NO. 19-_____

In the Supreme Court of the United States

PHYLLIS DAVIS,

Petitioner,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION AND CASA BELLA PROPERTY MANAGEMENT, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit's published opinion established a new heighted pleading standard, intruded on the sovereign rights of the State of Michigan, and uprooted the carefully calibrated balance between the distinct roles of judges and juries. The opinion dismissed half of the issues on appeal because the complaint was not amended to plead facts and theories with particularity by the summary judgment stage. Fundamentally altering the rights and obligations of the parties, the opinion engaged in an unsolicited redrafting of the contract and imposed a heightened burden for tobacco-related nuisance claims under Michigan law. The opinion also placed a rigid ceiling on failure-to-accommodate claims, which is so low that the disabled enjoy lesser protections under the Fair Housing Act than guaranteed to prisoners under the Eighth Amendment.

THE QUESTIONS PRESENTED ARE:

1. Whether the liberal notice pleading standard under Federal Rule of Civil Procedure 8(a) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ceases to apply at the summary judgment stage.

2. Whether federal courts of appeals have the authority to adjudicate substantive matters not at issue and to establish common law rules without consideration of governing state law.

3. Whether the reasonableness inquiry for failure-to-accommodate claims under the Fair Housing Act is solely a question of law to be decided by courts instead of juries.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Phyllis Davis

Respondent and Defendants-Appellees Below

- Echo Valley Condominium Association
- Casa Bella Property Management, Inc.

Defendants in Trial Court but Non-Parties to Petition

- Moisey Lamnin
- Ella Lamnin
- Wanda Rule

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

Case No. 18-2405

Phyllis Davis, *Plaintiff-Appellant,* v.
Echo Valley Condominium Association; Casa Bella Property Management, Inc., *Defendants-Appellees.*

Date of Final Opinion: December 19, 2019

Date of Rehearing Denial: January 22, 2020

United States District Court
Eastern District of Michigan Southern Division

Case No. 17-12475

Phyllis Davis, *Plaintiff*, v. Echo Valley Condominium Association; Casa Bella Property Management, Inc.; and Wanda Rule, *Defendants*.

Date of Final Opinion: November 7, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Phyllis Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 945 F.3d 483 and reproduced at App.1a-25a. The Sixth Circuit's order denying rehearing en banc is unreported and is reproduced at App.62a-63a. The district court's opinion and order is reported at 349 F. Supp. 3d 645 and reproduced at App.26a-61a.

JURISDICTION

The Sixth Circuit issued its opinion on December 19, 2019. App.1a. Petitioner filed a timely petition for rehearing en banc, which was denied on January 22, 2020. App.62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App.64a-70a: 42 U.S.C. §§ 3601, 3604; Mich. Comp. Laws §§ 559.207, 559.215.

STATEMENT OF THE CASE

A. Background and Party Admissions

1. Petitioner Phyllis Davis ("Davis") is a breast cancer survivor with asthma. App.27a. Davis' condominium complex, Echo Valley, has an endemic problem of cigarette and marijuana smoke polluting the common elements and units of non-smokers. Davis seeks to enforce her right to breathe in her own home and to live free of intrusions that Respondents admit are "extreme" and "intolerable" "health hazard[s]." *See* Genovese Dep. Tr., App.78a-79a; Williams Dep. Tr., App.83a-84a.

2. Echo Valley is a multi-building condominium complex in Michigan that is subject to a master deed, bylaws package, and the Michigan Condominium Act, Mich. Comp. Laws § 559.101 *et seq.* App.2a. Respondent Echo Valley Condominium Association ("Association") is organized to manage the affairs of the community and to enforce the bylaws. App.16a, 28a. Respondent Casa Bella Property Management, Inc. ("Management Company") (Association and Management Company collectively, "Respondents") assumed the Association's enforcement obligations. *Cf.* App.28a.

The bylaws grant the Association and its agents the authority "to enter upon the common elements" or "into any apartment" to "summarily remove and abate . . . any structure, thing[,] or condition existing or maintained contrary to the provisions of the Condominium Documents." Bylaws, App.76a-77a.

The governing bylaws are highly restrictive. Article VI, Section 15 ("Section 15") affirmatively requires co-owners to maintain their units and appurtenant spaces thereto "in a safe, clean and sanitary condition." App.53a. Article VI, Section 4 ("Section 4") prohibits all co-owners and invitees from doing anything that "may be or become an annoyance or a nuisance," is "unlawful" or "offensive", or "will increase the rate of insurance." App.52a-53a. In 2015, the bylaws committee—a subcommittee established by the board—recommended that smoking of any "plant material," including "tobacco" and "marijuana," be restricted to outdoor porches and patios "so as to be free of nuisance, offensive, dangerous health and safety activity. . . . " Nov. 2015 Minutes, App.86a-87a. Davis contends cigarette and marijuana pollution is unsafe, unclean, an annoyance, a nuisance, and offensive. Davis also contends indoor smoking increases the rate of insurance. Possession and consumption of marijuana is unlawful. App.22a.

The bylaws contain an anti-waiver provision, which provides that the failure of the Association or any co-owner to enforce any right, provision, covenant, or condition shall not constitute a waiver. App.77a. The Michigan Condominium Act preserves the right of co-owners to compel the Association to enforce the terms and provisions of the condominium documents. Mich. Comp. Laws § 559.207; *see also* Mich. Comp.

Laws § 559.215(1) (providing that a "person . . . adversely affected by a violation of or failure to comply with . . . any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction").

3. Davis purchased her condominium (Unit 214) in 2004, which is one of four in her building (Unit 114, Unit 115, and Unit 215). *Cf.* App.28a. Nearly a decade later, Moisey and Ella Lamnin ("Landlords") leased Unit 115 to Wanda Rule ("Tenant"). *Id.* The Tenant smoked copious amounts of tobacco and marijuana, which caused smoke to regularly invade Davis' unit and the common elements of the building. The smoke intrusion was significant enough to make Davis' clothes and towels smell of smoke. App.21a.

