

**No. 06-3665**

---

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

---

**NEW WEST, an Illinois Limited Partnership,**

**Plaintiff-Appellant,**

**v.**

**CITY OF JOLIET, an Illinois Municipal  
Corporation, ARTHUR SCHULTZ, both  
individually and officially as the Mayor of Joliet,  
JOHN M. MEZERA, both individually and officially  
as the City Manager of Joliet, and JIM SHAPARD,  
both individually and officially as the Deputy City  
Manager of Joliet,**

**Defendants-Appellees.**

---

**On Appeal from the United States District Court  
For the Northern District of Illinois, Eastern Division**

**Hon. Judge Charles R. Norgle, Sr.**

**District Court No. 2005-cv-1743**

---

**BRIEF OF DEFENDANTS-APPELLEES  
CITY OF JOLIET, ARTHUR SCHULTZ,  
JOHN M. MEZERA, AND JIM SHAPARD**

---

**Peter A. Silverman (6196081)  
Carl A. Gigante (6185561)  
Catherine M. Towne (6287549)  
FIGLIULO & SILVERMAN, P.C.  
10 S. LaSalle Street, Suite 3600  
Chicago, IL 60603  
Telephone: 312-251-4600  
Facsimile: 312-251-4610  
Attorneys for Defendants-Appellees**

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: \_\_\_\_\_

Short Caption: \_\_\_\_\_

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

\_\_\_\_\_

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

\_\_\_\_\_

Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Attorney's Printed Name: \_\_\_\_\_

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** \_\_\_\_\_ **No** \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone Number: \_\_\_\_\_ Fax Number: \_\_\_\_\_

E-Mail Address: \_\_\_\_\_

**TABLE OF CONTENTS**

DISCLOSURE STATEMENT ..... 1

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF JURISDICTION..... 1

STATEMENT OF THE ISSUES..... 3

STATEMENT OF FACTS ..... 4

SUMMARY OF THE ARGUMENT..... 7

ARGUMENT..... 11

I. The District Court Properly Dismissed New West's Conflict Preemption  
Claims ..... 11

    A. New West’s Conflict Preemption Claims are Moot on Appeal..... 11

    B. The District Court Properly Dismissed New West’s Conflict Preemption  
    Claims for Lack of Subject Matter Jurisdiction..... 13

    C. Even if the District Court has Subject Matter Jurisdiction of New West’s  
    Conflict Preemption Claims, Those Claims are Properly Dismissed Under  
    Rule 12(b)(6) Because No Conflict Exists ..... 17

II. The District Court Properly Dismissed New West’s Claims Brought Under 42 U.S.C. §§  
1982 and 1983 ..... 22

    A. The District Court Properly Dismissed New West’s Claims Brought  
    Under Section 1983 for Failure to Allege a Municipal Policy ..... 23

    B. The Claims Against the Individual Defendants In Their Individual ..... 27

    C. New West Lacks Standing to Assert a Claim for a Violation of Section  
    1982 Because It is Not a “Citizen” ..... 32

    D. New West’s Civil Rights Claims Brought Under Sections 1982 and  
    1983 were Properly Dismissed Because New West Lacks Standing to  
    Assert the Rights of Third-Parties..... 35

    E. New West Cannot State a Claim Under Section 1983 for a Violation of the

Fifth Amendment Due Process Clause.....	40
III.    The District Court Properly Dismissed New West’s Fair Housing Act Claim .....	41
A.    New West’s Claim for Injunctive Relief is Moot .....	41
B.    New West Lacked Standing to Assert a Claim Under the FHA.....	43
C.    New West Failed to State a Claim Under the FHA .....	46
CONCLUSION.....	49
CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(A)(7) .....	50
CIRCUIT RULE 31(E)(1) CERTIFICATION.....	51
PROOF OF SERVICE .....	52
SERVICE LIST .....	53
TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX .....	54

