with non-discriminatory housing and that it retaliated against her because of her complaints, each in violation of the Fair Housing Act (FHA or Act), 42 U.S.C. §§ 3601–3619. St. Andrew insists that the Act affords Wetzel no recourse, because it imposes liability only on those who act with discriminatory animus, an allegation Wetzel had not expressly made of any defendant. The district court agreed and dismissed Wetzel's suit. We read the FHA more broadly. Not only does it create liability when a landlord intentionally discriminates against a tenant based on a protected characteristic; it also creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment. We therefore reverse the district court's grant of St. Andrew's motion to dismiss and remand for further proceedings.

I

After her partner of 30 years died, Wetzel moved into St. Andrew, a residential community for older adults; she continues to live there today. Her tenancy, presumably like that of St. Andrew's other residents, is governed by a form Tenant's Agreement ("Agreement"). Beyond a private apartment, the Agreement guarantees three meals daily served in a central location, access to a community room, and use of laundry facilities. It conditions tenancy at St. Andrew on refraining from "activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" or that is "a direct threat to the health and safety of other individuals." It also requires compliance with the "Tenant Handbook," which may "be amended from time to time." The

Agreement authorizes St. Andrew to institute eviction proceedings against a tenant in breach, and if St. Andrew prevails, the breaching tenant must also reimburse St. Andrew for its attorney's fees. (Indeed, the Agreement requires reimbursement of St. Andrew's fees related to an alleged violation or breach even if suit has not been instituted.)

After arriving at St. Andrew, Wetzel spoke openly to staff and other residents about her sexual orientation. She was met with intolerance from many of them. The following is just a sample of what Wetzel has alleged that she endured. At this early stage of the litigation, we accept her account as true, recognizing that St. Andrew will have the right to contest these assertions at a trial.

Beginning a few months after Wetzel moved to St. Andrew and continuing at least until she filed this suit (a 15-month period), residents repeatedly berated her for being a "fucking dyke," "fucking faggot," and "homosexual bitch." One resident, Robert Herr, told Wetzel that he reveled in the memory of the Orlando massacre at the Pulse nightclub, derided Wetzel's son for being a "homosexual-raised faggot," and threatened to "rip [Wetzel's] tits off." Herr was the primary, but not sole, culprit. Elizabeth Rivera told Wetzel that "homosexuals will burn in hell."

There was physical abuse too. Wetzel depends on a motorized scooter. Herr at one time rammed his walker into Wetzel's scooter forcefully enough to knock her off a ramp. Rivera bashed her wheelchair into a dining table that Wetzel occupied, flipping the table on top of Wetzel. In yet another incident, Wetzel was struck in the back of the head while alone in the mailroom; the blow was hard enough to push her from her scooter, and she suffered a bump on her head and

a black eye. She did not see the assailant, but the person said "homo" when attacking her. Following this mugging, Herr taunted Wetzel, rubbing his head and saying "ouch." Wetzel also had two abusive trips in the elevator. During the first, Rivera spat on her and hurled slurs. During the second, Wetzel, Herr, and another resident, Audrey Chase, were together in the elevator when Herr again hit Wetzel's scooter with his walker.

Wetzel routinely reported the verbal and physical abuse to St. Andrew's staff, including Carolyn Driscoll, Sandra Cubas, and Alyssa Flavin (the "management defendants"). Wetzel's initial complaints won her a brief respite, prompting her to draft a thank-you note. But the management defendants, among whom we need not distinguish for purposes of this appeal, otherwise were apathetic. They told Wetzel not to worry about the harassment, dismissed the conduct as accidental, denied Wetzel's accounts, and branded her a liar. Wetzel's social worker accompanied her to one meeting about the harassment; despite that, the managers denounced Wetzel as dishonest.

