

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MARY WALSH and
BEVERLY NANCE,

Plaintiffs-Appellants,

v.

FRIENDSHIP VILLAGE OF SOUTH
COUNTY d/b/a FRIENDSHIP
VILLAGE SUNSET HILLS and
FV SERVICES, INC.,

Defendants-Appellees.

No. 19-1395

**PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANTS-
APPELLEES' MOTION TO VACATE JUDGMENT**

Plaintiffs-Appellants Mary Walsh and Beverly Nance (“Plaintiffs”) respectfully submit this response to the Motion to Vacate Judgment (“Motion”) filed by Defendants-Appellees Friendship Village of South County d/b/a Friendship Village Sunset Hills and FV Services, Inc. (“Defendants”). Plaintiffs agree with Defendants that, following the Supreme Court’s decision in *Bostock v. Clayton County, Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020), there are no grounds on which the District Court’s judgment can be affirmed. Under these circumstances, Plaintiffs submit that this Court’s proper course of

action is to reverse the District Court’s decision and remand for further proceedings.

In this case, Plaintiffs allege that Defendants denied them housing together because they are two married women; Defendants would have offered them housing together if they were a man and a woman who were married. The District Court granted Defendants’ motion for judgment on the pleadings. It observed that this Court had held that Title VII of the Civil Rights Act does not bar discrimination based on sexual orientation in employment and reasoned that the Fair Housing Act is generally construed consistently with Title VII. Plaintiffs appealed. The Supreme Court thereafter granted certiorari in *Bostock* on the question of whether Title VII’s prohibition of discrimination “‘because of . . . sex’ encompasses discrimination based on an individual’s sexual orientation.” Due to the likelihood that the resolution of that question would control this appeal, this Court stayed proceedings pending the Supreme Court’s decision.

Earlier this month, the Supreme Court ruled that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 2020 WL 3146686, at *7. It reasoned that, “[i]f the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.” *Id.* at *7. Thus, the

“employer would not have discharged an employee but for that individual’s sex, the statute’s causation standard is met, and liability may attach.” *Id.* That reasoning controls this appeal involving the comparably worded Fair Housing Act, which also prohibits discrimination “because of . . . sex,” making it impossible to defend the District Court’s judgment, as Defendants appear to concede. *See* Motion at 2-3.

When both parties agree that the District Court’s judgment is substantively erroneous, the normal and proper course of action is for this Court to reverse, in order to give appellants the relief to which they would be entitled if the appeal went forward. *See, e.g., United States v. Manning*, 452 F. App’x 700, 2012 WL 118327, at *1 (8th Cir. 2012) (“The government concedes that there was error in Manning’s sentence. We reverse and remand for resentencing.”); *Gondron v. United States*, 242 F.2d 149, 150 (5th Cir. 1957) (Upon government admission of error, “[t]he result is that the relief sought by the appellants, the reversal of the judgments, is granted as prayed for by each of them”).

Defendants err in equating this case with *Elchuk v. United States*, 370 U.S. 722 (1962), in which—at the request of the United States—the Supreme Court did not reverse, but merely vacated and remanded for the Fifth Circuit to provide a new hearing at which the *pro se* petitioner would be “accorded the opportunity to present oral argument.” The error here was not a procedural one that can be cured

by a new hearing, but a substantive one. Since both parties now agree that the decision below was wrong, Appellants are entitled to have it reversed.

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CERTIFICATE OF COMPLIANCE

1. Plaintiffs-Appellants' foregoing Response to Defendants-Appellees' Motion to Vacate Judgment (the "Response") complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because the Response contains a total of 594 words (excluding the case caption and signature block). This certification is based on the word-count function of Microsoft Office 365 ProPlus, Microsoft Word 2016 for Windows ("Word 2016"), which was used in preparing the Response.

2. The Response complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because this Response has been prepared in a proportionally spaced typeface using 14-point Times New Roman font in Word 2016.

3. This Response complies with the technical requirements of Eighth Circuit Local Rule 25A(g) because it has been generated as a PDF by printing to PDF from the original Word 2016 document, the text of the PDF document may be searched and copied, and the PDF document has been scanned for viruses and is virus-free.

/s/ Sasha Samberg-Champion
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CERTIFICATE OF SERVICE

I certify that a copy of Plaintiffs-Appellants' foregoing Response to Defendants-Appellees' Motion to Vacate Judgment was filed electronically and served by operation of the Court's CM/ECF system on all counsel of record on June 30, 2020.

/s/ Sasha Samberg-Champion
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