## TABLE OF AUTHORITIES

### CASES

<i>Adkins v. Ill. Cent. R.R. Co.</i> , 326 F.3d 828 (7th Cir. 2005).....	16
<i>Althin CD Med., Inc. v. W. Suburban Kidney Ctr., S.C.</i> , 874 F. Supp. 837 (N.D. Ill. 1994).....	45
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....	30, 31
<i>Aurora Loan Servs., Inc. v. Craddieth</i> , 442 F.3d 1018 (7th Cir. 2006) .....	45
<i>Barron v. Baltimore</i> , 32 U.S. 243 (1833).....	15, 40
<i>Baxter v. Vigo County Sch. Corp.</i> , 26 F.3d 728 (7th Cir. 1994).....	24
<i>Brokaw v. Mercer County</i> , 235 F.3d 1000 (7th Cir. 2000) .....	27
<i>California Coastal Comm’n v. Granite Rock Co.</i> , 480 U.S. 572 (1987) .....	21, 22
<i>Caplin &amp; Drysdale v. United States</i> , 491 U.S. 617 (1989) .....	36
<i>Cisneros v. Alpine Ridge Group</i> , 508 U.S. 10 (1993).....	19
<i>City of Columbus v. Ours Garage &amp; Wrecker Serv., Inc.</i> , 536 U.S. 424 (2002).....	19
<i>Clay v. Fort Wayne Cmty. Sch.</i> , 76 F.3d 1030 (7th Cir. 1996).....	36, 39
<i>Clifton Terrace Assoc. v. United Tech. Corp.</i> , 929 F.2d 714 (D.C. Cir. 1991).....	37
<i>Comtel Techs., Inc. v. Schwendener, Inc.</i> , No. 04-3870, 2005 WL 433327 (N.D. Ill. Feb. 25, 2003) .....	34
<i>Commissioner v. Clark</i> , 202 F.2d 94 (7 <sup>th</sup> Cir. 1953).....	48
<i>Diamond v. United States</i> , 657 F.2d 1194 (Ct. Cl.1981) .....	45
<i>Duda v. Bd. of Ed. of Franklin Park Pub. Sch. Dist. No. 84</i> , 133 F.3d 1054 (7th Cir. 1998).....	25, 26
<i>Duke Power Co. v. Carolina Envtl. Study Group</i> , 438 U.S. 59 (1978) .....	17
<i>Endres v. Indiana State Police</i> , 334 F.3d 618 (7th Cir. 2003) .....	24

<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	Passim
<i>Feldman v. Bahn</i> , 12 F.3d 730 (7th Cir. 1993).....	28
<i>Fifth Third Bank v. CSX Corp.</i> , 415 F.3d 741 (7th Cir. 2005).....	18
<i>Forest Park II v. Hadley</i> , 336 F.3d 724 (8th Cir. 2003) .....	20
<i>Forseth v. Vill. of Sussex</i> , 199 F.3d 363 (7th Cir. 2000).....	41
<i>Franks Bros., Inc. v. Wisconsin Dep’t of Transp.</i> , 409 F.3d 880 (7th Cir. 2005) .....	19
<i>Golden State Transit Corp. v. City of L.A.</i> , 493 U.S. 103 (1989).....	15
<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	40
<i>Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n</i> , 388 F.3d 327 (7th Cir. 2004).....	46, 47
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982) .....	42
<i>Hayfield Northern R.R. Co., Inc. v. Chicago &amp; N.W. Transp. Co.</i> , 467 U.S. 622 (1984).....	19
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941).....	18
<i>Horwitz v. Bd. of Ed. Avoca Sch. Dist. No. 37</i> , 260 F.3d 602 (7th Cir. 2001) .....	24, 25
<i>Humphries v. CBOCS West, Inc.</i> , No. 05-4047, 2007 WL 60876 (7th Cir. Jan. 10, 2007).....	33
<i>Hurd v. Hodge</i> , 334 U.S. 24 (1948).....	34
<i>Ill. Ass’n of Mortgage Brokers v. Office of Banks and Real Estate</i> , 308 F.3d 762 (7th Cir. 2002) .....	14
<i>James v. Vatierra</i> , 402 U.S. 137 (1971).....	16, 20
<i>Kaupus v. Vill. of Univ. Park</i> , No. 02 C 3674, 2003 WL 22048173, 92 Fair Empl. Prac.Case (BNA) 1236 (N.D. Ill. Sept. 2, 2003) .....	25, 26
<i>Killinger v. Johnson</i> , 389 F.3d 765 (7th Cir. 2004).....	25
<i>Knapp v. Eagle Prop. Mgmt. Corp.</i> , 54 F.3d 1272 (7th Cir. 1995).....	20
<i>Knapp v. Smilganic</i> , 54 F.3d 1435 (W.D. Wis. 1995) .....	20