Had the management defendants done nothing but listen, we might have a more limited case. But they took affirmative steps to retaliate against Wetzel for her complaints. For example, they relegated Wetzel to a less desirable dining room location after she notified them about being trampled by Rivera. Following other complaints, they barred her from the lobby except to get coffee and they halted her cleaning services, thus depriving her of access to areas specifically protected in the Agreement. They falsely accused Wetzel of smoking in her room in violation of St. Andrew's policy. Early one morning, two staff members woke Wetzel up and again accused her of smoking in her

room. When she said that she had been sleeping, one of them slapped her across the face. One month, Wetzel did not receive the customary rent-due notice, though other tenants did. She remembered to pay on time, but she had to pry a receipt from management.

In response, Wetzel changed her daily routine. She ate meals in her room, forgoing those included as part of the Agreement. She stopped visiting the third floor of St. Andrew, where Herr lived. She did not use the laundry room at hours when she might be alone. And she stayed away from the common spaces from which she had been barred by management.

Eventually Wetzel brought this action against the management defendants and the entities that own and operate St. Andrew (the "corporate defendants"). Unless the distinction matters, we refer to the group collectively as defendants or St. Andrew. She alleged that St. Andrew failed to ensure a non-discriminatory living environment and retaliated against her for complaining about sex-based harassment, each in violation of the FHA. The complaint included related state claims.

All of the defendants moved for dismissal, contending that the FHA does not make a landlord accountable for failing to stop tenant-on-tenant harassment unless the landlord's inaction was animated by discriminatory animus. In the alternative, the defendants argued that Wetzel's harassment claim must be dismissed insofar as it relied on 42 U.S.C. § 3604(b) because that section does not cover post-acquisition harassment claims—in other words, harassment claims brought by a tenant already occupying her home. The defendants also asserted that Wetzel's retaliation claim failed because it too lacked an allegation that the defendants were motivated by discriminatory animus. The district

court agreed with each of the defendants' arguments and dismissed the harassment claim. It dismissed the retaliation claim without further discussion. With the federal claims gone, the court chose to relinquish supplemental jurisdiction over the state claims. Wetzel appeals the dismissal of her suit.

II

A

As we recognized in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (*en banc*), the protections afforded by the Fair Housing Act do not evaporate once a person takes possession of her house, condominium, or apartment. The question before us, while an important one, is thus narrow: does the Act cover the particular kinds of post-acquisition discrimination that Wetzel suffered?

Under 42 U.S.C. § 3604(b), it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." In addition, the Act makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section . . . 3604 . . . of this title." 42 U.S.C. § 3617. Among other things, these sections prohibit discriminatory harassment that unreasonably interferes with the use and enjoyment of a home—by another name, a hostile housing environment. *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); see also *Bloch*, 587 F.3d at 781 (recognizing that the protections under sections 3604(b) and 3617 may be coextensive).

A hostile-housing-environment claim requires a plaintiff to show that: (1) she endured unwelcome harassment based on a protected characteristic; (2) the harassment was severe or pervasive enough to interfere with the terms, conditions, or privileges of her residency, or in the provision of services or facilities; and (3) that there is a basis for imputing liability to the defendant. See *DiCenso*, 96 F.3d at 1008; see also *Alamo v. Bliss*, 864 F.3d 541, 549 (7th Cir. 2017) (listing elements of a Title VII hostile-workplace claim); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (adopting elements of a Title VII hostile-workplace claim for the FHA).

B

St. Andrew agrees that our ruling in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*), holding that discrimination based on sexual orientation qualiȩes as discrimination based on sex under Title VII, applies with equal force under the FHA. We therefore move directly to the second element of the case: whether the harassment from which Wetzel suffered was severe or pervasive enough to interfere with her enjoyment of her dwelling. Harassment is severe or pervasive if it objectively interferes with the enjoyment of the premises or inhibits the privileges of rental. *DiCenso*, 96 F.3d at 1008. That standard requires us to consider the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating rather than merely offensive. *Alamo*, 864 F.3d at 549–50. There is no "magic number of instances" that must be endured before an environment becomes so hostile that the occupant's right to enjoyment of her home has been violated. *Id.* at 550. While isolated minor affronts are

not enough, *DiCenso*, 96 F.3d at 1008, either a small number of "severe episode[s]" or a "relentless pattern of lesser harassment" may suffice, *Alamo*, 864 F.3d at 550 (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 994, 951 (7th Cir. 2005)).

