No. 17-1322

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARSHA WETZEL,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

MOTION TO STAY ISSUANCE OF MANDATE PENDING FILING
AND DISPOSITION OF PETITION FOR CERTIORARI

Now come Defendants-Appellees, 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 "Defendants" or "Appellees"), by their attorneys, LISA A. HAUSTEN and CLAUSEN MILLER P.C., pursuant to Fed. R. App. P. 41(d)(2), and hereby move this Court for entry of an order staying the mandate in the above-captioned case pending the filing and disposition of a petition for a writ of certiorari to the United States Supreme Court. In support of said motion, Appellees attach the affidavit of Lisa A. Hausten and state as follows:

1. On July 27, 2016, Plaintiff-Appellant Marsha Wetzel filed a complaint under Sections 3604(b) and 3617 of the Fair Housing Act ("FHA), alleging Defendants had violated

the Act by failing to intervene and stop the tenant-on-tenant harassment she allegedly suffered at the hands of three of her co-tenants who discriminated against her because of her sexual orientation. 42 U.S.C. §§3604(b), 3617.

2. The district court dismissed her FHA claims with prejudice on January 17, 2017. The court interpreted Section 3617 to require Plaintiff to allege discriminatory intent on the part of the Defendants she sought to hold liable, and Wetzel had alleged only that Defendants failed to intervene in the tenant-on-tenant harassment, not that they acted with discriminatory intent. Citing this Court's *en banc* decision in *Bloch v. Frischolz*, 587 F.3d 771, 779-80 (7th Cir. 2009), the court further held that to state a post-acquisition/rental claim under §3604(b) (hereinafter referred to as "post-acquisition claim"), Plaintiff would have to allege Defendants constructively evicted her or otherwise made her apartment uninhabitable. Since she alleged neither, the court also dismissed her §3604(b) claim with prejudice. The court declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them without prejudice.

3. Plaintiff appealed. Choosing to interpret the Fair Housing Act "more broadly," on August 27, 2018, this Court issued its Opinion reversing the district court in *toto*. *Wetzel v. Glen St. Andrews Living Cmty., LLC*, 2018 U.S. App. LEXIS 24193, *2 (7th Cir. 2018). Recasting the complaint as one for hostile housing, rather than disparate-treatment as pled, the Court read discriminatory intent out of Section 3617. In this case of admittedly first impression (*Id.* at 11), the Court held that the FHA created for landlords, a "duty not to permit *known* harassment on *protected* grounds." *Id.* at *16 (original emphasis). Since Plaintiff alleged Defendants breached that duty by failing to intervene, the Court reasoned Defendants could be held directly liable under §3617. Further finding that the use of common areas and provision of meals was

connected to Plaintiff's initial rental agreement, the Court additionally concluded that Defendants could be held liable for the tenants' post-acquisition interference under §3604(b).

4. Defendants-Appellees seek a stay of the mandate because they intend to file a petition for writ of certiorari to the United States Supreme Court on or before November 26, 2018. *See* Affidavit of Lisa A. Hausten, attached.

5. A stay is appropriate if there is "(1) 'a reasonable probability' that the Supreme Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012)(internal citations omitted). Each of the foregoing criteria is satisfied here.

<u>There Is a Reasonable Probability Certiorari Will Be Granted</u>

6. There is a fair prospect that certiorari will be granted because this case involves a question of national importance—the statutory construction of the FHA; there is a split in the circuits; and the court's decision is in conflict with Supreme Court precedent. Squarely at issue is who can be held liable under the FHA, and what kind of post-acquisition conduct is actionable. These issues have not been, but should be, settled by the Supreme Court.

7. While the statutory interpretation of any federal statute is important, the FHA is of particular national significance because housing issues touch hundreds of thousands of lives and Congress has chosen the FHA as a primary vehicle to help stamp out of a vast array of discrimination in the housing context. Thus the scope and contours of the Act are of particular importance on a national level.