<i>Kulwicki v. Dawson</i> , 969 F.2d 1454 (3d Cir. 1992) .....	40
<i>Lauer Farms, Inc. v. Waushara Cty. Bd. of Adjustment</i> , 986 F. Supp. 544 (E.D. Wis. 1997).....	38
<i>Lee v. City of Chicago</i> , 330 F.3d 456 (7th Cir. 2003).....	41
<i>Lekas v. Briley</i> , 405 F.3d 602 (7th Cir. 2005) .....	26
<i>Looper Maint. Serv. Inc. v. City of Indianapolis</i> , 197 F.3d 908 (7th Cir. 1999).....	23, 24
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	36, 43
<i>Massey v. Helman</i> , 196 F.3d 727 (7th Cir. 2000).....	17
<i>McConnell v. F.E.C.</i> , 540 U.S. 93 (2003) .....	43
<i>McMillian v. Monroe County, Ala.</i> , 520 U.S. 781 (1997).....	25
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996) .....	18
<i>Metro. Life. Ins. Co. v. Ward</i> , 470 U.S. 869.....	32
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978).....	22, 23
<i>Mungiovi v. Chi. Hous. Auth.</i> , 98 F.3d 982 (7th Cir. 1996).....	15
<i>Neighborhood Research Inst. v. Campus Partners for Cmty Urban Dev.</i> , 212 F.R.d. 364 (S.D. Ohio 2002) .....	16
<i>New York State Conf. of Blue Cross &amp; Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995).....	12, 19
<i>N. Shore Gas Co. v. E.P.A.</i> , 930 F.2d 1239 (7th Cir. 1991).....	36
<i>Nott v. Aetna U.S. Healthcare, Inc.</i> , 660 F. Supp. 3d 565 (E.D. Pa. 2004).....	16
<i>Park View Heights Corp. v. City of Black Jack</i> , 467 F.2d 1208 (8th Cir. 1972).....	34
<i>Payne ex rel. Hicks v. Churchich</i> , 161 F.3d 1030 (7th Cir. 1998).....	28
<i>Rodgers v. Lincoln Towing Serv., Inc.</i> , 596 F. Supp. 13 (N.D. Ill. 1984).....	26, 27
<i>Runnemed Owners, Inc. v. Crest Mortgage Corp.</i> , 861 F.2d 1053 (7th Cir. 1988).....	44
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001).....	28, 29