Though it need be only one or the other, the harassment Wetzel describes plausibly can be viewed as both severe and pervasive. For 15 months, she was bombarded with threats, slurs, derisive comments about her family, taunts about a deadly massacre, physical violence, and spit. The defendants dismiss this litany of abuse as no more than ordinary "squabbles" and "bickering" between "irascible," "crotchety senior resident[s]." A jury would be entitled to see the story otherwise. (We confess to having trouble seeing the act of throwing an elderly person out of a motorized scooter as one of the ordinary problems of life in a senior facility.) Wetzel has presented far more than "a simple quarrel between two neighbors or [an] isolated act of harassment." See *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004).

C

That takes us to the main event: Is there a basis to impute liability to St. Andrew for the hostile housing environment? This question is new to our circuit. Our response begins, as it must, with the text of the statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Again, 42 U.S.C. § 3604(b) makes it unlawful "[t]o discriminate . . . because of . . . sex," and 42 U.S.C. § 3617 forbids a housing provider to "interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section . . . 3604 . . . of this title." The focus on the actor rather than the benefitted class, St. Andrew deduces, confines the world of

possible defendants under these sections to those accused of carrying discriminatory animus. But St. Andrew relies on language defining the substantive contours of an FHA action to ascertain a landlord's potential liability for actionable abuse—in other words, it is looking at *what* is prohibited, not *who* is subject to those prohibitions. As the Supreme Court's cases in analogous areas demonstrate, the questions are different. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (distinguishing the scope of behavior proscribed under Title IX from availability of private suit); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788–89 (1998) (separating the analysis of the substantive contours of a forbidden hostile environment claim under Title VII from the rules for determining employer liability); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (telling lower courts to look to common-law principles for guidance on employer liability under Title VII). True, a sex-harassment claim under the FHA demands sex-based discrimination, but Wetzel has alleged such discrimination. On its face, the Act does not address who may be liable when sex-based discrimination occurs or under what circumstances. *Cf. Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 754–55 (1998) (considering proper vicarious liability standard for an employer for purposes of Title VII).

Because the text of the FHA does not spell out a test for landlord liability, we look to analogous anti-discrimination statutes for guidance. One natural point of reference is Title VII, which governs discrimination in employment. It and the FHA have been described as "functional equivalent[s]" to be "given like construction and application." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); see also *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2516 (2015)

(comparing section 3604(a) of the FHA to Title VII); *Bloch*, 587 F.3d at 779 (noting that section 3604(b) mirrors Title VII). The Supreme Court's interpretation of Title VII's parallel section is illuminating. That section makes it unlawful "to discriminate against any individual . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Under operative language in Title VII identical to that of the 42 U.S.C. § 3604(b), an employer may be liable under some circumstances when its own negligence is a cause of prohibited harassment. *Burlington Indus.*, 524 U.S. at 758–59. Indeed, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). The FHA followed Title VII by four years. See Civil Rights Act of 1964 § 703; Civil Rights Act of 1968 § 804. St. Andrew provides no reason why the FHA requires in all instances that the defendant acted with discriminatory animus when an identically worded statute has not been read in such a manner. As a textual matter, we see none.

We recognize, however, that there are some potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord. We thus refrain from reflexively adopting the Title VII standard and continue our search for comparable situations.

That takes us to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. Like the FHA and Title VII, Title IX aims to eradicate sex-

based discrimination from a sector of society—education. The Supreme Court has held that Title IX supports a private right of action on the part of a person who experiences sex discrimination in an education program or activity receiving federal financial aid. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979). In *Davis v. Monroe County Board of Education*, the Court confronted the question whether a school district's "failure to respond to student-on-student harassment in its schools can support a private suit for money damages." 526 U.S. at 639. Because Title IX was enacted pursuant to the Spending Clause, private damages were available against a funding recipient only if it had adequate notice of its potential liability. *Id.* at 640. Applying that limiting principle, the Court held that the district could be held accountable only for its own misconduct. *Id.* But that is just what the *Davis* plaintiff was trying to do. As the Court put it, "petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools." *Id.* at 641. Indeed, the district itself subjected the plaintiff to discrimination by remaining "deliberately indifferent to known acts of student-on-student sexual harassment [when] the harasser is under the school's disciplinary authority." *Id.* at 646–47. It emphasized that the recipient of funds exercised substantial control over both the harasser and the premises on which the misconduct took place. *Id.* at 645.

