Brooklyn Law Review

Volume 88 | Issue 1 Article 10

12-9-2022

Who's the Fairest of Them All: Circuit Split Over Landlord Liability for Tenant-On-Tenant Discrimination Under the Fair Housing Act

Kelli Conway

Who's the Fairest of Them All

CIRCUIT SPLIT OVER LANDLORD LIABILITY FOR TENANT-ON-TENANT DISCRIMINATION UNDER THE FAIR HOUSING ACT

INTRODUCTION

If you were asked to describe the typical American, would "racist," "sexist," "homophobic," or "transphobic" come to mind? The unfortunate truth is that more Americans than not find these attributes to be prevalent and projected against people in this country.[1] In fact, according to a 2019 study, "three-quarters of Black and Asian respondents and more than half of Hispanic respondents report[] experiencing discrimination or being treated unfairly because of their race."[2] 90 percent of LGBTQ individuals believe prejudice exists against them, 42 percent of women have reported experiencing job discrimination, and 81 percent of women have experienced some sort of sexual harassment.[3] While some members of these communities will experience discrimination more sparingly, more than half of these marginalized individuals will face it on a daily basis.[4]

---

[1] A 2017 survey titled "Discrimination in America" conducted for National Public Radio, the Robert Wood Johnson Foundation, and Harvard T.H. Chan School of Public Health asked 3,453 US adults, "including African Americans, Latinos, Asian Americans, Native Americans, white Americans, men, women, and LGBTQ adults—about both their beliefs regarding and personal experiences with discrimination in America." ROBERT WOOD JOHNSON FOUND. ET AL., DISCRIMINATION IN AMERICA: FINAL SUMMARY 3 (2018). "[M]ajorities of nearly all groups . . . say that, generally speaking, they believe discrimination against their own group exists in America today." *Id.* at 4.

[2] *Confronting Prejudice: How to Protect Yourself and Help Others*, PEPPERDINE UNIV. (July 9, 2019), https://onlinegrad.pepperdine.edu/blog/prejudice-discrimination-coping-skills/ [https://perma.cc/48UW-JRFV] (citing JULIANA M. HOROWITZ ET AL., PEW RSCH. CTR., RACE IN AMERICA 2019 41 (2019)); ROBERT WOOD JOHNSON FOUND. ET AL., *supra* note 1, at 4; Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RSCH. CTR. (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/ [https://perma.cc/B6KA-5VNZ].

[3] *See id.*; *see also 2019 Study on Sexual Harassment and Assault*, STOP ST. HARASSMENT (2019), https://stopstreetharassment.org/our-work/nationalstudy/2019 study/ [https://perma.cc/LFN9-QEZZ].

[4] *The Impact of Discrimination*, AM. PSYCH. ASS'N (2015), https://www.apa.org/news/press/releases/stress/2015/impact [https://perma.cc/89NB-PK95].

The persistence of discrimination and harassment can significantly interfere with people's mental and physical well-being, especially when victimization is a common or day-to-day occurrence.[5] Studies conducted by the UCLA Fielding School of Public Health in 2014 and 2015 revealed that chronic harassment or discrimination can lead to a variety of psychological effects, including stress disorders, anxiety, depression, and even substance or alcohol abuse.[6]

Despite the rates of personal experience with discrimination, most people tend to succumb to the "bystander effect"[7] when witnessing discrimination. The bystander effect is a longstanding social phenomenon where individuals fail to speak up on behalf of a victim because they hope or expect that someone else will.[8] This is an understandable psychological reaction; a bystander's silence does not necessarily imply that they condone violence or discrimination.[9] On the other hand, there are certain people in positions of authority that society generally expects to speak up, or are in fact legally required to intervene.[10] For example, employers can be held vicariously liable for discrimination perpetuated in the workplace,[11] and academic institutions can be held liable for disregarding discrimination or harassment that occurs on school grounds.[12] In both instances, there is a duty of care owed to provide a safe space.[13] However, the same is not definitively true of property

---

[5] *See* Dan Gordon, *Discrimination Can Be Harmful to Your Mental Health*, UCLA (Jan. 13, 2016), https://newsroom.ucla.edu/stories/discrimination-can-be-harmful-to-your-mental-health [https://perma.cc/9EUN-W9NL].

[6] *See id.*

[7] *See* Ruth Terry, *How To Be an Active Bystander When You See Casual Racism*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/smarter-living/how-to-be-an-active-bystander-when-you-see-casual-racism.html [https://perma.cc/UVC9-84FA].

[8] *Id.*

[9] *Id.*; *see also* Francesca Gino, *Why It's So Hard to Speak Up Against a Toxic Culture*, HARV. BUS. REV. (May 21, 2018), https://hbr.org/2018/05/why-its-so-hard-to-speak-up-against-a-toxic-culture [https://perma.cc/HDZ2-F74A].

[10] *See* Chris Ceplenski, *Vicarious Employer Liability for Workplace Harassment: Who Is a Supervisor?*, HR DAILY ADVISOR (Oct. 10, 2013), https://hrdailyadvisor.blr.com/2013/08/11/vicarious-employer-liability-for-workplace-harassment-who-is-a-supervisor/ [https://perma.cc/2SPT-TE38]; *see also* Dr. Edward F. Dragan, *Public School Civil Rights Liability: Protecting Students from Discriminatory Harassment and Abuse*, EDUC. EXPERT (Jan. 30, 2020), http://education-expert.com/2020/01/public-school-civil-rights-liability-protecting-students-from-discriminatory-harassment-and-abuse/ [https://perma.cc/D8KQ-NS3N].

[11] *See* Ceplenski, *supra* note 10.

[12] *See* Dragan, *supra* note 10.

[13] *See* Ceplenski, *supra* note 10; Dragan, *supra* note 10. As for employer responsibilities, "[e]mployers have the responsibility to provide a safe workplace. Employers MUST provide their employees with a workplace that does not have serious hazards and must follow all OSHA safety and health standards." *Workers' Rights*, U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., at 4 (2019), https://www.osha.gov/sites/default/files/publications/osha3021.pdf [https://perma.cc/3VPR-

managers and landlords in the housing industry. While housing providers are under an explicit duty not to discriminate when renting or selling housing,[14] their legal obligations are often blurred beyond the acquisition phase.[15]

Federal courts are split on the issue of landlord liability for known "tenant-on-tenant discrimination,"[16] as this legal issue has arisen as a matter of first impression in numerous federal courts in recent years.[17] For example, in 2018, the US

6TBM]. Additionally, employers hold a responsibility to refrain from engaging in discriminatory behavior or practices against employees in the workplace. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)–(c). As for academic institutions, both states and the federal government have recognized this legal responsibility to keep students safe. *See School Safety Legal Issues and Laws*, FINDLAW (Mar. 16, 2018), https://www.findlaw.com/education/school-safety/legal-issues-and-laws-relating-to-school-safety.html [https://perma.cc/PTH3-ASCB]. In general, all property owners have a duty to "provide a safe [] environment" for legal occupiers or visitors under the longstanding theory of premises liability, which is applied even more strictly and rigorously in the context of schools. *Id.*; *see also* Utkarsha Nikam, *Premises Liability: A Duty of Reasonable Care*, AM. COURTHOUSE, https://americancourthouse.com/premises-liability-a-duty-of-reasonable-care/ [https://perma.cc/7N9W-2M49]. Taking it a step further, states have also enacted antibullying laws "aimed at making schools safe for learning." *School Safety Legal Issues and Laws*, *supra*; *see also Specific State Laws Against Bullying*, FINDLAW (June 20, 2016), https://www.findlaw.com/education/student-conduct-and-discipline/specific-state-laws-against-bullying.html [https://perma.cc/96ZY-LN8Q]. Lastly, various federal laws, including rights derived from the US Constitution and Title IX, prohibit discrimination and promote equal protection in schools. *See id.*; *see also* Title IX, Education Amendments Act of 1972, 20 U.S.C. §§ 1681–88.

[14] *See Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [https://perma.cc/6MT5-5HPN].

[15] *See* Jeffrey B. Greenspan, *Do-Nothing Landlords Can Be Liable for Known Tenant-On-Tenant Harassment Under Federal Housing Act*, A.B.A. (Aug. 30, 2018), https://www.americanbar.org/groups/litigation/committees/trial-practice/practice/2018/do-nothing-landlords-can-be-liable-for-known-tenant-on-tenant-harassment-under-federal-housing-act/ [https://perma.cc/Y76N-GRVR]; John Dolgetta, *Legal Corner: The 2nd Circuit Reverses Course: Landlord is Not Found Liable Under Fair Housing Laws*, REAL ESTATE IN-DEPTH (Apr. 12, 2021), http://www.realestateindepth.com/legal-advocacy/legal-corner-the-2nd-circuit-reverses-course-landlord-is-not-found-liable-under-fair-housing-laws/ [https://perma.cc/SNY3-TMS2] (citing Francis v. Kings Park Manor, Inc., 992 F.3d 67, 75 (2d Cir. 2021) (en banc)) (explaining that, per the Second Circuit's holding in Francis v. Kings Park Manor, landlords do not possess the degree of control over tenants that produces legal responsibility for tenants' actions, which subsequently limits landlords' exposure to liability under the FHA).

[16] "Tenant-on-tenant discrimination" is the term coined by the circuits that have adjudicated matters involving a plaintiff tenant complaining of another tenant's discriminatory conduct against them. *See* Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 859 (7th Cir. 2018); *see also Francis*, 992 F.3d at 71. In *Wetzel*, the Seventh Circuit refers to the discriminatory conduct at issue in the case as harassment, but harassment and discrimination are used interchangeably by courts, so this note for consistency purposes refers to such conduct as discrimination.

[17] *See* Scutt v. Dorris, No. 20-00333, 2021 WL 206356, at *5 (D. Haw. Jan. 20, 2021) (order dismissing in part and allowing to proceed in part); *see also* A. Michelle Canter et al., *Federal Appeals Court Holds that Landlord May Be Liable for Deliberate Indifference to Tenant-on-Tenant Discrimination*, BRADLEY ARANT BOULT CUMMINGS LLP (Sept. 24, 2018), https://today.westlaw.com/Link/Document/Blob/I439091dfc26a11e8a5b3e3d9e23d7429.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=e691be2b-f3fa-41c6-99b7-1435ddff596e&contextData=(sc.Default)&firstPage=true [https://perma.cc/YC6B-MQS8].