Davis went to "every meeting" to seek relief. *See* O'Rourke Dep. Tr., App.89a. Davis also sent several emails and letters to Respondents. In March 2016, for example, Davis sent an email indicating that the Tenant was smoking all day and night and the smoke was interfering with Davis' breathing and causing constant coughing. App.4a. In a subsequent email, Davis wrote that, "because of the heavy smoke, she [had to] turn the heat up and open the windows in her condo so that she [could] breathe." App.30a. Respondents sent a letter to the Landlords acknowledging complaints about the heavy smoke and asking the Landlords to assist in keeping the smell contained to their unit. App.5a. Davis later urged the board to send a second letter to the Landlords about "heavy smoking of cigarettes, weed[,] and etc., infiltrating common areas and other units." *Id.* A second letter was never sent.

In April 2017, Davis' counsel sent a letter to the Landlords and Respondents that outlined Davis' health

issues and explained that the Tenant's excessive smoking was a nuisance and a violation of the bylaws. App.32a. The letter demanded appropriate action be taken. *Id.* Nevertheless, the smoke problem continued. In July 2017, Davis filed suit against Respondents and the Landlords, asserting claims for violation of the Fair Housing Act, violation of the Michigan Persons with Disabilities Civil Rights Act, tortious nuisance, and breach of covenant. App.33a. Davis subsequently amended the complaint to add the Tenant. App.33a-34a. By early 2018, the Tenant moved out of Echo Valley and the Landlords settled. *Id.* Seeking a permanent solution, Davis continued the suit against Respondents.

On April 3, 2018, Davis' counsel notified Respondents that a new tenant in Davis' building was "smoking cigarettes and marijuana," which was "making it very difficult for her to breathe." App.7a, 29a. Davis requested that the Association provide "a reasonable accommodation and prohibit smoking within her building." *Id.* The following day, Davis' counsel indicated that a new tenant in Unit 114 was likely the source of the smoke. *See* App.29a, 54a.

4. In April 2018, Davis deposed all six board members. Board members admitted that smoke pollution violates Section 15's safe and clean requirements. Board members also admitted that indoor smoking violates Section 4's prohibition on activities that may be or become an annoyance or a nuisance, are offensive, or will raise the rate of insurance. For example, Board member Louise Genovese ("Genovese") testified to the following:

Q Do you consider marijuana smoke to be safe?

A I would say no.

Q Do you consider cigarette smoke to be safe?

A No.

Q Do you consider marijuana smoke to be clean?

A No.

Q Do you consider cigarette smoke to be clean?

A No.

* * *

Q You consider marijuana smoke and cigarette smoke to both be unsafe and unclean; is that correct?

A Yes.

Q In your opinion, is marijuana smoke or cigarette smoke pumping through the vents from another person's unit a violation of Section 15 on the page that has the Bates Number PD 020?

A Well, on those two, evidence – I'd say for those two, yes.

Genovese Dep. Tr., App.81a (objections omitted). Genovese admitted that smoking raises the rate of insurance. *See* App.21a. Board member Diana Williams ("Williams") testified that indoor smoking was a "violation" of Section 4's prohibition on activities that may be or become an annoyance or nuisance. App.85a; *see also* Genovese Dep. Tr., App.81a. Describing the problem as "intolerable," Williams admitted that the smoke makes her uncomfortable and interferes with the enjoyment of her unit. App.83a-85a. Williams explained

that smoke entered her unit through air vents almost every day, making it hard to breathe and inducing coughing. App.83a-84a. When asked to give an example of how the smoke reduced the enjoyment of her unit, Williams stated that she "couldn't sit still and watch a program" and "had to get up and move around." App.84a-85a. While Genovese and Williams live in a different building than Davis, the Association's former president testified that there was a "pretty significant amount of smoke" in Davis' building—worse than other buildings. *See* App.33a. Multiple residents have left Echo Valley because of the smoke problem. App.82a-83a.

5. On May 18, 2018, Davis filed for summary judgment on liability as to all claims. *See* App.40a. On June 18, 2018, Respondents filed a cross-motion for summary judgment. App.91a. The trial court denied Davis' motion and granted Respondents' motion on all counts. The Sixth Circuit affirmed, primarily on alternative grounds. Finding Davis' pleading deficient, the Sixth Circuit declined to consider the unlawful and offensive restrictions, the facts related to marijuana, and the evidence concerning Unit 114. As to the remaining issues, the court held that Davis' breach of covenant and tortious nuisance claims failed under a *sua sponte* contract construction and a "default rule" derived from non-Michigan case law. The Sixth Circuit also found that the requested accommodation was unreasonable as a matter of law.

B. Marijuana and the Sixth Circuit's Summary Judgment Pleading Standard

1. The amended complaint contained two sets of allegations central to the procedural rulings below.

First, the amended complaint contained several allegations about "Smoking," which was broadly defined as consumption of "tobacco and/or other substances by way of combustion . . . ." Am. Compl., App.73a-74a (emphasis added) (quote from paragraph 29). Second, it broadly alleged that Respondents "breached [their] duties under the Condominium Documents[] by, among other things, failing to enforce provisions contained in the Condominium Documents, including the Annoyance and Nuisance Provision, the Insurance Rate Provision, and the SCS Provision." App.74a ¶¶ 102-103 (emphasis added). A complete set of the bylaws was attached as Exhibit 1 to the amended complaint. App. 72a.