Much of what the Court said in *Davis* can be applied readily to the housing situation. In *Davis*, the fund recipient's own misconduct subjected the student to actionable sex-based harassment. Here, we need look only to the management defendants themselves, asking whether they had actual knowledge of the severe harassment Wetzel was enduring and whether they

were deliberately indifferent to it. If so, they subjected Wetzel to conduct that the FHA forbids. (We say nothing about the situation in a setting that more closely resembles custodial care, such as a skilled nursing facility, or an assisted living environment, or a hospital. Any of those are different enough that they should be saved for another day.) Wetzel may be in unchartered territory, but the Supreme Court's interpretation of analogous anti-discrimination statutes satisfies us that her claim against St. Andrew is covered by the Act.

D

St. Andrew offers several reasons why, in its view, we should not adopt the analysis we have just laid out. We respond to the most important points. It argues that there is no agency or custodial relationship between a landlord and tenant, and from that it reasons that a landlord has no duty to protect its tenants from discriminatory harassment. But we have not gone that far: we have said only that the duty not to discriminate in housing conditions encompasses the duty not to permit *known* harassment on *protected* grounds. The landlord does have responsibility over the common areas of the building, which is where the majority of Wetzel's harassment took place. And the incidents within her apartment occurred precisely because the landlord was exercising a right to enter. More broadly, St. Andrew has a statutory duty not to discriminate. As the Supreme Court said, the FHA "defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). The same is true of an action under Title VII or Title IX. See *Dunn v. Washington*, 429 F.3d 689, 691 (7th Cir. 2005); *Davis*, 526 U.S. at 643.

We need not address St. Andrew's arguments about vicarious liability, because it is irrelevant here to the management defendants' possible liability. (The Supreme Court has held already that the Act imposes vicarious liability on a corporation, but not upon its officers or owners. See *Meyer v. Holley*, 537 U.S. 280, 285–86 (2003).) The management defendants' liability, if any after a full trial, would be direct—the result of standing pat as Wetzel reported the barrage of harassment. Because liability is direct, "it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer . . . . The genesis of inequality matters not; what *does* matter is how the employer handles the problem." *Dunn*, 429 F.3d at 691. A school district's liability under Title IX is the same. *Davis*, 526 U.S. at 640–43.

St. Andrew complains that it would be unfair to hold it liable for actions that it was incapable of addressing, but we are doing no such thing. We have no quarrel with the idea that direct liability for inaction makes sense only if defendants had, but failed to deploy, available remedial tools. *Id.* at 644; *Dunn*, 429 F.3d at 691. St. Andrew protests that it can only minimally affect the conduct of its tenants because tenants expect to live free from a landlord's interference.

Control in the absolute sense, however, is not required for liability. Liability attaches because a party has "an arsenal of incentives and sanctions . . . that can be applied to affect conduct" but fails to use them. *Id*. St. Andrew brushes aside the many tools for remedying harassment that it has pursuant to the Agreement. For example, the Agreement allows St. Andrew to evict any tenant who "engages in acts or omissions that constitute a direct threat to the health

and safety of other individuals" or who "engage[s] in any activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants." The mere reminder that eviction (along with liability for attorneys' fees) was a possibility might have deterred some of the bad behavior. St. Andrew also could have updated the Tenant Handbook to clarify the anti-harassment and anti-abuse provisions. With respect to the common areas, St. Andrew could have suspended privileges for tenants who failed to abide by the anti-harassment policies, instead of taking a blame-the-victim approach.