8. The case presents novel issues that the Supreme Court has not yet addressed, but on which the lower courts are in need of guidance because the issues are continuing. *Id.* at *15

(issues fall in "unchartered territory"). The need for definitive and speedy guidance is especially critical in light of the Court's decision because this Court held that housing providers have a new and unexpected duty, the contours of which are unclear.

9. Adding to the confusion, is the Department of Housing and Urban Development's ("HUD"), new regulation that had been up for public debate for nearly two years and became final one month after Plaintiff filed suit, and upon which Plaintiff relied in part below. 24 C.F.R. §100.7(a)(1)(iii) (the "Regulation"). The Regulation attempts to impose a similar, but even broader duty on housing providers based on agency principles analogized from Title VII decisions. Defendants argued the Regulation was invalid because it improperly expanded the scope of the Act. The Court did not directly rule on the validity of the Regulation, but in dicta observed that "more analysis than HUD was able to offer is necessary before we can take that step." *Id.* at *20. The state of the law is thus murky.

10. Because the FHA is a fee-shifting statute, there is a significant risk that if the decision is not reversed, 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. A similar suit is pending in the Second Circuit. *Donahue Francis v. Kings Park Manor, Inc.*, No. 15-1823. Tellingly, despite Plaintiff's litany of complaints about her co-tenants, not one was named as a defendant although their direct liability under Section 3617 is clear.

11. Under the decision, landlords, who do not possess the means or skill to determine when speech is protected or actionable, will now have the impossible task of policing communications among tenants. Making landlords civility police is fraught with potential for abuse and suppression as it is subject to easy manipulation. To remain viable, landlords will

need more insurance, making insurance companies wealthier, but driving the costs of rentals higher for a segment of society that is least able to pay. The plaintiff and defense bars will benefit from the increased litigation, but the judicial system will suffer with the backlog. In short, a speedy and definitive ruling from the Supreme Court is needed for all concerned.

12. The case, moreover, is well positioned for consideration because review is sought on appeal from a motion to dismiss and if the Supreme Court holds that discriminatory intent is required by the FHA, the decision will be outcome determinative.

13. Separately, and independently, a significant basis for certiorari lies because there is a split among the circuits regarding the scope of post-acquisition claims under §3604(b). Section 3604(b) provides it is unlawful "to 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." While the courts agree that pre-acquisition discrimination is covered, they are split as to what post-acquisition claims fall within the confines of the statute. The Fifth Circuit in *Cox v. City of Dallas*, 430 F.3d 734, 745-746 (5th Cir. 2005), held that the "services or facilities" set forth in the statute must be "in connection" with the "sale or rental of a dwelling." *Id.* at 746. Thus the court held that the only post-acquisition services and facilities that could be challenged under §3604(b) were those that were secured at the time of, or in connection with, the sale or rental of a dwelling, *e.g.*, claims for attempted, but unsuccessful discrimination relating to the initial sale/rental, or constructive eviction (habitability is a privilege of sale). The Ninth Circuit, by contrast, in *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009), held that the natural reading of the FHA is that it "reaches post-acquisition discrimination" because most services or facilities are provided subsequent to occupancy. In *Bloch*, the Seventh Circuit sitting *en banc*, adopted the reasoning in

Cox, finding plaintiffs post-acquisition claims of discriminatory enforcement of the condominium rules were cognizable under §3604(b) because the sale included the agreement to be governed by the condominium rules. *Id.* at 779-80. In the case at bar, the three-judge panel ostensibly followed *Bloch* in holding that the services and facilities were connected to the initial rental. *Wetzel* at *22. At the same time, however, the Court, in dicta, gave a nod of approval to the Ninth Circuit's decision in *City of Modesto*, possibly creating an intra-circuit conflict. At a minimum, the decision has muddied the waters, but either way, the circuits remain split and the Supreme Court needs to resolve the issue.