In her motion for summary judgment, Davis argued that Respondents breached their covenant to enforce the bylaws against marijuana and cigarette pollution, more specifically: (a) Section 15's requirement that units and appurtenant spaces thereto be maintained in a safe and clean condition; and (b) Section 4's prohibition on activities that may be or become an annoyance or a nuisance, are unlawful or offensive, or will raise the rate of insurance. *See* App. 17a-22a, 51a-54a. Respondent subsequently filed a cross-motion for summary judgment that asserted:

> [T]he Complaint is devoid of any claim of breach of covenant as to a Bylaw provision on "Unlawful and Offensive" conduct. Since Plaintiff has not plead [*sic*] that claim, it is not part of her lawsuit and she cannot now attempt to base any claim upon an alleged breach of any Bylaw provision for "Unlawful and Offensive" conduct.

App.92a-93a.

2. The trial court declined to consider the unlawful and offensive restrictions, stating: "Davis [] seeks to allege a failure to enforce the 'unlawful and offensive activity' provision. That latter claim was not pleaded in the amended complaint, Davis has not sought another amendment, and therefore that claim is not properly before the Court." App.51a.

3. On appeal, the Sixth Circuit established a rigid and inflexible rule, which requires that facts, theories, and claims be pled with particularity to be considered on summary judgment. *See* App.22a-23a. The Sixth Circuit held that "[p]arties who seek to raise new claims must first move to amend their pleadings under Federal Rule of Civil Procedure 15(a) before asserting [them] in summary judgment briefing." App.22a (emphasis added). The court stated that, by the summary judgment stage, "a plaintiff has conducted discovery and has had the opportunity to amend the complaint [to] raise additional theories." *Id.* (emphasis added). Applying this rule, the Sixth Circuit not only affirmed the trial court's exclusion of the unlawful and offensive theories but also broadly refused to consider facts concerning complex-wide marijuana consumption, marijuana use in Unit 115, and marijuana and tobacco smoking in Unit 114.[1] *See* App.22a-23a.

These issues fall within the scope of Davis' allegations. First, the amended complaint alleged that the tenants in Unit 115 were smoking "tobacco and/or other substances." App.73a (emphasis added). Second,

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[1] The opinion asserts that the issue of marijuana was limited to the tenant in Unit 114. Both the Sixth Circuit and trial court opinions, however, acknowledged evidence of marijuana smoke coming from Unit 115. App.5a, 28a-29a.

it broadly alleged that Respondents "breached [their] duties under the Condominium Documents, by, among other things, failing to enforce provisions contained in the Condominium Documents, including the Annoyance and Nuisance Provision, the Insurance Rate Provision, and the SCS Provision." App.74a. Davis also affirmatively notified Respondents of these issues prior to June 18, 2018, the date Respondents moved for summary judgment. On April 3, 2018, Davis put Respondents on notice that another person was smoking cigarettes and marijuana in her building. App.29a. On April 4, 2018, Davis informed Respondents that the new smoker was likely the tenant in Unit 114. App.29a, 54a. Throughout April 2018, Davis deposed Respondents' agents and asked them extensive questions regarding whether residents were smoking marijuana and whether that violated the asserted bylaws. *See* App.53a-54a (discussing deposition testimony about marijuana); Genovese Dep. Tr., App.78a-79a (deposition taken on April 30, 2018). While the Sixth Circuit implicitly acknowledged that Respondents received adequate notice, the court nevertheless held that Davis did not notify Respondents in the "correct way" and that her "failure to follow this rule dooms her claim." App.22a-23a.

C. The Sixth Circuit's *Sua Sponte* Construction of the Contract and "Default Rule" for Tobacco-Related Nuisance Claims

1. Respondents never challenged the validity or enforceability of any contractual term other than the "annoyance" restriction. *See* Defs.' Mot. for Summ. J., App.91a-96a (complaining that Davis failed to present "any controlling authority holding that an annoyance is legally actionable"). Respondents also never contested

Davis' interpretation of the bylaws, which aligned with Respondents' unrebutted admissions. *See id.* Rather, Respondents argued that the business judgment rule foreclosed liability and that Davis' evidentiary showing was insufficient. App.91a-96a (citing no affirmative evidence). These concessions and Respondents' defensive posture significantly influenced Davis' presentation of her case. *Compare.* App.17a (acknowledging Davis relied "on a combination of common knowledge and board-member admissions") *with* Fed. R. Evid. 801 (d)(2) (providing for the admissibility of party admissions).

2. Without addressing the business judgment rule, the trial court held that Davis failed to prove "any of the units have not been maintained in a safe, clean, or sanitary condition," the circumstances were sufficiently "extreme" to constitute a nuisance, or that smoking increases insurance rates. App.53a-56a. Regarding the safe and clean restrictions, for example, the court concluded that Davis failed to submit evidence proving that smoke infiltrated "the ventilation system of her unit" and failed to definitively identify a source of the smoke. App.54a. As for the nuisance restriction, the court remarked that the parties "agree that tort principles supply the appropriate meaning" of nuisance. *Id.* Distinguishing cases cited by Davis, the court held that Davis failed to show the extent or amount of smoke, the extent of harm to her body, or the uniqueness of the smokers' habits. App.59a.

3. The Sixth Circuit did not address the business judgment rule and implicitly rejected two of the trial court's factual findings. First, the Sixth Circuit acknowledged that Davis "point[ed] to evidence suggesting that the amount of smoke infiltrating her condo and

her hallways [was] 'strong,' at times even leaving the smell of smoke on clothes and towels." App.21a. Second, the court quoted Davis' declaration, which explained that the smoke had "significant adverse effects on [her] ability to breathe comfortably." *See* App.4a.