If liability is possible here, St. Andrew warns, then landlords may just renounce control of the premises altogether. But unless the rental unit is a detached, single-family dwelling, such total abandonment is not a practical possibility. St. Andrew itself had a common living area, a common dining area, common laundry facilities, and hallways. It is hard to believe that a total disclaimer of liability would be in its own best interest. In addition, contract law is not the exclusive source of a landlord's duties or powers. Property law governs landlord-tenant relations as well. A landlord typically must provide its tenants a residence that is free from "interfer[ence] with a permissible use of the leased property by the tenant." RESTATEMENT (SECOND) OF PROP.: LAND. & TEN. § 6.1. The obligation is breached even if a third party causes the interference, so long as the disturbance was "performed on property in which the landlord has an interest" and the "conduct could be legally controlled by [the landlord]." *Id.* § 6.1 cmt. d. Inherent powers spring from that obligation. *Cf. id.* § 6.1 cmt. d, illus. 10–11 (illustrating that a landlord breaches its obligation to a tenant if the landlord fails to act after learning that conduct performed on the owned property interferes

with the tenant's permissible use of the leased property). And if need be, there is always the right of exclusion, which is "[o]ne of the main rights attaching to property." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1). The same kinds of steps we already mentioned could have been justified as a matter of property law.

Seeking a broader ruling, Wetzel points to a rule interpreting the FHA that the U.S. Department of Housing and Urban Affairs (HUD) published in 2016. The HUD rule interprets the FHA to make a landlord directly liable for failing to "take prompt action to correct and end a discriminatory housing practice by a third party" if the landlord "knew or should have known of the discriminatory conduct and had the power to correct it." 24 C.F.R. § 100.7(a)(1)(iii). HUD's rule mirrors the scope of employee liability under Title VII for employee-on-employee harassment. We have no need, however, to rely on this rule. As we noted earlier, there are salient differences between Title VII and the FHA. In the end, it is possible that they could be overcome, but more analysis than HUD was able to offer is necessary before we can take that step. It is enough for present purposes to say that nothing in the HUD rule stands in the way of recognizing Wetzel's theory.

It is important, too, to recognize that the facts Wetzel has presented (which we must accept at this stage) go far beyond mere rudeness, all the way to direct physical violence. This case is thus not, as St. Andrew would have it, one about good manners. Courts around the country have policed that line for years in the context of Title VII, for which they have ensured that the standard is "sufficiently demanding to ensure that Title VII does not become a general

civility code," and "filter[s] out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher*, 524 U.S. at 788 (citations omitted). We have no reason not to expect the same discipline here.

III

In the alternative, St. Andrew urges that Wetzel's section 3604(b) claim falls outside the scope of post-acquisition actions available under that section of the FHA. Our treatment of this argument might have little effect on the outcome of this case, because Wetzel's harassment claim invokes the protections of both section 3604(b) and section 3617. And a claim alleging a post-acquisition pattern of harassment can proceed under section 3617 even if there is no route for relief under section 3604. *Halprin*, 388 F.3d at 330. St. Andrew nonetheless maintains that Wetzel's section 3604(b) claim is unavailable post-acquisition.

In *Bloch,* the *en banc* court took a careful look at the availability of post-acquisition claims under section 3604(b). 587 F.3d at 779–81. We identified two situations in which such a claim could proceed: (1) when discriminatory conduct constructively evicts a resident, and (2) when occupancy is governed by discriminatory terms (in that case, a condo association rule that prohibited hanging mezuzot and thus discriminated against Jews). *Id.* at 779–80. As to the first situation, we reasoned that habitation is a "privilege of sale." *Id.* As to the second, the Bloch family's adherence to the discriminatory rule was a "condition of sale." *Id.* St. Andrew reads *Bloch* as identifying the exclusive set of post-acquisition claims that would be possible under section 3604(b). But we said no such thing. Instead, as courts do, we were addressing the case before us, and

so we simply noted that those were "two possibilities for relief in [the present] case." *Id.* at 779. St. Andrew's argument also ignores that section 3604(b) protects not only against discrimination in the "terms, conditions, or privileges of sale or rental," but also discrimination "in the provision of services or facilities in connection therewith." As the Ninth Circuit has recognized, the latter language most naturally encompasses conduct that follows acquisition. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009). Few "services or facilities" are provided prior to the point of sale or rental; far more attach to a resident's occupancy. *Id.*