Court of Appeals for the Seventh Circuit held in *Wetzel v. Glen St. Andrew Living Community* that landlords can be held liable under the Fair Housing Act (FHA) for tenant-on-tenant discrimination.[18] More specifically, the *Wetzel* court held that a landlord can be held liable for negligently failing to address a tenant's known discriminatory conduct against another tenant.[19] In 2021, on the other hand, the Second Circuit held in *Francis v. Kings Park Manor, Inc.* that landlords cannot be held liable under similar circumstances.[20] The *Franis* court explained that when the landlord was not motivated by racial animus in disregarding reports of discrimination or did not possess a substantial "degree of control" over the situation, the landlord cannot be held liable.[21] Consequently, without some form of legislative redress, such conflicting views over what circumstances must be present to hold a landlord accountable for disregarded discrimination runs the risk of "significant consequences for the future of landlord-tenant litigation."[22] Not only do circuit splits create inconsistency when it comes to the protection of federal legal rights issues, they also leave injured parties unsure as to whether their claims stand a chance at survival due to conflicting evidentiary standards.[23]

This note argues that an amendment to the FHA is necessary to resolve the current circuit split over whether landlords can be held liable for knowing or recklessly disregarding tenant-on-tenant discrimination. Specifically, the FHA should be amended to enumerate "postacquisition discrimination" as an actionable claim against a landlord.[24] This could be accomplished by supplementing the FHA with a test for landlord liability reflective of the three-pronged hostile housing environment approach employed by the Seventh Circuit in

---

[18] *Wetzel*, 901 F.3d at 864–65.

[19] *Id.* at 864; *see also* Canter, *supra* note 17.

[20] *Francis*, 992 F.3d at 70.

[21] *Id.* at 70, 73–74.

[22] Zhihao (Amy) Zhang, *Landlord's Inaction in Tenant-on-Tenant Harassment: Second Circuit Says No More*, COLUM. J.L. & SOC. PROBS. (Mar. 11, 2020, 2:49 PM), http://blogs2.law.columbia.edu/jlsp/2020/03/11/landlords-inaction-in-tenant-on-tenant-harassment-second-circuit-says-no-more/ [https://perma.cc/V6UZ-4GMK].

[23] *See* Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF L. REV. 989, 996–98 (2020) (highlighting five major issues that arise from circuit splits in the federal judicial system).

[24] "Postacquisition [discrimination]" refers to injurious incidents occurring *after* the process of buying a home or renting a dwelling has come to a close, meaning the individual victim is subjected to discrimination and/or harassment while actually occupying the dwelling as a tenant or homeowner. *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 205 n.23 (2006).

Wetzel.[25] Such affirmative congressional action will concretely define a landlord's duty to protect their tenants from known discrimination and avoid future conflict over this legal issue in the courtroom.

Part I will provide a background of the FHA, including the social context that motivated its enactment, the amendments that rounded out the extent of its protection, and the role it plays in the housing industry. Part II will examine conflicting circuit court rulings on landlord liability for known tenant-on-tenant discrimination and consider how the inconsistencies in the approach to this legal issue pose a problem. Part III will propose that the FHA be amended to incorporate a "test" for landlord liability, or a set of criteria providing a uniform standard for liability, that courts can refer to when considering whether a landlord can be held liable for disregarding a known hostile housing environment.[26] This section will also explain how addressing this problem through a statutory amendment ensures greater protection of marginalized groups.

I. THE FAIR HOUSING ACT OF 1968

The federal provision that protects individuals and families from discrimination in the housing context, specifically in the sale or rental transaction of a home, is the FHA.[27] However, like many federal acts that purport to work towards greater equity, the FHA did not arise from Congress's goodwill.[28] Instead,

---

[25] Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 861–62 (7th Cir. 2018).

[26] "Hostile work harassment" is defined by the regulation:

> Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: [t]he availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.

24 C.F.R. § 100.600(a)(2) (2022). This note will collectively refer to the presence of such conditions as a "hostile housing environment."

[27] *See* 42 U.S.C. § 3604. Many states and municipalities have also enacted local prohibitions to supplement the federal law by refining or extending fair housing protection to circumstances not enumerated by the FHA. *See* Ron Leshnower, *The Fair Housing Act's Protected Classes: What Landlords Need to Know*, NOLO, https://www.nolo.com/legal-encyclopedia/the-fair-housing-acts-protected-classes-what-landlords-need-know.html [https://perma.cc/7XQF-KBRY].

[28] *See* Paul A. Jargowsky et al., *The Fair Housing Act at 50: Successes, Failures, and Future Directions*, 29 HOUS. POL'Y DEBATE 694, 694–95 (2019).

the bill was ultimately born from a drawn out fight for housing equality during the Civil Rights Movement.[29] While the FHA has been successful in impeding overt discriminatory practices, landlords and other housing providers have not ceased to engage in more covert discrimination.[30] Unfortunately, the FHA falls somewhat short in protecting against furtive discrimination and providing an avenue for legal action when landlords have been passive contributors to the persistence of discrimination.[31]

A. The Social and Legislative Background of the Fair Housing Act

In the face of the Great Depression, President Franklin Roosevelt rolled out the New Deal, which included various programs designed to help the millions of Americans economically sucker punched by arguably the most catastrophic financial crisis in US history.[32] However, this effort to tackle the devastation produced by the Great Depression proved to be socially ruinous.[33] Homeowner-related initiatives incorporated in the New Deal in particular worked to help white homeowners while ostracizing minorities.[34] The Supreme Court took a stab at correcting the legal wrongs made possible by the New Deal, but by that point in time the impact was irreversible.[35] Not only were

---

[29] *Id.*

[30] *Id.* at 701–02.

[31] *See* Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 863–64 (7th Cir. 2018) (explaining that the FHA fails to explicitly provide a test for landlord liability, which consequently leaves the amount of exposure to liability for landlords and property managers unclear).

[32] Brad Broberg, *Learning From Our Past: The History of the Fair Housing Act*, NAT'L ASS'N REALTORS® (May 15, 2018), https://www.nar.realtor/on-common-ground/learning-from-our-past-the-history-of-the-fair-housing-act [https://perma.cc/GMG2-P64C].

[33] *See* Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/W5D9-YWFV] (providing highlights from an interview with Richard Rothstein on his book *The Color of Law* and discussing the discriminatory impact of the Home Owners Loan Corporation).

[34] *Id.*; *see also* Broberg, *supra* note 32; *Home Owners' Loan Corporation (HOLC) Neighborhood Redlining Grade*, ARCGIS (May 5, 2022), https://www.arcgis.com/home/item.html?id=ef0f926eb1b146d082c38cc35b53c947 (last visited Oct. 1, 2022); Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. AM. PROGRESS 6 (Aug. 2019), https://americanprogress.org/wp-content/uploads/2019/08/StructuralRacismHousing.pdf?_ga=2.266802253.21144793.1657050601-1192884036.1657050600 [https://perma.cc/PPM2-NVWP].

[35] *See* Shelley v. Kraemer, 334 U.S. 1 (1948); *see also* MATTHEW D. LASSITER & SUSAN CIANCI SALVATORE, U.S. DEP'T OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL DISCRIMINATION IN HOUSING 49 (2021), https://www.nps.gov/subjects/nationalhistoriclandmarks/upload/Civil_Rights_Housing_NHL_Theme_Study_revisedfinal.pdf [https://perma.cc/33GC-LCCQ]. "Today, approximately 3 in 4

some of the effects irreparable, but outlawing obvious exercises of discrimination did not stop housing providers from finding other, less apparent ways of engaging in prejudicial behavior.[36] As civil unrest proceeded to fester for decades and eventually exploded in the 1960s, Congress was forced to face the music and legislatively address racism plaguing the nation.[37]

The institutional racism that ultimately incited such widespread backlash plagued various sectors of American society, including the buying, renting, and selling of homes.[38] Within the housing industry, systemic discrimination became particularly egregious with the implementation of the Home Owners' Loan Corporation (HOLC)[39]—one of President Roosevelt's New Deal programs.[40] HOLC, referred to as the bedrock of the National Housing Act of 1934, facially aimed to provide relief to homeowners on the verge of foreclosure through low-interest refinancing.[41] In reality, however, it amounted to what Richard Rothstein,[42] author of *The Color of Law*,[43] calls a "state-sponsored system of segregation" proving to be far more

---

neighborhoods—74 percent—that the HOLC deemed 'hazardous' in the 1930s remain low to moderate income, and more than 60 percent are predominantly nonwhite." Solomon et al., *supra* note 34, at 6–7.

[36] *See Fair Housing Act*, HISTORY (Jan. 28, 2021), https://www.history.com/topics/black-history/fair-housing-act [https://perma.cc/228Q-AFZP] (noting that even after *Shelley v. Kraemer*, housing providers still utilized race-based discriminatory practices).

[37] *See* Clayborne Carson, *American Civil Rights Movement*, ENCYCLOPEDIA BRITANNICA (Mar. 6, 2022) https://www.britannica.com/event/American-civil-rights-movement [https://perma.cc/NG3W-R8V6]; *see also* 42 U.S.C. §§ 1981–2000; 42 U.S.C. § 3604.

[38] *See id.*; *see also* Brad Broberg, *Learning From Our Past: The History of the Fair Housing Act*, NAT'L ASS'N REALTORS® (May 15, 2018), https://www.nar.realtor/on-common-ground/learning-from-our-past-the-history-of-the-fair-housing-act [https://perma.cc/GMG2-P64C].

[39] *See generally* Charles Courtemanche & Kenneth A. Snowden, *Repairing a Mortgage Crisis: HOLC Lending and Its Impact on Local Housing Markets*, (Nat'l Bureau of Econ. Rsch, Working Paper No. 16245, 2010) (explaining the housing market crisis that led to the implementation of HOLC, HOLC's mortgage-lending system, and its impact).

[40] Jameelah Nasheed, *What is Redlining? How Residential Segregation Shaped U.S. Cities*, TEEN VOGUE (Feb. 19, 2021), https://www.teenvogue.com/story/what-is-redlining-united-states [https://perma.cc/6572-ZH3E]; *see also* Alan Blinder, *From the New Deal, a Way Out of a Mess*, N.Y. TIMES B6 (Feb. 24, 2008), https://www.nytimes.com/2008/02/24/business/24view.html [https://perma.cc/BF93-H7KQ].

[41] Blinder, *supra* note 40.

[42] "Richard Rothstein is a Distinguished Fellow of the Economic Policy Institute and a Senior Fellow (emeritus) at the Thurgood Marshall Institute of the NAACP Legal Defense Fund," and acclaimed author. *Richard Rothstein*, ECON. POL'Y INST., https://www.epi.org/people/richard-rothstein/ [https://perma.cc/D8GF-USS8]. Rothstein's research and literature focuses on "race and education." *Id.*

[43] For greater insight into the theory that racially segregated, homogenous neighborhoods in the United States are ultimately a byproduct of government policies, one of which being the Home Owners' Loan Corporation program implemented in the New Deal Era, see generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

systemically devastating than restorative.[44] Through "a neighborhood ranking system," later labeled "redlining," the Federal Housing Administration marked areas on a scale of least to most risky for lending, foreclosing the opportunity for HOLC loans in neighborhoods heavily populated by racial minorities.[45] This institutionalized discriminatory practice of limiting assistance to white homeowners and buyers, compounded by zoning regulations and property laws aimed at maintaining segregation,[46] made white neighborhoods virtually inaccessible to low-income communities.[47]

Race-based discriminatory housing practices, particularly the practice of ensuring homes could only be sold to white people, was finally challenged in *Shelley v. Kramer*.[48] There, the Supreme Court held that restrictive covenants[49] prohibiting the sale of real property to any nonwhite party could not be enforced by courts because such state action would violate citizens' Fourteenth Amendment right to the equal "enjoyment of property."[50] While this was a landmark ruling for civil rights and it appeared to mark a promising path towards housing integration, this victory by no means wiped the nation clean of housing discrimination.[51] Clear, egregious bias against certain renters or buyers continued to plague the nation.[52]

The civil unrest over centuries-long racial oppression exploded in the mid-1950s in a series of marches, mass protests, and other civil demonstrations that would continue over the course of the next decade and come to be known as the Civil Rights Movement.[53] The National Association for the Advancement of Colored People (NAACP), among several organizations, fought vigorously for equality, exposing the

---

[44] Gross, *supra* note 33.