Nevertheless, the Sixth Circuit concluded that "context" required reading a right to smoke into the bylaws. App.17a-21a. First, pointing to the "record" generally, the court asserted that the Association has "long read" the bylaws to permit smoking. App.16a. The court neither explained how it reached this conclusion nor attempted to reconcile its finding with the contrary testimony of board members and the committee recommendation. Second, the court asserted that the bylaws can only prohibit activities "most residents would reasonably find significantly bothersome—in contrast to [] activities that can be 'generally expected' in a condo complex." App.18a-19a (original emphasis in italics). The court did not explain its justification for assuming that smoking is generally expected or that most residents do not find smoking significantly bothersome. Third, the court concluded that broad restrictions must be construed to permit all activities not otherwise prohibited by a more specific bylaw provision. *See* App.16a. In other words, the court rendered all broad restrictions unenforceable—without input from the parties.

As an example, the court acknowledged that Davis' safe and clean theories were supported by "a combination of common knowledge and board-member admissions" and that the "generally understood" meaning of "safe" means "free from danger" and "clean" means "free from pollution." App.17a; *see also Roydson v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir.

1988) ("Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community."). The Sixth Circuit opined, however, that "ordinary levels of 'smoke' cannot be considered a 'danger' or 'pollution'; otherwise, this provision would ban a practice that the bylaws permit." App.17a. After concluding ordinary levels of smoke cannot trigger liability, the Sixth Circuit declined to consider whether Davis established, or could establish, the existence of an unordinary amount of smoke: "We need not decide whether unusual amounts or types of smoking might violate this provision, because [Davis'] theory of 'breach' is far more expansive." *Id.*

Without citation to Michigan precedent or consideration of the contrary cases cited in the trial court's opinion, the Sixth Circuit asserted that there is a "default rule that smoking cannot be considered a nuisance in a condo complex that allows it." App.21a. Applying this heightened threshold, the court stated: "we do not think th[e] evidence suffices to take this case outside the default rule" as "Davis presented no evidence that her neighbors had 'unique' 'smoking habits.'" *Id.* Notably, the Management Company's agent testified that Echo Valley is the only place that she has received smoking complaints, App.90a, and Williams testified that Echo Valley is the only place she has ever experienced smoke traveling through air vents, App. 85a. Additionally, the Association's previous president testified that the smoke problem in Davis' building was worse than others in Echo Valley. App.33a. The Sixth Circuit did not explain why these facts were insufficient to overcome its default rule.

D. Davis' Requested Accommodations and the Sixth Circuit's Reasonableness Ceiling

1. The Fair Housing Act ("FHA"), as amended, 42 U.S.C. § 3601 *et seq.* makes it unlawful to discriminate on the basis of a person's handicap (hereinafter "disability") in certain housing practices. § 3604(f)(2)(A). The FHA defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]" § 3604(f)(3)(B). The Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1101 *et seq.* contains a parallel prohibition. § 37.1506a(1)(b). Davis requested two accommodations. First, Davis asked Respondents to take further action to provide her relief. App.32a. After no adequate relief was provided, Davis requested that Respondents prohibit indoor smoking in her building. *See* App.7a.

2. The trial court rejected Davis' failure-to-accommodate claims for two reasons. First, the court concluded that Davis could not show that the "proposed accommodation ameliorated [Davis'] handicap specifically, and not just the burden shared by all individuals exposed to smoke." App.47a. Second, the court held that it would be illegal for Respondents to restrict tobacco smoking to outside. *See* App.48a-49a. The court did not address whether the Association could legally regulate the location of marijuana smoking.

3. The Sixth Circuit did not reach the same conclusions. First, while it did not address whether the requested accommodations would confer Davis benefits beyond those of other residents, the Sixth Circuit contrarily concluded that Davis' breach-of-covenant

claim was undercut by the fact that "smoking affects Davis more than other residents. . . . " *See* App.19a. Second, the Sixth Circuit did not determine that it would be illegal for Respondents to regulate smoking.

Instead, the Sixth Circuit concluded that Davis' requested accommodation was unreasonable on two alternative grounds. The Sixth Circuit held that an accommodation is an unreasonable fundamental alteration if it "turns [a] challenged policy into something else entirely." App.13a. The Sixth Circuit concluded that Davis' request was unreasonable as a matter of law because it was incompatible with an implicit smoking-friendly policy. *See* App.14a. Additionally, the Sixth Circuit held that an accommodation is unreasonable as a matter of law if it might "intrude on the rights of third parties." App.14a. Applying this rule, the Sixth Circuit concluded Davis' accommodation was unreasonable because "[n]eighbors who smoke may well have bought their condos because of the Association's policy permitting smoking." *Id.* (emphasis added). Notably, these rules do not leave room for consideration of the totality of circumstances or the performance of a cost-benefit analysis in deciding the question of reasonableness.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has decided important questions of federal law in a way that conflicts with decisions of this Court. The Sixth Circuit's opinion imposed a heightened pleading standard that is incompatible with this Court's precedent concerning the Federal Rules of Civil Procedure's liberal system of notice pleading. Against well-established jurisprudence outlining the limited role of appellate courts, the Sixth Circuit's opinion circumvented the party presentation principle, intruded upon Michigan's sovereign right to establish its own common law, and improperly engaged in the weighing of evidence. The Sixth Circuit also decided an important question of federal law that has not been, but should be, settled by this Court. The Sixth Circuit created bright-line rules that release defendants from liability merely when the accommodation causes any burden or when defendants adopt a policy—whether explicit or implicit—that is incompatible with the requested accommodation. These rules set the ceiling for what constitutes a "reasonable" accommodation so low that the disabled receive lesser protection under the FHA than guaranteed to prisoners under the Eighth Amendment.

Courts are without authority to impose unsanctioned pleading standards in civil rights cases, a result which can only be obtained by amending the Federal Rules and not through judicial interpretation. Federal courts are not courts of general jurisdiction and are subject to constitutional and prudential limitations in all dimensions. Federal courts are only permitted to rule on the case and controversy before them. Federal

courts are required to adhere to state law on substantive state law issues. Unless the right to a jury is waived by the parties, federal courts are not permitted to weigh the evidence. The question of reasonableness has long been held to be a fact-intensive question to be decided by juries—not judges. A federal court does not have the authority to interfere with constitutional acts of Congress or infringe upon rights guaranteed under the Seventh Amendment.