14. Finally, certiorari is likely to be granted because this Court's decision is at odds with the Supreme Court's decision in *Bank of Am. Corp. v. City of Miami*, 197 L. Ed. 2d 678 (2017), and misconstrues *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). *Bank of Am. Corp.* holds that the FHA requires "some direct relation" between the injury complained of, *i.e.*, the tenants' discriminatory harassment, and "the *defendant's* unlawful conduct." 197 L. Ed. at 690 (emphasis added). Here, however, no such relation exists. Defendants took no deliberate discriminatory actions. They offered and provided services and facilities on a non-discriminatory basis. It was the co-tenants' alleged unlawful interference with those services that caused Plaintiff injury.

15. To hold Defendants liable for the co-tenants' misconduct, it was necessary for this Court to create a duty (where none heretofore existed), the breach of which would be the basis for liability. Acknowledging that Title VII agency principles did not provide a proper basis, the Court turned to the Supreme Court's decision in *Davis* and held that if Defendants knew of the harassment and deliberately chose to ignore it, Defendants could be held directly liable for their own alleged negligence. 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. The parameters of Title IX, however, 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*, the funding recipient was found liable for its deliberate indifference for known student-on-student harassment 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). Landlords, however, unlike an education funding recipient or 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 (2204)(control does not arise from power to evict). Illinois property law, moreover, makes clear 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).

<u>There Is a Fair Prospect of Reversal</u>

16. There is a fair prospect that upon review, the Supreme Court will reverse the decision at issue. In addition to the foregoing, the text, structure of the statute, legislative history and scope of the FHA make clear Congress' intent—discriminatory intent by the party sought to be held liable is an essential element of a cause of action under both §3604(b) and 3617. Section 3604(b) provides: "[i]t shall be unlawful…*[t]o discriminate…because of*" a protected

characteristic. The text requires deliberate conduct motivated by discriminatory animus. Section 3617 likewise is aimed at purposeful conduct motivated by discriminatory intent: "[i]t 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." Under this provision, the co-tenants who interfered with Plaintiff's use and enjoyment can be held liable—not Defendants who provided a rental agreement that was non-discriminatory on its face and in application.

17. Not only is the Court's decision contrary to the text, it imposes a duty without sufficient limits. Discriminatory intent provides the needed limit on liability so that Defendants are not held liable for discrimination they did not participate in or create. Even in the context of disparate-impact, the Supreme Court has held there must be a robust casual link between a defendant's allegedly discriminatory policies and the claimed disparity. *Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015). And most recently in *Bank of Am. Corp. v. City of Miami*, 197 L. Ed. 678, 690 (2017), the Supreme Court explicitly held that proximate cause in the context of the FHA requires "some direct relation" between the injury and "the defendant's unlawful conduct." Here, the unlawful conduct was committed by the co-tenants, not Defendants. The decision nevertheless holds Defendants liable for what the Court considers Defendants' own negligence in failing to intervene in known harassment by others. But the logic fails because it is based on a faulty foundation.

18. In the context of Title IX, the education funding recipient's substantial control over both the harassing students and the environment made the school obligated to the students entrusted to its care. Schools "retain substantial control over the context in which the harassment occurs. More importantly…[schools] exercise significant control over the harasser..[the]

power…is custodial and tutelary, permitting a degree of supervision and control that *could not be exercised over free adults.*" *Davis*, 526 U.S. at 646. Not even this Court suggested landlords exert that kind of control.

19. Similarly, the employer under Title VII, has an obligation to its servants. Section 1.01 of the Restatement (Third) of Agency provides that an agency relationship is by definition a *fiduciary relationship* that arises when the principal agrees to have the agent act on the principal's behalf and subject to the principal's control, and the agent agrees to so act. RESTATEMENT (THIRD) OF AGENCY §1.01 (2017). In keeping with agency principles, Congress explicitly provided that the employer shall be held liable: "[i]t shall be an unlawful employment practice for *an employer*—." The landlord has no such fiduciary relationship with its tenants or its tenants' invitees. Hence there is no basis to impose a duty on landlords that is not provided for in the text or substance of the FHA. In the absence of a duty, landlords cannot be negligent for failing to intervene in tenant-on-tenant harassment. The imposition of liability imposed under the Court's decision is derivative, not direct, and is without a sound basis.