[45] *Home Owners Loan Corporation (HOLC) Neighborhood Redlining Grade*, *supra* note 34; *see also* Broberg, *supra* note 32.

[46] *See* RICHARD D. KAHLENBERG, CENTURY FOUND., AN ECONOMIC FAIR HOUSING ACT 5–8 (2017), https://production-tcf.imgix.net/app/uploads/2017/08/09133724/an-economic-fair-housing-act.pdf [https://perma.cc/7NVE-SCXC]. For more on the discriminatory impact of late 19th and early 20th century zoning laws, see generally ROTHSTEIN, *supra* note 43.

[47] KAHLENBERG, *supra* note 46, at 8.

[48] *See* Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

[49] A "restrictive covenant" is "a covenant acknowledged in a deed or lease that restricts the free use or occupancy of property." *Restrictive Covenant*, MERRIAM WEBSTER, https://www.merriam-webster.com/legal/restrictive%20covenant [https://perma.cc/E2GJ-QSVX].

[50] *Shelley*, 334 U.S. at 20–21.

[51] *See* LASSITER & SALVATORE, *supra* note 35, at 49.

[52] *See Fair Housing Act*, *supra* note 36. "[W]hile a growing number of African American and Hispanic members of the armed forces fought and died in the Vietnam War, on the home front their families had trouble renting or purchasing homes in certain residential areas because of their race or national origin." *Id.*

[53] *See* Carson, *supra* note 37.

intolerance occurring throughout the nation and "initiated lawsuits to secure equal treatment for Black Americans in education, employment, housing, and public accommodations."[54]

Despite the intense opposition and violence that ensued as a result of these efforts, the activists' persistence ultimately led to federal intervention and the proposal of civil rights legislation in Congress.[55] The passage of the Civil Rights Act of 1964 (1964 Act) marked a historic stride in American history towards equality and righting systematic wrongs by "prohibit[ing] discrimination on the basis of race, color, religion, sex or national origin."[56] However, Congress purposefully excluded a fair housing provision from the 1964 Act.[57] Later, in 1966, when a fair housing bill came to the forefront of Congress' agenda, the proposed legislation was met with resistance from senators.[58] Previously enacted civil rights laws, including the 1964 Act and the Voting Rights Act of 1965, granted rights to minorities in a manner that did not *physically* infringe on white Americans' personal lives.[59] A fair housing program, on the other hand, encompassed a proactive effort to diversify and desegregate neighborhoods in the most personal way possible: to the right and left of white Americans' own homes.[60] This meant that white people would have to accept intermingling with minorities in their daily life, which was, as Walter Mondale coined it, "civil rights getting personal."[61] Congress' hesitancy in

---

[54] *Id.*

[55] *See id.*

[56] *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964 [https://perma.cc/J7YG-WD6H]; *see also* 42 U.S.C. §§ 1981–2000.

[57] *See* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 574 (2015). "The passage of legislation to address housing segregation proved to be among the most difficult tasks undertaken by the civil rights movement. Congress had specifically excluded the FHA and VA insurance programs from coverage under the 1964 Civil Rights Act." *Id.* In particular, "[s]outhern senators naturally opposed" the passage of the bill and advancing all-inclusive housing rights, and made repeated, avid attempts to "prolong the debate." *Id.* at 575.

[58] *See History of Fair Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [https://perma.cc/KG8H-CRYR]. "[A] fair housing provision[ ] had passed the House in 1966, [but] it died under the weight of a Senate filibuster and an attempt to revive it in 1967 bottled up the legislation in committee." Massey, *supra* note 57, at 574.

[59] *See* Jargowsky et al., *supra* note 28, at 695.

[60] *See id.*

[61] Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/D9SN-9QEY].

formalizing this stride forward was apparent in the bill's failure to gain the needed majority for passage in both 1966 and 1967.[62]

Ultimately, the release of the Kerner Commission Report and the tragic assassination of Dr. Martin Luther King Jr. triggered a genuine sense of urgency in providing greater protection against housing discrimination.[63] In the wake of racial uprisings in major cities across the nation throughout the summer of 1967, President Johnson established the National Advisory Commission on Civil Disorders (the Commission) to uncover the roots of the unrest and devise potential remedies.[64] Led by Governor Otto Kerner Jr. of Illinois, the Commission released the Kerner Report in February of 1968 exposing the state of race relations in the country as the driving force of inner-city violence, and revealing the nation was "moving toward two societies, one black, and one white—separate and unequal."[65] The Kerner Report stressed America's deep racial divide was not an inevitability, but rather created by choice and therefore reversable through affirmative action.[66] The Kerner Report solidified what so many civil rights leaders had been urging the country to acknowledge.[67] While President Johnson tried to divert attention from its revelations, the truth-bearing publication resonated with Americans across the country and pressure mounted on President Johnson to respond.[68] This pressure grew exponentially with the assassination of Dr. King just two months later, on April 4, 1968, as the country once again erupted in uprisings.[69] In the face of both tragedy and truth,

---

[62] *See History of Fair Housing*, *supra* note 58; *see also* Jargowsky et al., *supra* note 28, at 695.

[63] *See* Jargowsky et al., *supra* note 28, at 695.

[64] *See* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: SUMMARY OF REPORT 1 (1968) [hereinafter THE KERNER COMMISSION REPORT], https://www.hsdl.org/?view&did=35837 [https://perma.cc/FW94-SYT6]; *see also* Clyde Haberman, *The 1968 Kerner Commission Report Still Echoes Across America*, RETRO REP. (June 23, 2020), https://www.retroreport.org/articles/the-1968-kerner-commission-report-still-echoes-across-america/ [https://perma.cc/23EA-5JNC].

[65] THE KERNER COMMISSION REPORT, *supra* note 64, at 1; *see also* Ira Rheingold et al., *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 CLEARINGHOUSE REV. 642, 645 (2001).

[66] THE KERNER COMMISSION REPORT, *supra* note 64, at 1, 20.

[67] *See* Justin Driver, *The Report on Race that Shook America*, ATLANTIC (May 2018), https://www.theatlantic.com/magazine/archive/2018/05/the-report-on-race-that-shook-america/556850/ [https://perma.cc/W8XX-YSSU].

[68] *See id.*

[69] *See* DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018, 12:28 PM), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/ [https://perma.cc/4AEN-QZCF].

President Johnson and Congress ultimately had no choice but to recognize the need to approve the fair housing bill.[70]

The Civil Rights Act of 1968, signed into law by President Johnson, supplemented the 1964 Act by prohibiting discrimination in the "sale, rental, and financing of housing based on race, religion, national origin, sex, . . . handicap and family status."[71] This federal provision constitutes Title VIII of the Civil Rights Act of 1968, and what is known as the principal directive of the FHA.[72] Congress' passage of the FHA represented the first instance in American history of a legislative ban on racial discrimination in the context of housing.[73] However, it also marked Congress's last major legislative implementation in response to the Civil Rights Movement.[74]

B. The Fair Housing Act Defined

The general purpose of the FHA is to prevent the occurrence of discrimination against protected classes[75] in the process of applying, renting, or owning a home.[76] Sections 3601–3619 and 3631 of the United States Code provide for the legal enforcement of fair housing throughout the United States and collectively embody the FHA in its modern, amended form.[77] Section 3604 represents the principle directive, establishing that discrimination against the enumerated, protected classes in the

---

[70] *See History of Fair Housing*, *supra* note 58. President Johnson ultimately decided to bring something good from something so evil, and used the nation's unrest, grief, and anger to push the passage of a necessary supplement to the Civil Rights Act of 1964. *Id.*

[71] *Id.*

[72] *Id.* The Fair Housing Act was amended in 1988 to include protection for persons with disabilities and those with children. UNITED SPINAL ASS'N, UNDERSTANDING THE FAIR HOUSING AMENDMENTS ACT 1 (2004).

[73] *See* Massey, *supra* note 57, at 571.

[74] *See* Elizabeth Julian, *The Fair Housing Act at Fifty: Time for a Change*, 40 CARDOZO L.R. 1133, 1134 (2019).

[75] "A group of people who share such an identified characteristic is collectively known as a 'protected class.'" Leshnower, *supra* note 27. Civil rights statutes specifically provide protection to citizens of protected classes against instances of discrimination, and Congress has since extended such safeguards to groups unnamed in these statutes but nevertheless deserving of protection given the systematic intolerance they have faced in employment, housing, and other societal contexts. *See* Meghan Droste, *What are "Protected Classes"?*, SUBSCRIPT L. (June 22, 2020), https://subscriptlaw.com/protected-classes/ [https://perma.cc/XDM9-HZXP]. The seven enumerated protected classes in the Fair Housing Act are: "race, color, religion, sex, handicap, familial status, [and] national origin." 42 U.S.C. § 3604.

[76] *See* Leshnower, *supra* note 27; 42 U.S.C. § 3604.

[77] *See* Fair Housing Act, 42 U.S.C. §§ 3601–19, 3631; *see also* Bd of Governors of the Fed. Rsrv. Sys., *Fair Lending Regulations and Statutes: Fair Housing Act*, *in* CONSUMER COMPLIANCE HANDBOOK (2017), https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf [https://perma.cc/TW35-HFQ7].

sale or rental of housing is federally prohibited.[78] Specifically, the statute prohibits discrimination in the form of (1) refusing to negotiate for the sale or rental; (2) limiting the availability of a dwelling to a certain class of people (i.e., "whites only") through an advertisement or other publication form; (3) refusing to sell after a prospective purchaser or renter makes a bona fide offer, or in setting the terms and conditions of the sale or rental; and (4) giving the impression that a housing space is unavailable when it in fact is available.[79]

The FHA also grants authority to the US Department of Housing and Urban Development (HUD) to enforce the FHA.[80] When a direct provider of housing, such as a landlord, real estate company, property manager, or other operating entity subjects an individual to illegal housing practices in violation of the FHA, that individual may report the conduct by filing a complaint either with HUD or independently in a federal or state court.[81] If the individual chooses to involve HUD, HUD's Office of Fair Housing and Equal Opportunity (OFHEO) will conduct a formal investigation.[82] The OFHEO prioritizes resolution through voluntary agreements. But if such efforts fail, the Department of Justice (DOJ) will then pursue legal recourse upon the OFHEO's recommendation where the investigation reveals the FHA's mandates have been violated.[83]

While the hope was that the FHA would cure the racial animosity egregiously present in the housing industry, it has become clear that inadequacies remain.[84] The procedures in place facially appear to effectively approach and counteract discriminatory housing practices, but intolerance nevertheless remains widespread more than half a century after the passage of the FHA.[85]

---

[78] 42 U.S.C. § 3604.