The undisputed testimony of Respondents' agents established that the smoke problem is intolerable and dangerous. Respondents' agents also admitted that smoking is a nuisance and a violation of seven different bylaw provisions. The Sixth Circuit's opinion makes unsolicited rulings that ignores the parties' mutual interpretation of the contract and understanding of the severity of the situation. Like all other Echo Valley residents, Davis chose to live in a community that is subject to substantial restrictions. She chose to permanently reside in a state that has guarded residents against unreasonable smoke intrusions for over a century. Under the FHA, Davis is a protected person with broad statutory rights and is lawfully entitled to reasonable accommodations necessary to afford her with an equal opportunity to use and enjoy her home. While this case concerns the subject of tobacco and marijuana consumption, it is more fundamentally about equal access to the procedural and substantive protections provided by law. The notion that, as a matter of law, an abstract interest in unregulated smoking takes precedence over the disabled's right to live free of dangerous and illegal intrusions cannot be ratified, whether through explicit adoption or passive acquiescence.

I. THE COURT SHOULD GRANT CERTIORARI TO BRING THE SIXTH CIRCUIT IN LINE WITH THIS COURT'S PROCEDURAL JURISPRUDENCE AND TO MAINTAIN UNIFORMITY IN PLEADING STANDARDS.

1. Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (unanimous). This simplified notice pleading standard applies to all civil actions, subject to limited exceptions. *Id.* at 513 (citing Fed. R. Civ. P. 9(b)). Rule 10(c) provides that "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes." (emphasis added). Rule 56 governs the standard for granting or denying summary judgment. Answers to interrogatories were included among the materials to be considered on summary judgment in recognition that the "very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note to 1963 amendment.

In 1957, the Court in *Conley v. Gibson* held that the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." 355 U.S. 41, 47 (1957). The Court explained that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48; *accord Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (citing Fed. R. Civ. P. 1). Further, *Conley* set forth the "rule that a complaint should not be dismissed for

failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46 (emphasis added). Citing *Conley*, the Court in *Hishon v. King & Spalding* alternatively stated a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." 467 U.S. 69, 73 (1984) (emphasis added).

In 1993, the Court in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit* unanimously held that it was improper to impose a pleading standard for claims arising under 42 U.S.C. § 1983 that is higher than prescribed by Rule 8(a)(2). 507 U.S. 163, 168 (1993). The Court stated that "[p]erhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subject to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.*

In 2002, the Court in *Swierkiewicz v. Sorema N.A.* unanimously held that it was improper to convert an evidentiary requirement for employment discrimination claims under Title VII into a heighted pleading requirement. 534 U.S. at 510-11. The Court cautioned against construing the Federal Rules in a manner that would undermine Rule 8(a)'s liberal system of notice pleading. *Id.* at 512-13. "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Id.* at 514. The Court stated that "the precise requirements of a prima facie case can vary depending on the context and were never

intended to be rigid, mechanized, or ritualistic." *Id.* at 512 (internal quotation marks omitted). "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Id.* at 514. "Accordingly, all pleadings must be construed "as to do substantial justice" and a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* (emphasis added).

In 2007, the Court in *Bell Atlantic Corp. v. Twombly* retired *Conley*'s "no set of facts" language. 550 U.S. 544, 562-63 (2007). The Court stated that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* (emphasis added). Rejecting the notion that *Twombly* ran counter to *Swierkiewicz*, the Court stated that it still does "not require heightened fact pleading or specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 569-70; *accord Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

In 2014, the Court's per curiam decision in *Johnson v. City of Shelby* addressed yet another attempt to impose a heighted pleading standard in a civil rights case. 574 U.S. 10 (2014) (citing *Leatherman, Swierkiewicz*, and *Twombly*). The Court held that a lower court improperly granted summary judgment on a § 1983 claim merely because the plaintiffs failed to cite the statute in their complaint. *Id.* at 10-12. The Court explained that *Twombly* and *Iqbal* were not in point, because they concerned the threshold for dismissal under Rule 12(b)(6). *Id.* at 12. Neverthe-

less, the Court instructed that Rule 8(a) only requires a plaintiff to "plead facts sufficient to show that her claim has substantive plausibility" and is "required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* (emphasis added). The Court went on to unequivocally reject a "punctiliously stated 'theory of the pleadings,'" explaining that the Federal Rules "effectively abolish the restrictive theory of the pleading doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief[.]" *Id.* Taken together, a plaintiff need only "plead facts sufficient to show that her claim has substantive plausibility" and may rely upon "any set of facts [or theories] consistent with the allegations in the complaint"—even on summary judgment. *See Twombly,* 550 U.S. at 562-63; *Johnson*, 574 U.S. at 12.

2. The Sixth Circuit's holding conflicts with *Johnson* and its predecessors. The Sixth Circuit held that it could not consider two contractual provisions, the issue of marijuana, and evidence related to Unit 114 because those facts and theories were not explicitly pled. App.21a-23a. By designating the complaint as the exclusive ledger of issues that can be considered on summary judgment, the Sixth Circuit improperly makes pleading "a game of skill in which one misstep by counsel may be decisive to the outcome" and frustrates the notion that the purpose of the Federal Rules is to "facilitate a proper decision on the merits." *Foman*, 371 U.S. at 181-82. Contrary to the Court's precedent, the Sixth Circuit's approach requires courts to dispose of meritorious claims solely on the basis that a plaintiff failed to plead facts, theories, and claims with particularity by the summary judgment stage.