<i>Shaikh v. City of Chicago</i> , 341 F.3d 627 (7th Cir. 2003).....	12, 19, 46
<i>Shaw v. Delta Airlines, Inc.</i> , 463 U.S. 85 (1983).....	14
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976).....	39
<i>South Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors</i> , 935 F.2d 868 (7th Cir. 1991).....	18, 39
<i>Spiegel v. City of Chicago</i> , 106 F.3d 209 (7th Cir. 1997).....	28
<i>Sttots v. Cmty. Sch. Dist. No. 1</i> , 230 F.3d 989 (7th Cir. 2000).....	11
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969).....	32, 33
<i>TIG Ins. Co. v. Reliable Research Co.</i> , 334 F.2d 630 (7th Cir. 2003).....	13
<i>Townsend v. Vallas</i> , 256 F.3d 661 (7th Cir. 2001).....	30
<i>United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm’n</i> , 24 F.3d 1008 (7th Cir.1994).....	42
<i>U.S. Gen., Inc. v. City of Joliet</i> , 432 F. Supp. 346 (N.D. Ill. 1977).....	39
<i>Vill. of Bellwood v. Dwivedi</i> , 895 F.2d 1521 (7th Cir. 1990).....	34
<i>Vorhees v. Naper Auto Club, Inc.</i> , 272 F.3d 398 (7th Cir. 2001).....	14, 16
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	36
<i>Washington v. Confederated Bands and Tribes of the Yakima Indian Nation</i> , 439 U.S. 463 (1979).....	28
<i>White v. City of Markham</i> , 310 F.3d 989 (7th Cir. 2002).....	30
<i>Williamson County Reg’l Planning Comm’n v. Hamilton Bank</i> , 473 U.S. 172 (1985).....	41
<i>Zambrano v. Reinart</i> , 291 F.3d 964 (7th Cir. 2002).....	15

**STATUTES**

65 ILCS 5/3.1-15-10 .....	25
65 ILCS 5/3.1-35-5 .....	25

65 ILCS 5/5-3-7-(1), (6).....	25, 26
28 U.S.C § 1331.....	14
28 U.S.C § 2201.....	13
42 U.S.C § 1437f(a) .....	Passim
42 U.S.C § 1982.....	Passim
42 U.S.C § 1983.....	Passim
42 U.S.C § 1981.....	33
42 U.S.C § 1988.....	37
42 U.S.C § 3604.....	46, 47
42 U.S.C § 3617.....	46, 47

**OTHER AUTHORITIES**

24 C.F.R. § 100.400 .....	47, 48
24 C.F.R. § 245.405 .....	21
24 C.F.R. § 248.101 .....	21
24 C.F.R. § 401.403(b)(2) .....	44
24 C.F.R. § 401.500 .....	30
24 C.F.R. § 401.501 .....	30
24 C.F.R. § 970.2.....	21
24 C.F.R. Pt. 248.....	20
24 C.F.R. Pt. 970.....	21
Fed. R. Civ. P. 9.....	44
Fed. R. Civ. P. 12(b) .....	Passim

Pub.L 105-65 ("MAHRA") § 511.....Passim

## STATEMENT OF JURISDICTION

**New West's ("New West") Statement of Jurisdiction is not complete and correct. A complete and correct statement of jurisdiction follows.**

### **A. The District Court's Jurisdiction**

The District Court lacked original subject matter jurisdiction to entertain Count I of the Amended Complaint for want of New West's Article III standing to seek recovery for the injuries sought under that Count. New West has failed to allege a sufficient injury-in-fact as required by Article III.

The District Court had subject matter jurisdiction under 28 U.S.C. § 1343 over Counts II (section 1982); III (section 1983 for purported violation of the equal protection clause of the Fourteenth Amendment); and VI (section 1983 for purported violation of the due process clause of the Fifth Amendment) of the Amended Complaint. Section 1343 provides:

- (a) The district court shall have original jurisdiction of any civil action authorized to be commenced by any person:
  - ...
  - (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
  - (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . .

The District Court lacked original subject matter jurisdiction to entertain Counts V and VII of the Amended Complaint, because those Counts do not “arise under . . . the Constitution, laws or treaties of the United States” within the meaning of 28 U.S.C. § 1331. In those Counts, New West seeks a declaration that the Supremacy Clause bars

Joliet from instituting eminent domain or demolition proceedings. The Declaratory Judgment Act, 28 U.S.C. § 2201, however, does not provide an independent basis of subject matter jurisdiction, and New West pleads only conflict preemption, which does not provide basis for federal subject matter jurisdiction.