[79] *Id.* The statute also elaborates on prohibitions more specific to the context of discrimination against handicapped persons. *Id.* § 3604(f).

[80] Craig Flournoy, *The Fair Housing Act: Enacted Despite the Mainstream Media, Neutered by the Federal Government's Unwillingness to Enforce It*, 40 CARDOZO L. REV. 1101, 1110–11 (2019).

[81] *See The Fair Housing Act*, U.S. DEP'T OF JUST. (May 31, 2022), https://www.justice.gov/crt/fair-housing-act-1 [https://perma.cc/4W2J-AJWE].

[82] *Learn About the FHEO Complaint and Investigation Process*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Process_for_Complaints [https://perma.cc/48KG-QEKL].

[83] *See id.*

[84] *The Fair Housing Act*, *supra* note 81.

[85] *See id.*

C. *How the Fair Housing Act Fails to Address Postacquisition Discrimination*

On the one hand, lawmakers have explicitly prohibited discrimination in a number of industries and sectors of American life, thereby reducing its prevalence to some extent.[86] On the other hand, in the context of housing, residential inequality and discriminatory behavior persist—despite the FHA.[87] While commentators have identified a plethora of issues that remain uncured since the FHA was signed into law,[88] this note will focus on the inadequate protections for residents subjected to discrimination by fellow tenants in community-style housing settings.[89]

A noticeable defect of the FHA is its lack of explicit post postacquisition protection to renters and homeowners.[90] The FHA focuses quite narrowly on discriminatory practices in matters relating to one's *receipt* of housing.[91] More specifically, the FHA enumerates circumstances in which discrimination in housing is prohibited, but such circumstances are limited to those that arise while *in the process* of renting or purchasing a housing space.[92] Therefore, the correlating sections of the United

---

[86] *See* KAHLENBERG, *supra* note 46, at 2.

[87] *See id.*; *see also* Solomon, *supra* note 34, at 7–8, 10–12 (detailing how policies at all government levels have sustained housing discrimination in the decades since the FHA's enactment).

> For decades, governments and private citizens have employed exclusionary tactics to prevent African Americans and other people of color from building wealth through homeownership and affordable housing. Whether through formal policy decisions or a persistent failure to enact and enforce civil rights laws, government action and inaction continues to undermine prosperity in communities of color.

Id. at 6. Despite the Fair Housing Act, lenders continue to disadvantage minorities. *Id.* at 9.

[88] *See* Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act (last visited Oct. 1, 2022). Sponsors of the Fair Housing Act hoped the federal statute would pave the way for genuine integration and balanced living in America's neighborhoods. *See id.* However, as ultimately written, commentators have concluded that the bill failed to encompass the measures necessary to .achieve this end realistically and fully. *See id.* Issues have been raised about, among other things, the weakness of the available enforcement measures in comparison to the magnitude of the social problem at play, the limits placed on the federal government to administer the program or prosecute violations, and the problems that arise from the responsibility being placed on victims if violators are to be held accountable. *See id.*; *see also* Flournoy, *supra* note 80, at 1120–21 (highlighting that the presidential administrations succeeding the Johnson administration to invoke the stronger federal penalties available to rectify discrimination in housing).

[89] *See infra* Part II.

[90] *See* Short, *supra* note 24, at 205.

[91] *See* 42 U.S.C. §§ 3604–19, 3631.

[92] *See id.*

States Code fail to explicitly mention instances of discrimination or harassment that occur after the transaction process is complete, whereby the individual has officially become the tenant or homeowner.[93] By doing this, the extent of protection against "postacquisition harassment" has remained unclear.[94] As a result, plaintiffs who have brought suit claiming to have experienced discrimination *while living in their home* have had their complaints dismissed.[95] Federal courts have granted a defendant's motion to dismiss on the grounds that the conduct at issue did not occur during the sale or rental process, therefore the plaintiff failed to state a viable cause of action pursuant to the FHA.[96]

Postacquisition cases have involved homeowners harassed and discriminated against at the hands of neighbors.[97] For example, in *Halprin v. Prairie Single Family Homes of Dearborn Park Association* Jewish homeowners brought suit against their homeowners association for persistent harassment from a neighbor based on their religious beliefs.[98] The Northern District of Illinois dismissed the complaint for failure to state a viable claim under the FHA since the conduct did not arise in the process of acquiring the home.[99] On appeal, the Seventh Circuit ordered the reinstatement of one of the plaintiffs' federal claims.[100] The court relied on a combination of a uniquely narrow interpretation of the FHA and, more heavily, on a HUD regulation that "prohibits unlawful conduct interfering with persons 'in their enjoyment of a dwelling.'"[101]

Other cases have arisen where postacquisition discrimination has furnished the basis for a cause of action, specifically where the allegations have asserted that the landlord or property-managing entity was the source of the

---

[93] *See* Short, *supra* note 90, at 205.

[94] *See id.* at 205 n.23.

[95] *See id.* at 204–05.

[96] *See* Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004); *see also* Short, *supra* note 24 at 204–05.

[97] *See Halprin*, 388 F.3d at 330; *see also* Short, *supra* note 24, at 204.

[98] *See* Halprin v. Prairie Fam. Homes of Dearborn Park Ass'n, 208 F. Supp. 2d 896, 899 (N.D. Ill. 2002), *rev'd in part*, 388 F.3d 327 (7th Cir. 2004).

[99] *Id.* at 901.

[100] *See Halprin*, 388 F.3d at 330–31.

[101] Short, *supra* note 24, at 205 (quoting 24 C.F.R. § 100.400(c)(2) (2022)). Under the regulation, it is unlawful for a housing provider to "threaten[], intimidat[e] or interfer[e] with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons." § 100.400(c)(2). However, this regulation does not address the prohibitions as they are applicable to exercises of discrimination or harassment perpetrated by housing *residents*. *See* § 100.400 (lacking any reference to persons outside of housing providers).

discrimination.[102] For example, in *Bloch v. Frischolz*, Jewish residents of a Chicago condominium building, relying on various provisions of the FHA, brought suit against their condominium association and its president for exhibiting anti-Semitic behavior towards them.[103] On rehearing *en banc* the United States, participating as amicus curie, argued in favor of the court interpreting the FHA as providing protection from postacquisition discrimination because "[n]othing in the statute indicates that it is limited to discrimination in the initial sale or rental transaction."[104] Going a step further than it did in *Halprin*, the Seventh Circuit more clearly announced that the FHA's protection may extend to postacquisition discrimination that works to constructively evict[105] a resident. However, the Seventh Circuit still refrained from elaborating on exactly what circumstances make for an actionable postacquisition discrimination claim, thereby precluding a precise legal framework for future claimants.[106]

The Seventh Circuit has therefore taken the position that in some circumstances homeowners or tenants can assert a cause of action under the FHA for discrimination that occurs after the homeowner or tenant has moved in.[107] However, this stance was asserted vaguely and cautiously.[108] The court warned

---

[102] *See* Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009).

[103] *Id.* at 772–74.

[104] Jessica D. Zietz, *On Second Thought: Post-Acquisition Housing Discrimination in Light of Bloch v. Frischholz*, 66 UNIV. MIA. L. REV. 495, 514–15 (2012) (alteration in original) (quoting Brief for the United States as Amicus Curiae in Support for Plaintiff-Appellants Urging Reversal and Remand on Fair Housing Claims, Bloch v. Frischholz, 587 F.3d at 771 (7th Cir. 2009) (No. 06-3376)).

[105] Zietz, *supra* note 104, at 515. Constructive eviction can be defined as follows:

> [O]ccur[s] when a landlord does not physically or legally evict a tenant, but takes actions that interfere with the tenant's use and enjoyment of the premises significantly . . . Constructive eviction can occur as a result of the landlord's breach of the implied covenant of quiet enjoyment if: (1) The landlord substantially interferes with the tenant's use and enjoyment of the premises by their actions or failure to act to resolve a problem; (2) The tenant gives the landlord notice of the problem and the landlord fails to respond and resolve the problem; and (3) The tenant vacates the premises in a reasonable amount of time after the landlord fails to resolve the problem.

Constructive Eviction, LEGAL INFO. INST., https://www.law.cornell.edu/wex/constructive_eviction [https://perma.cc/MP9N-PLPC].

[106] *See* Zietz, *supra* note 104, at 515.

[107] *See Bloch*, 587 F.3d at 772.

[108] *See id.* at 776. The court explains that

> [t]here *could* be situations where a person is denied that right [to live where they choose for discriminatory reasons] after he or she moves in. . . . So we agree with *Halprin* that § 3604(a) *may* reach postacquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant, somewhat like a constructive eviction.

its opinions in these cases provided minimal leeway for postacquisition discrimination claims,[109] and it did not provide any test or the exact elements that would give rise to an actionable claim.[110] Therefore, the extent of protection against postacquisition discrimination under the FHA has remained unclear.[111] In particular, the question of whether a claim brought by a *tenant* against a landlord or property owner for experiencing discrimination or harassment at the hands *of a fellow tenant* is actionable under the FHA has been one of first impression in federal courts in recent years, including in the Seventh Circuit.[112] Both the lack of precedent for this particular legal issue and the lack of clarity concerning the outer bounds of the FHA's enforceability have allowed courts to diverge in their positions on the actionability of such a claim.

II. COURTS AT ODDS OVER LANDLORD LIABILITY FOR TENANT-ON-TENANT DISCRIMINATION

In 2018, the Seventh Circuit was once again confronted with a postacquisition discrimination claim.[113] In *Wetzel v. Glen St. Andrew Living Community*, a senior community housing resident was discriminated against and harassed by fellow residents on the basis of her sexual orientation.[114] The Seventh Circuit ruled in favor of the plaintiff resident, going further than it did in *Halprin* and *Bloch* by specifically defining elements that, if satisfied, give rise to an actionable postacquisition discrimination claim under the FHA.[115]

However, in March 2021 the Second Circuit positioned itself as an adversary of the Seventh Circuit in *Francis v. Kings Park Manor*.[116] In *Francis*, the court ruled against a plaintiff tenant who brought a postacquisition discrimination claim against the property owners of his apartment building, his

---

Id. (emphasis added). The court here provides that it will not entirely foreclose any possibility of a viable postacquisition discrimination claim, but does so in an allusive rather than concrete fashion.

[109] *See* Zietz, *supra* note 104, at 515.