3. The Sixth Circuit's opinion cannot be reconciled with Rule 10(c), which provides "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes." (emphasis added). The unlawful and offensive provisions were contained in the bylaws, which were attached as Exhibit 1 to the amended complaint. By holding that these provisions were not in the case, the Sixth Circuit improperly concluded that the written instrument attached to the amended complaint was not part of the pleading for all purposes.

4. The Sixth Circuit's holding is incompatible with *Swierkiewicz.* In establishing a heighted pleading standard, the Sixth Circuit relied on *Tucker v. Union Needletrades, Indus. & Textile Emps.*, 407 F.3d 784 (6th Cir. 2005). App.22a-23a. In *Tucker*, the Sixth Circuit held that "[o]nce a case has progressed to the summary judgment stage . . . the liberal pleading standards under *Swierkiewicz* and the Federal Rules are inapplicable." 407 F.3d at 788. Like in this case, the court in *Tucker* concluded a heightened pleading standard was necessary to prevent "unfair surprise." *See id. Tucker* quotes the following passage from *Swierkiewicz*:

> This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought

> frankly into the open for the inspection of the court.

534 U.S. 512-13 (internal citations omitted). Importantly, however, *Tucker* omitted the following portion of the quote from *Swierkiewicz*: "attempted surprise in federal practice is aborted very easily, synthetic issues detected . . . ." *Compare Swierkiewicz*, 534 U.S. at 514 *with Tucker*, 407 F.3d at 788. In other words, *Tucker* quotes *Swierkiewicz* out of context to justify the establishment of a contrary principle. Indeed, the Court in *Swierkiewicz* ultimately held that it was improper for a lower court to impose a heighted pleading standard not contained in the Federal Rules. 534 U.S. at 514.

5. The Sixth Circuit's heightened pleading standard also conflicts with *Johnson*, which unequivocally held that theories do not need to be pled to avoid summary judgment. 574 U.S. at 12. While the Sixth Circuit asserts that the unlawful and offensive restrictions are "claims," the opinion uses the terms "claims" and "theories" interchangeably. *See* App.21a-23a ("like her first theory, this claim"). The Sixth Circuit's heightened pleading standard cannot be reconciled with *Johnson* as there is no principled reason to impose a punctiliously stated theory of the pleadings for contract terms when there is not one for statutes—particularly in light of Rule 10(c).

6. The Sixth Circuit's opinion raises the exceptional question of whether there is a heightened pleading standard hidden between *Johnson* and *Twombly*/*Iqbal*. This uncertainty leaves litigants without critical guidance as to the dispositive role of the complaint and the level of particularity necessary to satisfy pleading requirements at the summary judgment stage. With

this ambiguity, plaintiffs have no choice but to excessively amend their complaints or risk the possibility that their meritorious cases will fall to latent procedural technicalities. In instances where a plaintiff's case is exceedingly strong, defendants are encouraged to deploy feigned ignorance as a mechanism for avoiding dispositive issues. Indeed, the Sixth Circuit's rule, as was the case here, rewards defendants for failing to utilize traditional discovery tools—such as motions for a more definite statement, depositions, and interrogatories—and creates an unnecessary procedural trap. At a minimum, if courts have the discretion to impose heightened pleading standards, the Court should make the existence and confines of that discretion known.

II. THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE IMPROPER EXPANSION OF APPELLATE AUTHORITY AND FEDERAL INTRUSION ON STATE SOVEREIGNTY.

1. Federal courts are subject to constitutional limitations, statutes enacted by Congress pursuant thereto, and prudential constraints. *See Warth v. Seldin*, 422 U.S. 490, 498-501 (1975). This is both appropriate and necessary in a democratic society. *See id.* There are three well-established constraints pertinent to this case.

First, it has long been held that "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury v. Madison*, 5 U.S. 137, 175 (1803). Embodied in the party presentation principle, this Court has stated that "our adversary system is designed around the premise

that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008). Courts "should not, sally forth each day looking for wrongs to right[.]" *Id.* "Courts wait for cases to come to [them], and when they do, [courts] normally decide only questions presented by the parties." *Id.* (acknowledging that counsel almost always knows "a great deal more" about their cases than courts); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 676-77 (2010) (stating that litigants are entitled to have their case tried upon the assumption that stipulated facts are established).

Second, federal courts do not have the authority to disregard state precedent on substantive state law issues. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 71, 79-80 (1938). The result of a case should not change because a litigant brought their action in federal court instead of a state court "a block away." *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945).

Third, "[t]he federal policy favoring jury trials is of historic and continuing strength." *Simler v. Conner*, 372 U.S. 221, 222 (1963). The purpose of summary judgment is "to preserve the court from frivolous" cases and defenses "and to defeat attempts to use formal pleading as means to delay the recovery of just demands." *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902). In *Anderson v. Liberty Lobby, Inc.*, the Court held that credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts remain jury functions, not those of judges. 477 U.S. 242, 255 (1986). On summary judgment, the evidence of the nonmovant

must be believed, and all justifiable inferences drawn therefrom. *Id.* When deciding whether or not to grant summary judgment, a court is without the authority to surreptitiously refuse to acknowledge material evidence in favor of a non-moving party. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014). The Sixth Circuit's opinion violates these well-established doctrines.

2. The Sixth Circuit acted in conflict with the party presentation principle by rendering an unsolicited contract construction. The opinion construed all broad restrictions out of existence and stripped the Association of the power to regulate threats to community health and safety. Separately, the opinion imposes a regime where the Association's conduct alters the meaning of the contract. The opinion vitiated the bylaws' anti-waiver provision and rendered the Association's primary obligation (bylaw enforcement) illusory. Indeed, the opinion held that the Association's very failure to enforce the bylaws absolved it of the obligation to do so. *But see* Mich. Comp. Laws §§ 559. 207, 559.215 (expressly preserving the right of co-owners to bring actions against condominium associations for failure to enforce bylaws). The parties never asked for such a draconian result.