In this case, Wetzel has alleged that while the management defendants sat on their hands, residents' harassment confined her to her room for prolonged stretches. Regular harassment also impeded her from eating the meals she had paid for at the dining hall, visiting the lobby and other common spaces, and obtaining access to the laundry room. These were concrete violations of the Agreement, which guarantees "three-well balanced meals per day to be served in a central location," a community room, and available laundry facilities. At a minimum then, Wetzel has a cognizable post-acquisition claim because discrimination affected the provision of services and facilities connected to her rental.

Beyond that, the discrimination diminished the privileges of Wetzel's rental. Though she has not been constructively evicted from her apartment, occupancy of the unit is not the only privilege of rental. Use of the totality of the rented premises is another. See RESTATEMENT (SECOND) OF PROP.: LAND. & TEN. § 4.3; A. JAMES CASNER ET AL., 1 AMERICAN LAW OF PROPERTY § 3.49 (1952). So too is the covenant of quiet enjoyment.

See *City of Modesto*, 583 F.3d at 713; CASNER, *supra*, § 3.47.

Contrary to St. Andrew's assertion, this case is unlike *Halprin*. There, the Halprin family sued its homeowners' association because the association's president incessantly harassed them because they were Jewish. *Halprin*, 388 F.3d at 328. The *Halprin* opinion took a limited approach to post-acquisition claims under section 3604(b), and so it had no reason to reach the question whether the harassment was connected to a term, condition, or privilege, or the provision of services, related to homeownership. In *Bloch*, however, the *en banc* court distinguished *Halprin* as a case in which the homeowners' association had no contractual relationship to the Halprin family. *Bloch*, 587 F.3d at 780. St. Andrew tries to use *Halprin* by noting that there was no contractual relationship between Wetzel and any other *tenant*. True enough, but that is not the relevant comparator. It is between Wetzel and St. Andrew, and that relationship was governed by the Agreement and the Tenant Handbook. Nothing in *Halprin* supports the dismissal of Wetzel's case at this time.

IV

Wetzel separately alleged that after she complained about the harassment, the management defendants restricted her access to facilities and common spaces, downgraded her dining seat, halted her cleaning services, and attempted to build a case for her eviction. In doing so, she says, they retaliated against her in violation of 42 U.S.C. § 3617. St. Andrew offers several reasons to affirm the district court's dismissal of this claim. It argues that the alleged retaliatory conduct was not adverse action; if it was adverse, it was not causally related to Wetzel's complaints; and there is no allegation of discriminatory animus. St. Andrew

conceded at oral argument that it argued in the district court only that Wetzel's retaliation claim lacked an allegation of discriminatory animus. We thus limit our remark to that argument. *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010).

To prove retaliation, a plaintiff must show that: (1) she engaged in protected activity; (2) she suffered an adverse action; and (3) there was a causal connection between the two. See, *e.g.*, *Owens v. Old Wisconsin Sausage Co., Inc.*, 870 F.3d 662, 668 (7th Cir. 2017) (elements of a Title VII retaliation claim); *Boston v. U.S. Steel Corp.*, 816 F.3d 455, 464 (7th Cir. 2016) (same for ADEA); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012) (same for Title IX). Proof of discriminatory animus is not on the list. We have said that a claim under section 3617 requires showing intentional discrimination only when considering an *interference* claim. See *Bloch*, 587 F.3d at 783; *East-Miller v. Lake Cnty. Highway Dep't*, 421 F.3d 558, 562–63 (7th Cir. 2005); see also *Halprin*, 388 F.3d at 330–31 (recognizing that section 3617 creates different types of claims).

Indeed, if we were to read the FHA's anti-retaliation provision to require that a plaintiff allege discriminatory animus, it would be an anomaly. The FHA's anti-retaliation provision makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, . . . any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. Like all anti-retaliation provisions, it provides protections not because of who people are, but because of what they do. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

V

The district court's judgment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. We also instruct the district court to reinstate the state-law claims that were dismissed for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed: 01/18/17]

No. 16 C 7598

MARSHA WETZEL,

Plaintiff,

v.