[110] *See Bloch*, 587 F.3d at 772 (concluding only "that in some circumstances homeowners have an FHA cause of action for discrimination that occurred after they moved in").

[111] *See id.*; *see also* Zietz, *supra* note 104, at 515.

[112] *See* Canter et al., *supra* note 17.

[113] Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 859 (7th Cir. 2018).

[114] *Id.* at 859–60.

[115] *Id.* at 861–62.

[116] *See infra* Section II.B. The 2019 ruling in *Francis v. Kings Park Manor* and the 2021 re-hearing en banc are discussed independently as to their contrasting rulings, but will be referenced jointly to discuss the collective impact of the case.

landlord, and a fellow tenant.[117] Here, the tenant plaintiff reported numerous instances of targeted racial discrimination and harassment at the hands of the fellow tenant, which the landlord consistently disregarded.[118] The Second Circuit held the claim in this case was not actionable under the FHA because the plaintiff failed to establish the elements necessary to make the claim actionable.[119] In particular, the court explained that the plaintiff failed to demonstrate the defendants' disregard was "motivated by racial animus"[120] or the defendants were capable, in the first instance, of exerting a level of control sufficient to alter tenant behavior.[121]

While these two cases involved different housing settings, the underlying facts are similar in nature and are therefore legally comparable. Both cases involved a member of a protected class occupying a shared living space who endured persistent discrimination and harassment on the basis of a protected class characteristic where the discrimination was reported to or witnessed by individuals in positions of authority.[122] Therefore, the same underlying question was at issue for the federal courts to resolve: whether a plaintiff's postacquisition discrimination claim is actionable against a landlord or authoritative entity that fails to cure discrimination perpetrated by a fellow resident of the community-style housing.[123] However, despite the contextual similarity between these cases, the two courts diverged in their conclusions and the tenant-on-tenant discrimination "circuit split" was born.[124]

---

[117] Francis v. Kings Park Manor, Inc., 992 F.3d 67, 70–72 (2d Cir. 2021) (en banc).

[118] *See id.* at 71.

[119] *Id.* at 73.

[120] *Id.* at 74.

[121] *Id.* at 75.

[122] *See* Francis v. Kings Park Manor, Inc., 944 F.3d 370, 373–74 (2d Cir. 2019); *see also Francis*, 992 F.3d at 71; Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 859–60 (7th Cir. 2018).

[123] *See Francis*, 944 F.3d at 373; *see also Francis*, 992 F.3d at 70; *see also Wetzel*, 901 F.3d at 862.

[124] *Francis*, 944 F.3d at 373; *Francis*, 992 F.3d at 70. Conceptually speaking, a "circuit split" occurs when "two or more [federal] courts of appeals have decided the same legal issue differently" because the courts interpreted and applied the federal law that gave rise to the issue differently. Cohen & Cohen, *supra* note 23, at 990; *see also* DEBORAH BEIM & KELLY RADER, YALE UNIV, EVOLUTION OF CONFLICT IN THE FEDERAL CIRCUIT COURTS 1 (2015), https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/EvolutionofConflict.pdf [https://perma.cc/DK4P-SA5J].

A. Wetzel v. Glen St. Andrew Living Community

1. Facts and Holding

Masha Wetzel was an openly lesbian resident at St. Andrew Living Community (St. Andrew) when multiple fellow residents began physically and verbally tormenting her in the common living spaces because of her sexual identity.[125] These attacks included homophobic slurs (e.g., telling her homosexuals "will burn in hell"),[126] threats of physical violence against her, and numerous instances of actual physical violence against her.[127] Wetzel repeatedly reported the discriminatory incidents to St. Andrew staff members, imploring them to rectify the abusive behavior against her.[128] Under St. Andrew's Tenant's Agreement, residents were prohibited from engaging in activity that disrupts the "peaceful use and enjoyment of the community by other tenants or [poses] a direct threat to the health and safety of other individuals."[129]

Despite the assaults against Wetzel appearing to fall squarely within these categories of prohibited conduct, St. Andrew staff members instructed Wetzel to ignore the harassment, wrote the behavior off as accidental, and even proceeded to retaliate against her for having complained about the discriminatory conduct.[130] Not only did staff members restrict and bar Wetzel's access to certain communal areas, but they went so far as to falsely accuse her of engaging in behavior against St. Andrew's policy.[131] They even physically struck her for contesting such allegations.[132] Abused, ignored and silenced, Wetzel was essentially ostracized in her own home.[133] She ate in her room, avoided the common spaces, and felt unsafe venturing anywhere alone in the event of a run in with her harassers.[134]

Wetzel subsequently brought action against the owners and operators of St. Andrew (Corporate Defendants) and St. Andrew's managing staff members for violating the FHA by failing to "ensure a non-discriminatory living environment and retaliat[ing] against her for complaining about sex-based

---

125 *Wetzel*, 901 F.3d at 859.
126 *Id.* at 860.
127 *Id.*
128 *Id.*
129 *Id.* at 859 (internal quotation marks omitted).
130 *Id.* at 860.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.* at 861.

harassment."[135] The Seventh Circuit therefore needed to determine whether property owners and managers could be held liable under the FHA for failing to address known tenant-on-tenant discrimination.[136] This question of if and to what extent the FHA protects against postacquisition discrimination perpetrated by a fellow *resident* reflected a matter of first impression for the Seventh Circuit.[137]

The Seventh Circuit held that the Corporate Defendants were liable for failure to employ available remedial tools to rectify the discrimination Wetzel experienced at the hands of fellow St. Andrew residents.[138] In coming to this conclusion, the court based its analysis on a three-prong test that, in the court's view, needed to be satisfied to establish a viable "hostile-housing-environment claim"[139] against a landlord, under the FHA.[140] The three elements were (1) the plaintiff victim belongs to a protected class, for which the identifiable characteristic of the group was the basis of the discrimination; (2) the perpetrator's conduct amounted to "severe or pervasive"[141] harassment which substantially interfered with the plaintiff victim's use and enjoyment of her tenancy; and (3) a factual basis exists for which liability can justifiably be conferred to the defendant(s).[142]

2. Analysis

The court found the first element of a hostile housing environment claim was satisfied since discrimination based on sexual orientation falls under the umbrella of sex discrimination prohibited by Title VII of the 1964 Act (Title VII) and "applies with equal force under the FHA."[143] The court then found Wetzel more than sufficiently demonstrated she was subjected to "severe and pervasive"[144] harassment because of the substantial interference with the use and enjoyment of her tenancy at St. Andrew, thereby satisfying the second prong.[145] As for the third element, the court held Wetzel's claim was actionable under the FHA because the

---

135 *Id.*
136 *Id.*
137 *See id.* at 862.
138 *Id.* at 859.
139 *Id.* at 861.
140 *Id.* at 861–62.
141 *Id.*
142 *Id.*
143 *Id.* at 862.
144 *Id.*
145 *Id.*

defendants were aware of the harassment and failed to deploy any remedial tools to attempt to remedy the situation.[146]

Since the FHA lacks its own explicit test for liability in this context, Chief Judge Wood relied on similarly situated antidiscrimination statutes to support the court's holding. Specifically, the court leaned heavily on Title VII and Title IX to conclude that Wetzel need not prove the defendants' disregard was motivated by racial animus or that the defendants had "control in the absolute sense" over the situation.[147] As a result of this shortcoming, the court needed to outsource from analogous, but not entirely applicable, antidiscrimination statutes.[148] In particular, the court relied on both Title VII, which prohibits discrimination in employment,[149] and Title IX of the Education Amendments of 1972, which prohibits discrimination in education.[150] Title VII and the FHA have been recognized as "'functional equivalent[s]' to be 'given like construction and application'" because they encompass the same broad objectives and have a significant amount of identical language.[151] Presuming Congress therefore intended for Title VII and the FHA to provide the same extent of protection in their analogous contexts, the court opined that employer liability for disregarded discrimination under Title VII should generate liability for similarly situated landlords.[152]

The court next turned to Title IX of the Education Amendments of 1972, which prohibits discrimination in education.[153] In this setting, specifically in *Davis v. Monroe County Board of Education*, the Supreme Court has held a student could hold a city school board liable for failure to address known student-on-student discriminatory harassment.[154] It was of the court's opinion in *Wetzel* that the principles laid down in *Davis* could be applied to the housing setting, with the pivotal point being St. Andrew possessed actual knowledge of the discriminatory harassment Wetzel suffered.[155]

In examining both Title VII and Title IX, the court also rejected the defendants' contention that liability should only be

---

[146] *Id.* at 862–65.

[147] *Id.* at 863–65.

[148] *Id.*

[149] *See id.*; 42 U.S.C. §§ 2000e–2000e-17.

[150] 20 U.S.C. §§ 1681–1688; *see also Wetzel*, 901 F.3d at 863.

[151] *Wetzel*, 901 F.3d at 863 (alterations in original) (quoting Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 295 (7th Cir. 2000)).

[152] *Id.*

[153] *Id.*

[154] *Id.* at 864; Davis v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629, 639–41, 646–47 (1999).

[155] *See Wetzel*, 901 F.3d at 864–65; *see also Davis*, 526 U.S. at 640, 642.

imputed where the landlord's inaction was motivated by racial animus.[156] The court explained that these identically worded statutes have not been judicially interpreted as requiring the showing of such a motivation to hold employers or school districts liable.[157] Given the defendant provided no reason for the court to assume the FHA requires this, the Seventh Circuit was unpersuaded to diverge from this interpretation in an analogous situation.[158] Therefore, while the court made light of the FHA's failure to provide its own explicit test for landlord liability, the court felt assured other antidiscrimination statutes lent enough support to rationalize the court's conclusions.[159]

In *Wetzel*, the Seventh Circuit was more explicit with its stance than it was in *Halprin* and *Bloch*,[160] cementing its position on landlord liability for tenant-on-tenant discrimination going forward.[161] "Now, the rule in the Seventh Circuit is that the Fair Housing Act '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.'"[162] In creating liability under these circumstances, the court framed its analysis around 42 U.S.C. § 3617's prohibition of "a hostile housing environment."[163] Section 3617 prohibits discrimination or harassment that creates an interference with the "use and enjoyment of a home—by another name, a hostile housing environment."[164] The court interpreted this statute to allow for the imputation of liability to a landlord or property manager when they fail to deploy available remedial tools to address a tenant's discriminatory conduct against another tenant, thereby exposing the victim tenant to a hostile housing environment.[165] While the defendants in *Wetzel* argued liability would be inappropriate because their ability to affect tenant conduct is minimal given tenants' expectation "to live free from a landlord's interference,"[166] the court refuted the notion that a plaintiff

---

156 *Wetzel*, 901 F.3d at 862–63.

157 *Id.* at 864.

158 *Id.* at 863–64.

159 *Id.*

160 *See supra* notes 98–101 and accompanying text.