3. The opinion improperly displaced Michigan law. The Sixth Circuit concluded that "[c]ontext compels limiting th[e] bylaw's coverage to activities that most residents would reasonably find significantly bothersome—in contrast to activities that can be 'generally expected' in a condo complex." App.18a-19a (original emphasis in italics). The Michigan Supreme Court has instructed, however, that "fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon

which courts may refuse to enforce unambiguous contractual provisions." *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 26, 28 (Mich. 2005) (unanimous). Michigan law does not permit courts to impose their own suppositions about the intentions and expectations of contracting parties. *See Kendzierski v. Macomb Cty.*, 931 N.W.2d 604, 609 (Mich. 2019). Courts must give unambiguous terms their plain and ordinary meaning, and if ambiguous, the question of meaning must be submitted to a jury. *See Rory*, 703 N.W.2d at 28; *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d. 447, 453-54 (Mich. 2003). The Sixth Circuit did neither.

The Sixth Circuit also improperly created an idiosyncratic "default rule" for tobacco-related nuisances. Under Michigan law, however, a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 151 (Mich. 1960); *see also Whittemore v. Baxter Laundry Co.*, 148 N.W. 437, 437 (Mich. 1914) (stating that otherwise lawful activity can be a nuisance). A cause of action for nuisance arises whenever another "render[s] the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells, or with gases injurious to health." *Kilts v. Bd. of Supervisors*, 127 N.W. 821, 823 (Mich. 1910). It is not even "necessary that the smell [is] unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable." *Id.* The Michigan Supreme Court has opined on the actionability of smoke and odor nuisances on several occasions. *See e.g.*, *Obrecht*, 105 N.W.2d at 152; *Hillsdale v. Hillsdale Iron & Metal Co.*, 100 N.W.2d 467, 472 (Mich. 1960); *Kundinger v. Bagnasco*, 298 N.W. 386, 387 (Mich. 1941); *Nw. Home Owners Ass'n*

v. Detroit, 299 N.W. 740, 741 (Mich. 1941). The Sixth Circuit was without the authority to create a new "default rule" without consideration of this case law. Nevertheless, there is no principled basis for treating tobacco with favoritism:

> Courts, after all, long ago recognized the inherent risks of cigarette smoking. Cigarettes are wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. And physicians suspected a link between smoking and illness for centuries. In 1604, King James I wrote "A Counterblaste to Tobacco," that described smoking as a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lung, and the black stinking fume thereof, nearest resembling the horribly Stygian smoke of the pit that is bottomless.

Walker v. R.J. Reynolds Tobacco Co., 734 F.3d 1278, 1290 (11th Cir. 2013) (internal citations and quotation marks omitted).

4. The opinion improperly fails to acknowledge material evidence supporting Davis' claims and abrogates well-established standards governing summary judgment. *See Tolan*, 572 U.S. at 659. As an example, the Sixth Circuit made an improper credibility determination when it rejected board member testimony that smoking raises the rate of insurance solely because Davis did not preemptively explain why the board member "may competently opine on actuarial science." App.21a. Plaintiffs have never been required to establish the credibility of the defendants to avoid summary judgment. While this Court is "not equipped

to correct every perceived error coming from the lower federal courts" it should nevertheless "intervene here because the opinion [] reflects a clear misapprehension of summary judgment standards in light of [this Court's] precedents." *Tolan*, 572 U.S. at 659.

III. THE COURT SHOULD GRANT CERTIORARI TO PROTECT THE BALANCE OF POWER BETWEEN CONGRESS AND THE JUDICIARY AND THE WELL-ESTABLISHED DIVISION BETWEEN THE ROLE OF JUDGES AND JURIES.

1. The distance to equal opportunity for persons with disabilities in the United States remains considerable in the face of pervasive social, cultural, and legal roots of disability-based discrimination. The FHA's stated policy is "to provide, within constitutional limitations, for fair housing throughout the United States." § 3601. In interpreting the FHA, this Court has been mindful of the Act's "broad and inclusive" compass. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995). The FHA makes it unlawful to refuse to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the disabled an] equal opportunity to use and enjoy a dwelling[.]" § 3604(f)(3)(B). Currently, there is no case from this Court construing § 3604(f)(3)(B). For guidance, courts often look to precedent related to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* and the Rehabilitation Act ("RA"), 29 U.S.C. § 701 *et seq.*

In 1973, Congress enacted the RA. The RA makes it unlawful to discriminate against an "otherwise qualified individual . . . solely by reason of her or his disability" in any program or activity receiving federal

financial assistance. 29 U.S.C. § 794(a). In 1979, the Court in *Southeastern Community College v. Davis* held that the RA's prohibition on discrimination "solely by reason of [a] handicap" did not prevent schools from imposing physical qualification requirements for clinical training programs. 442 U.S. 397, 405 (1979) (emphasis added). The Court reasoned that a proper construction of the RA's statutory language does not require a "fundamental alteration in the nature of a program." *Id.* at 408 (emphasis added). The Court in *Alexander v. Choate* explained that *Southeastern Community College* "struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs . . . ." 469 U.S. 287, 300 (1985).

Enacted in 1990, the ADA makes it unlawful to discriminate against the disabled in a variety of contexts, including employment practices and public accommodations. Similar to the FHA, the ADA defines discrimination to include a failure to make reasonable accommodations. Dissimilarly, the ADA's statutory text places explicit limitations on this obligation. In the employment context, the ADA requires that the employee must "otherwise [be] qualified" and does not require a covered entity to make a reasonable accommodation if it "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]" § 12112(b)(5)(A) (emphasis added). In the public accommodation context, the ADA requires entities to make reasonable modifications "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities,

privileges, advantages, or accommodations." § 12182 (b)(2)(A)(ii) (emphasis added). Additionally, the ADA requires entities to "take steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently . . . unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." § 12182(b)(2)(A)(iii) (emphasis added).