20. The FHA, however, does not leave tenants remediless. Congress considered the situation at hand and squarely provided for relief in Section 3617 which holds the actors with discriminatory intent liable for their interference with Plaintiff's use and enjoyment of a dwelling. Section 3631 provides for the imposition of fines or imprisonment for violations of §3617. Such penalties should not be imposed absent discriminatory intent.

21. The overall structure of the FHA further makes clear Congress' intent to bifurcate liability. Section 3604(b) imposes liability for those who 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." Whereas Section 3617 imposes liability for those who "coerce,

intimidate, threaten, or interfere" with those services or the use or enjoyment of those services. The Court's decision improperly makes Defendants, who provided non-discriminatory services in accordance with Section 36014(b), liable for the harassing co-tenants who interfered with the services Defendants provided. The decision makes no sense. A landlord is not an employer of, or custodian for, its tenants and Congress never intended to provide otherwise through the FHA.

There Is A Likelihood That Irreparable Harm Will Result If A Stay Is Denied

22. The final element—a likelihood of irreparable harm—is also present. If the matter is not stayed pending the Supreme Court's consideration of Defendants' certiorari petition, Defendants will be forced to engage in litigation to defend themselves against a cause of action that does not exist. This will result in significant financial costs that at the end of the day cannot be recovered. It will also require significant amounts of time on both sides and subject many individuals to depositions that should not be taken in the first instance.

23. Plaintiff, by contrast, will suffer no harm while the petition is pending. After having resided at Glen St. Andrews Living Community for nearly three years, Plaintiff voluntarily chose to move elsewhere. There is no risk that Plaintiff will be subjected to harassment by her prior co-tenants and Defendants owe her no continuing obligations. The only issue is one—money. Can Plaintiff recover from a deep pocket landlord for the transgressions of others? On balance, that determination should await the decision of the Supreme Court.

WHEREFORE, for the reasons stated above, Defendants-Appellees, Glen St. Andrew Living Community, LLC, Glen St. Andrew Living Community Real Estate, LLC, Glen Health & Home Management, Inc., Alyssa Flavin, Carol Driscoll, and Sandra Cubas, pray that this Court

stay the mandate pending the filing and disposition of their petition for a writ of certiorari to the United States Supreme Court.

Respectfully submitted,
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

By: /s/Lisa A. Hausten

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, the foregoing was electronically filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM?ECF system.

By:/s/ Lisa A. Hausten_____

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

Lisa A. Hausten, being first duly sworn upon oath, deposes and states as follows:

1. I am the attorney charged with primary responsibility for handling the appellate proceedings in the instant case on behalf of Defendants-Appellees, 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.

2. I have personal knowledge of the following facts and would be competent to testify thereto if called as a witness.

3. I have consulted with Jennifer Knobloch (Vice President of Legal and Risk Management For Health and Home Management, Inc.), and claims personnel from Defendants' liability insurer, Chubb, concerning the Opinion issued in this case by the Seventh Circuit on August 27, 2018.

4. I have received authorization to prepare and file a petition for writ of certiorari on Defendants' behalf seeking United States Supreme Court review of said Opinion.

5. I will accordingly prepare and file a petition for writ of certiorari on Defendants' behalf within 90 days of the issuance of said Opinion, *i.e.*, on or before November 26, 2018.

6. This motion is made in the interests of justice and not for any improper purpose.

FURTHER AFFIANT SAYETH NOT.

Lisa A. Hausten

By: /s/Lisa A. Hausten

SUBSCRIBED and SWORN to before me this 14th day of September, 2018.

Kathleen Ann Wilson

Notary Public

OFFICIAL SEAL
KATHLEEN ANN WILSON
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 02/09/2019

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