161 *See* Andrew M. Lieb, *Landlord Liability for Tenant-on-Tenant Discrimination: Split in the Federal Circuits*, N.Y.L.J. (Apr. 14, 2021, 11:15 AM), https://www.law.com/newyorklawjournal/2021/04/14/landlord-liability-for-tenant-on-tenant-discrimination-split-in-the-federal-circuits/ [https://perma.cc/T7R5-Q2VW].

162 *Id.* (quoting *Wetzel*, 901 F.3d at 859).

163 *See Wetzel*, 901 F.3d at 861.

164 *Id.*; *see also* 42 U.S.C. § 3617.

165 *See Wetzel*, 901 F.3d at 861–62, 865.

166 *Id.* at 865.

tenant must demonstrate "[c]ontrol in the absolute sense."[167] In the Seventh Circuit's opinion, proving the defendant landlord or property manager possessed remedial tools and the ability to impose sanctions was sufficient for a plaintiff tenant to meet their burden of proof.[168]

A few courts have applied a similar hostile housing environment theoretical framework in adjudicating claims involving circumstances similar to those in *Wetzel*. For example, in *Scutt v. Doris*, a tenant brought action against her former landlords for failing to acknowledge a cotenant's discrimination against her for her LGBTQIA+ status.[169] The District of Hawaii held the plaintiff tenant's claims could proceed on a hostile housing environment theory because the landlords knew the plaintiff tenant was being harassed but failed to take any action to rectify the situation, thereby exposing the plaintiff to a hostile housing environment.[170] The court here took the stance that a hostile housing environment claim was actionable under the FHA.[171] In detailing the required elements to state a valid hostile housing environment claim, the court also excluded a requirement that the plaintiff demonstrate the landlord or property owner possessed substantial control over the harasser or the environment.[172] Ultimately, however, not many courts have specifically addressed tenant-on-tenant discrimination claims, and this lack of case law arguably provided the opportunity for the Second Circuit to subsequently diverge from the Seventh Circuit's approach.

B. Francis v. Kings Park Manor, Inc.

1. Facts and Holding

In 2019, the Second Circuit was faced with a case factually analogous to *Wetzel* in *Francis v. Kings Park Manor*.[173] Donahue Francis was a Black tenant renting a unit in an apartment building located in Suffolk County, New York, owned by Kings Park Manor (KPM).[174] Over a period of approximately seven

---

[167] *Id.*

[168] *Id.*

[169] *See* Scutt v. Dorris, No. 20-00333, 2021 WL 206356, at *5–6 (D. Haw. Jan. 20, 2021) (order dismissing in part and allowing to proceed in part).

[170] *Id.* at *6.

[171] *Id.* at *5–6.

[172] *See id.* at *6.

[173] Francis v. Kings Park Manor, Inc., 944 F.3d 370, 373–75 (2d Cir. 2019); *see also Wetzel*, 901 F.3d at 859–61.

[174] Francis v. Kings Park Manor, Inc., 992 F.3d 67, 71 (2d Cir. 2021) (en banc).

months in 2012, Francis was subjected to verbal racist attacks, intimidation, and even a threat against his life by a fellow tenant, Reymond Endres.[175] Francis reported the incidents on two occasions to the Suffolk County Police, which ultimately led to Endres' arrest and conviction for aggravated harassment.[176] Francis also submitted three letters notifying KPM of the incidents including the police's involvement in the matter.[177] Although KPM acknowledged and investigated other non-race-related tenant violations pertaining to tenants' housing agreements or occurring on the premises,[178] Francis asserted KPM failed to "investigate or intervene" in any way in response to Francis' reports.[179] Instead, Francis claimed KPM explicitly instructed the property manager, Corrine Downing (Downing), to ignore the issue.[180] Endres continued to live at the apartment complex without reprisal.[181] As a result, Francis brought suit against KPM and Downing (collectively, KPM Defendants) alleging, *inter alia*, violation of the FHA, the Civil Rights Act of 1866, and the New York State Human Rights Law for failure to address, investigate, or rectify the "racially hostile housing environment created by one tenant targeting another."[182]

In this case, the Second Circuit was tasked with addressing the same legal issue as the Seventh Circuit in *Wetzel*: whether KPM Defendants, as owners and managers of a housing complex, could be held "[vicariously] liable under the FHA for" failing to address discrimination suffered by a tenant, in the occupancy of his dwelling and at the hands of another *tenant*.[183] In its original 2019 review of the case, the Second Circuit held where a landlord expressly refuses "to take any action to address what it knew to be a racially hostile housing environment created by one tenant targeting another . . . the FHA's broad

---

[175] *Id.*

[176] *Id.* at 71, 86.

[177] *Id.* at 71.

[178] *Id.* at 73.

[179] *Id.* at 71.

[180] *Id.*

[181] Francis v. Kings Park Manor, Inc., 944 F.3d 370, 375 (2d Cir. 2019).

[182] *Id.* at 373, 375.

[183] *Francis*, 944 F.3d at 373. Vicarious liability refers to a scenario in which an individual or entity can be held legally "responsible for the unlawful" conduct of a third party. Will Kenton, *Vicarious Liability*, INVESTOPEDIA (Aug. 22, 2021), https://www.investopedia.com/terms/v/vicarious-liability.asp [https://perma.cc/JAM7-JAMA]. Liability in this context arises because, as a result of a certain relationship, the individual or entity is viewed to have assumed a responsibility over the third party. *Id.* Therefore, when the individual or entity fails to properly execute such responsibility and an injury is subsequently caused by the third party, the injured plaintiff may be able to hold the individual or entity vicariously liable. *Id.* For example, "[a]n employer can be held liable" for an employee's unlawful discrimination or harassment of another "in the workplace." *Id.*

language and remedial scope" allows for a landlord to be held liable for such inaction and the resulting injuries.[184] The court thereby vacated the Eastern District of New York's dismissal of Francis' FHA and New York State law claims and remanded the case for further proceedings.[185]

In the 2021 rehearing *en banc*, however, the court "affirm[ed] the District Court's dismissal of Francis's [FHA] claim."[186] Analyzing the FHA claim "under a deliberate indifference theory of liability,"[187] the Second Circuit held Francis failed to state a viable FHA claim.[188] Under this theory, a plaintiff must demonstrate two elements: discriminatory intent and control.[189] Regarding the former, the plaintiff tenant must create a reasonable inference that the defendant landlord's disregard of the plaintiff's reports of discrimination stemmed from racial animus.[190] And as for the latter, the defendant and harasser must have existed in a relationship that would allow for the defendant to exert a substantial degree of control "over the context in which the harassment occurs and over the harasser."[191] Here, the court held the circumstances involved failed to reveal discriminatory intent and Francis did not, and essentially could not, establish substantial control in this context.[192]

However, in setting forth the required elements for a prima facie case and its holding, the Second Circuit failed to attach a concrete definition to "substantial control."[193] Instead, the court's greatest attempt at clarification came in the form of a footnote.[194] The court only elaborated on "substantial control" in the negative, explaining that landlords, in their typical capacity, will never possess a level of authority equating to "substantial control over tenants," and that "[h]ere, Francis simply fail[ed] to allege—either plausibly or implausibly—that the KPM defendants had extraordinary power over tenants."[195]

---

184 *Francis*, 944 F.3d at 373.

185 *Id.*

186 Francis v. Kings Park Manor, Inc., 992 F.3d 67, 80 (2d Cir. 2021) (en banc).

187 *Id.* at 74.

188 *Id.* at 75.

189 *See id.* at 73–75.

190 *Id.* at 73–74.

191 *Id.* at 75.

192 *Id.* at 73–75.

193 *Id.* The Second Circuit explains that a plaintiff brings a viable FHA claim where the defendant "exercised substantial control over the context in which the harassment occurs and over the harasser," and that here Francis fails to sufficiently demonstrate the defendants had "substantial control," but never quantifies "substantial" or in any other way provides some sort of threshold for what qualifies as "substantial." *Id.*

194 *See id.* at 75 n.31.

195 *Id.*

2. Analysis

While the court assumes the deliberate indifference theory of liability could potentially form the basis of an FHA claim, it ultimately held the Francis's complaint failed to demonstrate discriminatory motivation or the requisite level of control.[196] The court first explained KPM defendants' previous acknowledgment of other violations was in and of itself sufficient to presume their disregard of Francis's reports was motivated by racial intolerance.[197] According to the court, Francis would have needed to provide a more robust factual basis to support an allegation of racial animus.[198] Once again, however, the court only provides minimal clarity, rather than being explicit as to what facts a similarly situated plaintiff *would* need to plead.[199] In concluding Francis could not establish substantial control, the court rejected any possibility that the requisite level of control could arise in the context of individual apartment-style housing.[200] The court noted the deliberate indifference theory of liability has almost exclusively come into play where discrimination occurred in a school or prison, given the unique level of authority assertable over individuals in these environments.[201] In these contexts, the defendant assumes a substantial level of control over a harasser and the environment in which harassment ensues, and therefore disregard for its occurrence gives way to liability.[202] The characteristics of apartment-style housing, on the other hand, neither allow for a defendant landlord to exert control over a tenant nor grant a

---

196 *Id.* at 73–75, 75 n.31.

197 *Id.* at 73–74. As for the racial animus prong, Francis argued that staff members' acknowledgement of non-race-related violations paired with their disregard for his reports of racial discrimination constituted intentional discrimination. *Id.*

198 *Id.*

199 *See id.* The court justified its rejection of Francis's claim by arguing that to find Francis "plausibly pleaded discriminatory intent" from the facts alleged "would be to indulge the speculative inference that 'because the KPM Defendants did *something* with regard to *some* incident involving *some* tenant at *some* past point,' racial animus explains the failure to intervene here," which clearly falls below the sufficient pleading threshold in the court's opinion. *Id.* at 74 (quoting Francis v. Kings Park Manor, Inc, 944 F.3d 370, 384 (2d Cir. 2019) (Livingston, J., dissenting)). The court then goes on to criticize Francis for vague allegations and for what he failed to allege, including not claiming KPM Defendants "regularly intervened in other disputes among tenants" or had a custom and "practice of addressing tenant-on tenant harassment." *Id.* But this comprises the extent of the court's elaboration on why Francis failed to create an inference that racial animus existed.

200 *See id.* at 75, 77–78.

201 *Id.* at 74.

202 *See id.*; *see also* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999).

landlord such "substantial control" over a tenant.[203] Therefore, the court, as a matter of law, shut down any possibility of claim viability for similarly situated individuals.[204]

Other courts have followed the Second Circuit's interpretation of landlord liability under the FHA in response to a claim involving tenant-on-tenant discrimination.[205] For example, in *Edstrom v. St. Nicks Alliance Corp.*, the New York Supreme Court Appellate Division held a landlord's failure to address a tenant's report of harassment inflicted by another tenant did not give rise to a viable FHA claim.[206] The court reasoned that the lack of a substantial degree of control over the harasser and the environment precluded landlord liability for the tenant's discriminatory behavior.[207]

C. The Impact of the Wetzel-Francis *Circuit Split*

Considering the starkly divergent holdings and rationales in *Wetzel* and *Francis*, largely due to the FHA's shortcomings, future claimants are now left with no concrete guidance regarding the answer to this relatively novel legal question. While the ability to bring a case in the Seventh Circuit would provide a more promising chance at claim viability, even the Seventh Circuit found its task challenging without any directives from the FHA. Ultimately, there is a very real chance individuals harmed in the same ways as Wetzel and Francis could end up with completely opposite outcomes simply because of where they must bring their case.