In *Olmstead v. L.C. by Zimring*, the Court cautioned against imposing an overly-rigid view of the fundamental alteration "defense" under the ADA. The Court held that a sensible construction "would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. 581, 603-604 (1999). In *PGA Tour, Inc. v. Martin*, the Court held that the PGA Tour violated the ADA by denying a golfer with mobility limitations a request to use a golf cart during tournaments. 532 U.S. 661, 669, 690 (2001). The Court rejected the argument that a waiver to the "walking rule" would constitute a fundamental alteration because the rule was "at best peripheral to the nature" of the event and a waiver would not impair the "purpose" of tournaments. *Id.* at 689-90.

2. Extending the holding in *Southeastern Community College* to the FHA, the Sixth Circuit in *Smith & Lee Assocs. v. City of Taylor* held that an accommodation is reasonable unless it requires "a fundamental alteration in the nature of the program" or imposes

"undue financial and administrative burdens." 102 F.3d 781, 795 (6th Cir. 1996). The court explained that the reasonableness inquiry requires a balancing of the needs of the disabled and the interests of defendants. *Id.* In *Groner v. Golden Gate Garden Apartments*, the Sixth Circuit stated that the question of whether a "requested accommodation is required by law is 'highly fact-specific, requiring case-by-case determination." 250 F.3d 1039, 1044 (6th Cir. 2001). In *Hollis v. Chestnut Bend Homeowners Ass'n*, the Sixth Circuit reaffirmed the notion that the reasonableness inquiry is "highly fact-specific" and requires a balancing of interests. 760 F.3d 531, 541-42 (6th Cir. 2014). The court noted that unlike the ADA, however, "undue hardship is not an element of an FHA reasonable-accommodation or reasonable-modification claim" and is "merely one consideration in the broader reasonableness calculus." *Id.* at 543.

3. In this case, the Sixth Circuit imposed two bright-line rules: (1) an accommodation constitutes an unreasonable fundamental alteration if it "turns [a] challenged policy into something else entirely," App.13a; and (2) an accommodation is unreasonable if it "intrude[s] on the rights of third parties," App.14a. This holding is improper.

First, the opinion replaced the traditional fact-intensive inquiry—whether an accommodation would fundamentally alter the nature of a program—with a rigid bar that permits discrimination whenever an accommodation is incompatible with a policy. Notably, the opinion allows even implicit, discriminatory, and unreasonable policies to take precedence over the rights of the disabled. The ruling also bars relief whenever a requested accommodation places a burden

on any person, without regard to whether the burden would be "undue." *See Smith & Lee Assocs.*, 102 F.3d at 795. The opinion improperly transformed the fundamental alteration and undue burden inquiries into indispensable elements of a failure-to-accommodate claim as opposed to merely factors in the broader reasonableness calculus. *Cf. Hollis*, 760 F.3d at 543.

Second, the opinion converted a traditional jury question into a question of law. This Court has instructed that questions which "call for the exercise of common sense and sound judgement under the circumstances of particular cases . . . are questions for the jury to determine." *Schultz v. Pa. R. Co.*, 350 U.S. 523, 525 (1956). Courts have long recognized that reasonableness is a question of fact to be submitted to a jury. *See Struble v. Republic Motor Truck Co.*, 185 N.W. 792, 797 (Mich. 1921) ("[W]hether a particular use is an unreasonable use and a nuisance is a question of fact to be submitted to a jury."); *Hubbard v. Preston*, 51 N.W. 209, 210 (Mich. 1892) (explaining whether it is "reasonable" and "necessary" to eliminate a nuisance is a question for a jury). The FHA should be treated no differently.

Third, the Sixth Circuit's holding is incompatible with the FHA's "broad and inclusive" compass. *See City of Edmonds*, 514 U.S. at 731. Davis requested reasonable accommodations that are necessary to stop her home from being flooded with tobacco and marijuana smoke. Respondents described the problem as an "extreme" and "intolerable" "health hazard." *See* Genovese Dep. Tr., 78-79; Williams Dep. Tr., App. 83a-84a. If Davis were an incarcerated individual living under commensurate conditions, she would have a viable claim under the Eighth Amendment.

The Eighth Amendment's prohibition against cruel and unusual punishment requires that "inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" *Helling v. McKinney,* 509 U.S. 25, 33 (1993). It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Id.* "Contemporary standards of decency require no less." *Id.* at 32. Guided by these principles, the Court in *Helling* held that a prisoner adequately stated a cause of action under the Eighth Amendment by alleging that prison officials acted with deliberate indifference in exposing him to excessive levels of environmental tobacco smoke ("ETS"), posing an unreasonable risk of serious damage to his future health. *Id.* at 35-36; *see also Cassady v. Donald*, 447 Fed. Appx. 28, 31 (11th Cir. 2011) (holding that forcing an asthmatic to be exposed to ETS can constitute cruel and unusual punishment); *Warren v. Keane*, 196 F.3d 330, 333 (2d Cir. 1999) ("Given the known dangers of ETS, we conclude that a reasonable person would have understood that exposing an inmate to high levels of ETS could violate the Eighth Amendment."). Nevertheless, the Sixth Circuit's opinion held that Davis' request is unreasonable as a matter of law.

It cannot be maintained that the FHA, which is intended to provide fair housing within constitutional limits, provides lesser rights than the Eighth Amendment, which represents the constitutional floor on what is permissible under contemporary standards of human decency. Simply, if Davis' requested accommodation is unreasonable as a matter of law, then nothing is reasonable.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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