GLEN ST. ANDREW LIVING COMMUNITY, LLC, *et al.*,

Defendants.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendants Glen St. Andrew Living Community, LLC's (GSALC), Defendant Glen St. Andrew Living Community Real Estate, LLC's, Defendant Glen Health & Home Management, Inc.'s, Defendant Alyssa Flavin's (Flavin), Defendant Carolyn Driscoll's (Driscoll), and Defendant Sandra Cubas' (Cubas) motion to dismiss. For the reasons stated below, Defendants' motion to dismiss is granted.

BACKGROUND

Marsha Wetzel (Wetzel) alleges that she moved to GSALC in November 2014. Wetzel alleges that she signed a tenant agreement with GSALC on November 26, 2014 to rent an apartment and in exchange for her rental payment, GSALC would provide a private room,

bathroom, utilities, maintenance, laundry facilities, three meals a day, access to community rooms and other necessities. Wetzel alleges that over fifteen months, she was subjected to a severe and pervasive pattern of discrimination, threats, harassment, and intimidation because of her gender and sexual orientation. Wetzel includes in her complaint claims brought under the Fair Housing Act (FHA) for alleged violations of 42 U.S.C. § 3617 (Section 3617) and 42 U.S.C. § 3604 (Section 3604) (Count I), and claims brought under the Illinois Human Rights Act, 775 ILCS 5/3-102, 5/3-105.1 (Count II). Defendants move to dismiss all claims.

LEGAL STANDARD

In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) (Rule 12(b)(6)), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'" and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(quoting in part *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)); see also *Morgan Stanley Dean Witter, Inc.*, 673 F.3d at 622 (stating that "[t]o survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," and

that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged")(quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))(internal quotations omitted).

DISCUSSION

I. Section 3617 Claims

A. Discriminatory Intent.

Defendants argue that Wetzel's FHA Section 3617 claim should be dismissed because Wetzel has failed to plead any intentional discrimination on the part of the Defendants. The FHA prohibits "interfer[ing] with any person in the exercise or enjoyment of, or on account of [her] having exercised or enjoyed, . . . any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. The Seventh Circuit has established that in order to prevail on a Section 3617 claim, the plaintiff must show that "(1) she is a protected individual under the FHA, (2) she was engaged in the exercise or enjoyment of her fair housing rights, (3) the defendants coerced, threatened, intimidated, or interfered with the plaintiff on account of her protected activity under the FHA, and (4) the defendants were motivated by an intent to discriminate." *Bloch v. Frischholz,* 587 F.3d 771, 783 (7th Cir. 2009). The Seventh Circuit has stated that "a showing of intentional discrimination is an essential element of a § 3617 claim." *East-Miller v. Lake County Highway Dept.,* 421 F.3d 558, 563 (7th Cir. 2005). A plaintiff must show that the defendants "had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the *McDonnell Douglas* test." *Kormoczy v. Sec'y, U.S. Dep't*

of Hous. & Urban Dev., 53 F.3d 821, 823-24 (7th Cir. 1995).

Wetzel argues that she is not required to allege discriminatory intent and cites to *Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015). However, in *Inclusive Communities Project,* the Supreme Court found that discriminatory intent is not required to be plead in cases alleging disparate-impact under the FHA. *Id.* at 2518-19. In contrast, a "plaintiff must establish that the defendant had a discriminatory intent or motive" when pleading a disparate-treatment case. *Id.* at 2513. In the instant action, Wetzel alleges a claim of disparate-treatment under the FHA. Thus, Wetzel is required to plead facts alleging discriminatory intent by Defendants.