Given the prevalence of discrimination and harassment, it is nearly certain people belonging to protected classes will continue to be victimized. In the last few years, studies have shown this country continues to be plagued with detestable discriminatory conduct in all sectors of American life.[208] Consequently, Americans ranging from activists and celebrities

---

[203] *See Francis*, 992 F.3d at 75. In a footnote, the Second Circuit compares apartment living to the senior citizen community living setting at play in *Wetzel* to justify the Court's opinion that the characteristics of apartment-style housing inhibit landlords from exercising control. The court explains that in contrast to a living community with common living areas, dining areas, and facilities in which resident access can be restricted or services be revoked, the same is not true in more independent residential spaces such as apartments. *Id.* at 77 n.40.

[204] *See id.* at 75 n.31.

[205] *See, e.g.*, Edstrom v. St. Nicks All. Corp., 149 N.Y.S.3d 26, 28 (N.Y. App. Div. 2021).

[206] *Id.*

[207] *Id.*

[208] *See Confronting Prejudice: How to Protect Yourself and Help Others*, *supra* note 2; *see also* ROBERT WOOD JOHNSON FOUND. ET AL, *supra* note 1, at 4; *see also* Parker & Funk, *supra* note 2; *see also 2019 Study on Sexual Harassment and Assault*, *supra* note 3.

to everyday individuals on social media have called upon the government and institutional leaders to recognize how deeply embedded racism is in the United States.[209] On top of this, with the recent drastic spike in rent prices across the country in 2021,[210] it is very possible victims of discrimination and harassment will not only have no available legal recourse, but they will also have no physical means of escaping their harassers.[211] Therefore, Congress should address this circuit split legislatively both to combat the ongoing presence of hate crimes in this country and to alleviate the very real consequences individuals are facing in the wake of the current rental market.

III. AN FHA AMENDMENT TO PROTECT AGAINST POSTACQUISITION DISCRIMINATION

The divergence in the analytical paths taken by the Second and Seventh Circuits is what is known as a "circuit split."[212] While circuit splits are common, they are inherently sources of conflict that "undermine the uniformity, consistency, and predictability of federal law"[213] and "ha[ve] been so widely regarded as a threat to the fair and consistent distribution of justice."[214] Because circuit splits produce a negative perception of the justice system, scholars, legal professionals, and congressional commissions have worked adamantly towards determining how to yield more consistency between federal courts.[215] While this issue could very well see its way up to the

---

[209] *See These 16 People and Groups are Fighting for a More Equal America*, TIME (Feb. 20, 2020, 7:30 AM), https://time.com/5783951/equality-activists/ [https://perma.cc/MP8P-CX6U]; *see also* Joe McCarthy, *10 Celebrities Who Use Their Influence to Fight Injustice*, GLOB. CITIZEN (Jan. 11, 2018), https://www.globalcitizen.org/en/content/10-celebrities-fighting-racism-martin-luther-king/ [https://perma.cc/FK6F-W7C4]; *see also* Christian Peña, *How Social Media is Helping Students of Color Speak Out About Racism on Campus*, PBS (Sept. 8, 2020, 6:28 PM), https://www.pbs.org/newshour/education/how-social-media-is-helping-students-of-color-speak-out-about-racism-on-campus [https://perma.cc/5485-PS5B].

[210] In 2021, rent prices saw a "record-breaking spike" with the median rent price increasing 17.8% compared to the "average annual increase of only 2.3% from 2017 to 2019." Natalie Campisi, *Nowhere To Go: How Record-High Rent Hikes Have Cornered Renters*, FORBES ADVISOR (Jan. 26, 2022, 5:00 AM), https://www.forbes.com/advisor/mortgages/rent-prices-all-time-high/ [https://perma.cc/972M-7PYQ].

[211] *See id.* "The conversation has shifted 'from people not being able to pay rent in 2020 because of the pandemic, to not being able to pay rent in 2021 because rent prices jumped 12% overnight,' says Rob Warnock, senior research associate at Apartment List." *Id.*

[212] *See* BEIM & RADER, *supra* note 124.

[213] Cohen & Cohen, *supra* note 23, at 990.

[214] *Id.*

[215] *See id*; *see also* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020).

Supreme Court, waiting for precedent to be set at the highest level could take years.[216] Instead, Congress should proactively address this issue through legislation, not only to resolve the circuit split but also to show Americans the presence of any form of discrimination in the context of housing will not be tolerated. Specifically, the FHA should be amended to include provisions expressly prohibiting tenant-on-tenant discrimination and define the duty that property managers or owners owe to tenants upon notice of discriminatory behavior occurring on their properties.

A. Why Other Courses of Action or Inaction Will Not Suffice

An amendment to the FHA may seem to lack urgency or even necessity given that similarly motivated antidiscrimination statutes can provide legal guidance to courts. Arguably, Title VII and Title IX can effectively lend the needed direction to determine whether a person or entity in a position of authority should be held liable for discrimination that occurs in the housing context.[217] The Seventh Circuit felt confident in utilizing these external authorities to come to its conclusion on the legal issue.[218] Therefore, reliance on analogous federal provisions would arguably be more of a "quick fix" than Congress going through the process of proposing and implementing an amendment to the FHA.

However, the Seventh Circuit itself made a point to note there may be "potentially important differences between the relationship that exists" in a work environment and that which exists between a landlord and tenant.[219] Specifically, in the landlord-tenant context, tenants are much more independent of their landlords than employees or students are of their respective authority figures.[220] In light of these "important differences," the Seventh Circuit refrained from adopting the Title VII or Title IX standards as wholly applicable to this context.[221] Instead, the court referred to and relied upon these

---

[216] *See* Cohen & Cohen, *supra* note 23, at 990; *see also* Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic, New Report Finds*, A.B.A. J. (Aug. 31, 2021, 12:57 PM), https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds [https://perma.cc/P8L7-Y86A] (explaining the exponential increase in backlogging of cases across the country as a result of the COVID-19 pandemic).

[217] *See* Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 863–64 (7th Cir. 2018); *see also* Zietz, *supra* note 104, at 519.

[218] *See Wetzel*, 901 F.3d at 864.

[219] *Id.* at 863. The Seventh Circuit also made light of analogous dynamics that exist in the educational system. *Id.* at 863–64.

[220] *See id.* at 863–64.

[221] *Id.*

statutes to justify upholding *Wetzel*'s hostile environment claim to this context strictly *because* the FHA fails to spell out its own "test for landlord liability"—not because it was a sincerely satisfactory means of analyzing the legal issue.[222] The court's refusal to adopt these standards given the distinguishable characteristics of a housing environment reveals that continuing to rely on these external authorities is neither an ideal nor permanent solution.

To another end, why not wait for the Supreme Court to grant certiorari to a case involving this issue and let them create the law of the land through precedent? Cases that become the subject of circuit splits are often ultimately granted review by the Supreme Court in order to resolve the discrepancy between varying judicial interpretations.[223] However, the Court has more recently reduced the number of cases it has taken on, consequently increasing the amount of circuit splits that go unresolved.[224] Not only has the Court limited the cases it is willing to review, but it has also increasingly denied review to cases involving legal issues creating circuit splits.[225] The enduring COVID-19 pandemic poses an additional obstacle to this pressing legal issue being resolved by the Supreme Court in the near future.[226] Case backlog already exists as a normal, unremarkable aspect of the United States court system.[227] In the wake of the COVID-19 health crisis, however, the backlog across the country has now increased by approximately 33 percent due to court closures and delayed proceedings amidst the transition to online forums.[228] Therefore, relying solely on the Supreme Court to resolve circuit splits "has imposed serious and well-recognized burdens on the operation of the federal courts."[229]

Congress must initiate action to close the gaps in the FHA that give rise to the inconsistent interpretations of its scope in the context of postacquisition discrimination, rather than

---

[222] *See id.*

[223] *See* BEIM & RADER, *supra* note 124.

[224] Cohen & Cohen, *supra* note 23, at 990.

[225] *See id.* at 994–95.

[226] *See* Moran, *supra* note 216.

[227] *See* THOMSON REUTERS INST., THE IMPACTS OF THE COVID-19 PANDEMIC ON STATE & LOCAL COURTS STUDY 2021: A LOOK AT REMOTE HEARINGS, LEGAL TECHNOLOGY, CASE BACKLOGS, AND ACCESS TO JUSTICE 4 (2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf [https://perma.cc/FM4E-2FLM] ("Even in the best of times, the nation's courts consistently battle case backlogs for a variety of reasons.")

[228] *See* Moran, *supra* note 216. "In 2019, a year before the pandemic, the average backlog was 958 cases. During the last 12 months, the average backlog increased to 1,274 cases." THOMPSON REUTERS INST., *supra* note 227.

[229] Sassman, *supra* note 215, at 1401.

wait for the issue to make its way to the Supreme Court. Specifically, Congress should amend the FHA by annexing a test for liability similar to those included in Title VII and Title IX.[230] Title VII and Title IX, as the Seventh Circuit noted, are linguistically identical to the FHA and were enacted by Congress with the same broad objective in mind: to eliminate discrimination and harassment.[231] If these federal provisions were enacted with the same end goal in mind and are to be treated as "functional equivalent[s],"[232] it naturally follows that the FHA should adopt its own test for landlord liability when postacquisition discrimination or harassment occurs.[233]

B. The Pitfalls of the Second Circuit's Approach in Francis

The test for landlord liability should not follow the Second Circuit's deliberate indifference framework because it fails to hold landlords accountable to the fullest extent of their duty of care owed to tenants.[234] The Second Circuit's approach is dependent on the plaintiff's ability to establish the landlord or property owner possesses a substantial level of control over the environment *and* the harasser.[235] However, "the duty not to discriminate in housing conditions encompasses the duty not to permit *known* harassment on *protected* grounds (i.e., common areas of the building)."[236] The lack of agency or a custodial relationship between a landlord and tenant should not preclude an injured plaintiff from holding their landlord liable where the landlord had the ability to remedy, or at the very least attempt to remedy, the hostile environment.[237] Therefore, liability should attach not when a plaintiff is able to demonstrate control, but rather when it has been shown the landlord had remedial tools at their disposal to deter the known discriminatory conduct, but

---

[230] *See supra* Section II.A.2 (explaining how the FHA lacks an explicit test for liability while Title VII and Title IX, which are functionally and linguistically equivalent statutes, provide such clarity); *see also* Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)–(e)(17); *see also* Title IX, Education Amendments Act of 1972, 20 U.S.C. §§ 1681–88.