Defendants argue that Plaintiff has failed to allege any discriminatory motive or intent to discriminate on the part of Defendants due to her sexual orientation and/or gender. Defendants contend that Wetzel's complaints relate to discriminatory actions by other tenants, for which the Defendants cannot be held liable. Wetzel alleges that she was verbally harassed by tenants. Wetzel also alleges that she was physically harassed by other tenants due to her sexual orientation and gender. Wetzel alleges that she complained about the tenant's harassment to Defendants and that the harassment did not end. On April 24, 2016, Wetzel alleges that she was awoken at 5:00 am and was physically confronted by Defendants' employees after they accused her of smoking in the room. Wetzel alleges that she called the police and filed a police report in regards to the incident. Wetzel argues that Defendants actions and failure to intervene constitute an implicit ratification of the other tenants' discrimination.

Wetzel does not allege any discriminatory motive or intent to discriminate on the part of the Defendants. Wetzel does not allege any facts that suggest any actions taken against her by Defendants that were based on her gender or sexual orientation. Wetzel fails to cite any discriminatory animus, motive, or intent. Thus, Wetzel has fails to allege facts that plausibly suggest a right to pursue relief under Section 3617.

Wetzel argues that holding landlords liable for tenant-on-tenant discrimination where the landlord was aware of the discrimination is consistent with the underlying purpose of the FHA. However, Wetzel fails to cite controlling precedent establishing this legal standard and the Seventh Circuit precedent indicates that intent to discriminate should be pled. *See Bloch,* 587 F.3d at 771. Therefore, Defendants' motion to dismiss the Section 3617 claims is granted. To the extent Wetzel references conduct by Defendants after she complained, the court notes that Wetzel has not pled a retaliation claim.

II. Section 3604(b) Claims

Defendants argue that Wetzel has failed to state a claim under Section 3604(b). Section 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Depriving an individual of "the right to inhabit the premises. . .by making the premises uninhabitable violates Section 3604(b)." *Bloch,* 587 F.3d at 779. In post-acquisition cases, Section 3604(b) may apply to bring a claim of constructive eviction. *See Bloch*, 587 F.3d at 779 (7th Cir. 2009)(stating that constructive eviction is an option for post-acquisition

cases under Section 3604). In order "[t]o establish a claim for constructive eviction, a tenant need not move out the minute the landlord's conduct begins to render the dwelling uninhabitable." *Bloch*, 587 F.3d at 778. However, "it is well-understood that constructive eviction requires surrender of possession by the tenant." *Id.* Also, "[i]f the tenant fails to vacate within a reasonable time, she waives her claim for constructive eviction." *Id*. Wetzel contends that post-acquisition claims may be alleged under the FHA. Defendants do not dispute that contention. However, Defendants argue that Wetzel's allegations fail to contain sufficient facts stating a plausible cause of action under Section 3604. Wetzel alleges that she continues to reside at GSALC. Wetzel also fails to allege GSALC is uninhabitable, and, as stated above, does not allege that Defendants acted as they did due to her sexual orientation or gender. Accordingly, Wetzel has failed to state facts that plausibly suggest a right to pursue relief under Section 3604(b). Therefore, Defendants' motion to dismiss the Section 3604 claims is granted.

III. Remaining State Law Claims

Having resolved the federal claims in this case, the court must determine whether to continue to exercise supplemental jurisdiction over the remaining state law claims. Once the federal claims in an action no longer remain, a federal court has discretion to decline to exercise supplemental jurisdiction over any remaining state law claims. *See Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251-52 (7th Cir. 1994)(stating that "the general rule is that, when all federal-law claims are dismissed before trial," the pendent claims should be left to the state courts). The Seventh Circuit has indicated that there is no "'presumption' in favor of relinquishing supplemental jurisdiction. . . ."

Williams Electronics Games, Inc. v. Garrity, 479 F.3d 904, 906-07 (7th Cir. 2007). The Seventh Circuit has stated that, In exercising its discretion, the court should consider a number of factors, including "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources. . . ." *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994). The court has considered all of the pertinent factors and, as a matter of discretion, the court declines to exercise supplemental jurisdiction over the remaining state law claims brought under the IHRA. Such claims are therefore dismissed without prejudice.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted.

/s/ Samuel Der-Yeghiayan
Samuel Der-Yeghiayan
United States District Court Judge

Dated: January 18, 2017