[231] Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 863 (7th Cir. 2018).

[232] *Id.* (alterations in original) (quoting Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 295 (7th Cir. 2000)).

[233] All circuit courts that have confronted some sort of postacquisition housing issue have acknowledged that the FHA's protections against discrimination extends to postacquisition conduct. *See, e.g.*, Francis v. Kings Park Manor, Inc., 992 F.3d 67, 89 (2d Cir. 2021) (en banc) (Lohier Jr., J., dissenting in part and concurring in part).

[234] *See* Greenspan, *supra* note 15.

[235] *Francis*, 992 F.3d at 75.

[236] *See* Greenspan, *supra* note 15.

[237] *Wetzel*, 901 F.3d at 865.

failed to utilize those tools.[238] This is the threshold embedded in the approach taken by the Seventh Circuit and offered in this note's proposed amendment below.[239]

The Second Circuit's approach also sets an extremely "high bar for tenants," which the court itself said will be nearly impossible to overcome in a landlord-tenant context since the relationship lacks agency or custodial control.[240] The Second Circuit quite hastily assumed in *Francis* a custodial relationship or some sort of agency, such as that found with an employer, in schools, or in prisons, is required to induce one to change their behavior.[241] However, under many lease agreements, landlords are empowered to terminate a lease and evict a tenant for engaging in illegal or objectionable conduct.[242]

The resident agreement in *Wetzel*, for example, allowed St. Andrew to evict any tenant who engaged in conduct that either threatened the health or safety of other residents or unreasonably interfered with residents' use and enjoyment of their home.[243] If a lease provides this discretion to a landlord, the threat of eviction provides more than enough incentive to change a reasonable tenant's conduct, despite the lack of agency or custodial nature of the landlord-tenant relationship.[244] While this may constitute extreme action, a landlord with the ability to stop discrimination or harassment by deploying an available remedial tool should be under a duty to do so, irrespective of the severity.

C. Proposed Solution: Amend the FHA by Adopting the Seventh Circuit's Approach

Therefore, Congress should propose an amendment to the FHA that implements a test for liability based on the Seventh Circuit's three-prong test guided by a hostile housing environment theory.[245] Specifically, Congress should amend Section 3604 of the FHA.[246] Enumerating postacquisition discrimination and defining the elements which must be present to hold housing authorities liable logically follows from the

---

[238] *See* Greenspan, *supra* note 15.

[239] *See Wetzel*, 901 F.3d at 861–62, 865.

[240] *See* Patrick McCormick, *High Bar for Tenants: Court Sides with Landlord in Harassment Case*, CAMPOLO, MIDDLETON & MCCORMICK, LLP (Jul. 29, 2021), https://cmmllp.com/high-bar-for-tenants-court-sides-with-landlord-in-harassment-case/ [https://perma.cc/DD3X-4HGH]; *Francis*, 992 F.3d at 74, 76.

[241] *Francis*, 992 F.3d at 75–76.

[242] *See* Lieb, *supra* note 161.

[243] *Wetzel*, 901 F.3d at 865.

[244] *See* Lieb, *supra* note 161.

[245] *Wetzel*, 901 F.3d at 861–62.

[246] *See* 42 U.S.C. § 3604.

language already present in this section.[247] Part (f) of Section 3604 prohibits discrimination in the sale or rental of a residential space, either by making it wholly unavailable or providing inequitable terms which effectively prevent an individual from reasonably acquiring the home.[248] In this portion of the statute, Congress should further provide that discriminatory practices that effectively prevent a reasonable person from *continuing to occupy* a space is similarly prohibited.[249] If individuals are protected from practical exclusion in the process of acquiring a home, they should continue to be protected from discrimination that may have the same effect once they have acquired the home.[250]

Specifically, the test amending the FHA must reflect the Seventh Circuit's hostile housing environment approach, rather than the Second Circuit's deliberate indifference approach. The latter does not consider the landlord's ability and duty to remedy hostile, illegal tenant conduct.[251] The former, on the other hand, provides for a fairer attachment of liability. By omitting the requirement that a plaintiff must establish discriminatory intent in a landlord's disregard of tenant-on-tenant discrimination, the Seventh Circuit's test more closely resembles Title VII and Title IX and restricts the focus to actual notice.[252] The three-prong approach employed by the court in *Wetzel* also eliminated the "substantial control" element, thereby recognizing the landlord's ability to induce behavioral change.[253] The elimination of these two elements does not imply landlords would be at risk of frivolous lawsuits by any slightly aggrieved tenant. While it attaches a lower threshold for liability, the test is balanced by still requiring a plaintiff to show that (1) *severe* misconduct occurred, (2) the landlord *substantially* disregarded such misconduct, *and* (3) the landlord had available remedial tools at its disposal to rectify the misconduct but did not utilize

---

[247] *See id.* (providing generally how and when discriminatory practices are prohibited for the purposes of the Fair Housing Act).

[248] § 3604(f).

[249] Section 3604 is an apt provision for such a change, in part, because "the language of this provision is expansive enough to cover situations in which existing housing is subsequently made unavailable as a result of violence or threats of violence." Short, *supra* note 24, at 214.

[250] The approach taken in *Wetzel* acknowledges that the protections afforded by the Fair Housing Act should continue to safeguard individuals after taking possession of their home, not simply during the acquisition process. *See* Martha C. Nussbaum, *Harassment and Capabilities: Discrimination and Liability in* Wetzel v. Glen St. Andrew Living Community, LLC, 87 UNIV. CHI. L. REV. 2437, 2450 (2020).

[251] *See* Lieb, *supra* note 161.

[252] *See* Wetzel v. Glen St. Andrew Living Cmty., 901 F.3d 856, 863–64 (7th Cir. 2018).

[253] *See id.* at 865.

them.[254] The Seventh Circuit's approach therefore embodies an equitable, yet balanced framework.[255]

Ultimately, Section 3604 functions as the bedrock of the FHA, considering every subsequent section of the FHA builds upon the fundamental protections laid out in that provision.[256] By annexing a test for landlord liability to the most basic tenet of the FHA, Congress will be filling one of the major gaps in this federal program in the most direct way possible. Section 3604(f)(3) defines what constitutes discrimination for the purposes of the FHA.[257] This portion of the provision identifies "refus[ing] to make reasonable accommodations . . . necessary to" ensure individuals are granted equal access to the use and enjoyment of a residential space as prohibited.[258] Annexing a subsection here that provides that landlords, property managers, or other housing association authority figures owe a duty to reasonably accommodate residents to ensure continued use and enjoyment of their homes would naturally follow from this language. This enumeration would then require an exacting threshold for when this duty is breached, at which point the Seventh Circuit's three-prong test could be incorporated.[259]

If Section 3604(f)(3)(B) already defines discrimination as failing to make accommodations necessary to provide equal access to dwellings, then housing authority figures should continue to be under a reflective duty to accommodate individuals once they have acquired the home.[260] Tenants or residents have a right to uninterrupted use and enjoyment of their home, even after the acquisition process, and such a right can certainly be obstructed by exposure to vicious discrimination

---

[254] *See id.* at 862–65.

[255] The approach taken in *Wetzel* acknowledges that the protections afforded by the Fair Housing Act should continue to safeguard individuals after taking possession of their home, not simply during the acquisition process. *See* Nussbaum, *supra* note 250, at 2450. It also recognizes that the FHA's "statutory duty not to discriminate" logically extends a legal responsibility to landlords to take reasonable measures to prevent discrimination from occurring in the spaces in which they have the authority to govern conduct. *Id.* Common areas in which residents of communal-style housing interact are certainly spaces in which landlords can exert their authority to prevent wrongful conduct in the interest of preserving the civil quality of the facility or building. *See* Lieb, *supra* note 161.

[256] 42 U.S.C. § 3604 sets out what constitutes discrimination in the sale or rental of housing and enumerates prohibited practices.

[257] § 3604(f)(3).

[258] § 3604(f)(3)(B).

[259] *See Wetzel*, 901 F.3d at 861–62.

[260] All circuit courts that have confronted some sort of postacquisition housing issue have at least acknowledged that the FHA's protections against discrimination should be viewed as extending to postacquisition scenarios. Francis v. Kings Park Manor, Inc., 992 F.3d 67, 89 (2d Cir. 2021) (en banc) (Lohier Jr., J., dissenting in part and concurring in part).

perpetrated by neighbors.[261] In this instance, landlords or property managers would then be obligated to employ available tools as necessary to rectify the situation, or be in breach of their duty under the FHA.[262]

CONCLUSION

For decades, legal professionals, scholars, and Congress itself have expended countless hours of time and research to reduce the volume of circuit splits and minimize their impact.[263] Congress has an opportunity to resolve one source of conflict for federal courts: the issue of landlord liability for tenant-on-tenant discrimination. The Second Circuit-Seventh Circuit split with *Francis* and *Wetzel* was not the first of its kind and surely will not be the last.[264] The plaintiffs in both of these cases were victims subjected to illegal discriminatory harassment.[265] However, one walked away with a victory while the other walked away empty handed, simply because of "the geographic location where their [respective] case[s were] decided."[266] Congress should eliminate this legal disparity and extend protection to vulnerable peoples. Individuals of protected classes are already likely to endure discrimination or harassment for who they are in the outside world.[267] They should not be subjected to discrimination in their own homes without at least an opportunity for legal recourse. Ultimately, preventing discrimination is the very purpose of the FHA production, and combating tenant-on-tenant discrimination deserves a front row seat.

Kelli Conway[†]

---

[261] *See supra* Part II. As seen in both *Francis* and *Wetzel*, along with numerous other federal court cases, individuals are psychologically, emotionally, and even physically harmed from exposure to discrimination to the point that they no longer feel it is safe physically or emotionally to live in their homes. *Id.*

[262] This is the perspective the Seventh Circuit took in *Wetzel v. Glen St. Andrew Living Community*. *See Wetzel*, 901 F.3d at 862–65.

[263] *See* Cohen & Cohen, *supra* note 23, at 990.

[264] Seven of the thirteen federal circuit courts have already been faced with, in one way or another, claims relating to postacquisition conduct. Francis v. Kings Park Manor, Inc., 992 F.3d 67, 89 (2d Cir. 2021) (en banc) (Lohier Jr., J., dissenting in part and concurring in part).

[265] *See The Impact of Discrimination*, *supra* note 4.

[266] *See* Cohen & Cohen, *supra* note 23 at 990.

[267] *See The Impact of Discrimination*, *supra* note 4.

[†] J.D. Candidate, Brooklyn Law School, 2023; B.A. Villanova University, 2020. Thank you to the entire *Brooklyn Law Review* staff for their hard work in the publication of this note. Thank you to my family for their unwavering love and support. I would not be where I am today without each of you. Lastly, a special thank you to my grandmother, who inspired me to pursue a career in law and who has shown me the true meaning of perseverance and success undeterred by adversity.