**B. Appellate Jurisdiction**

This is an appeal from the final judgment of the United States District Court for the Northern District of Illinois entered September 8, 2006, by the Honorable District Judge Charles R. Norgle. (R. 84.)<sup>1</sup> New West filed its Notice of Appeal on October 4, 2006. (R. 86.) This Court has jurisdiction of this appeal as an "appeal of a final decision of the district court[]" pursuant to 28 U.S.C. § 1291 (2007).

However, this Court lacks Article III jurisdiction to review the dismissal of Counts V and VII of the Amended Complaint for alleged violations of the Supremacy Clause because they are moot. New West's claim of conflict preemption contained in Count V is currently being adjudicated in the District Court (No. 05-6746), and thus the issue of whether the District Court properly dismissed Count V is moot. In Count VII, New West seeks a declaration that a legal proceeding by Joliet against Evergreen Terrace seeking demolition would violate the Supremacy Clause, but demolition was not sought in that proceeding (SA. 2-3), and thus the issue of whether the District Court properly dismissed Count VII is also moot.

---

<sup>1</sup> Citations to "(R. \_\_)" refer to docket entries in the appellate record. "(A. \_\_)" refers to a page in Appellant's separate appendix. "(AttA. \_\_)" refers to Appellant's required short appendix. "(SA. \_\_)" refers to the Appellees' supplemental appendix.

This Court also lacks Article III jurisdiction to review the dismissal of New West's sole claim for injunctive relief, which became moot during the pendency of this appeal. New West's sole claim for injunctive relief seeks an injunction to prevent Defendants-Appellees ("Joliet") "from further wrongful efforts to delay the closing of the deal with HUD." (A. 24). The referenced deal closed after New West filed its notice of appeal, and before it filed its brief. (SA. 2-3). The closing renders New West's prayer for injunctive relief moot.

### **STATEMENT OF THE ISSUES**

Joliet agrees with New West's Statement of the Issues, and adds to it the following issues presented by this appeal:

- V. Whether New West's conflict preemption claims (counts V and VII of the amended complaint) are moot on appeal.
- VI. If this Court finds that counts V and VII are not moot, and that federal subject matter jurisdiction over those claims exists, Whether New West's conflict preemption claims fails as a matter of law because no conflict exists.
- VII. Whether Arthur Schultz, John M. Mezera, and Jim Shapard (collectively the "Individual Defendants") are qualifiedly immune from this litigation, and thus properly dismissed below.
- VIII. If this Court finds that New West's section 1983 claim was not properly dismissed for failure to plead a practice or policy, Whether New West can assert a cause of action under that Statute based on purported violations of the equal protection rights belonging to third-parties.
- IX. As an alternative basis for affirmance, Whether New West has failed to state a claim in Count VI under section 1983 for violation of the Fifth Amendment due process clause.
- X. Whether New West's prayer for injunctive relief is moot on appeal.

- XI. Whether New West has failed to satisfy requisite Article III standing requirements to bring a claim under the Fair Housing Act.
- XII. Whether New West fails to state a claim under the Fair Housing Act because Section 3604 applies only to post-acquisition conduct, and any claim under § 3617 must be predicated upon a violation of § 3604, and to the extent that 24 C.F.R. § 100.400 would permit a claim for post-acquisition conduct, the regulation is invalid as exceeding the scope of the Statute.

### **STATEMENT OF FACTS**

Evergreen Terrace is a federally subsidized apartment complex that is over 40 years old. (R. 18, ¶ 10); (A. 6)<sup>2</sup>. It comprises two facilities commonly known as Evergreen Terrace I (“ET I”) and Evergreen Terrace II (“ET II”) (collectively “Evergreen Terrace”), the former being larger and the primary focus of this litigation. (R. 18, ¶ 13); (A. 7). New West is a for-profit Illinois Limited partnership that has owned and operated Evergreen Terrace since 1982. (R. 18, ¶¶ 10-11); (A. 6).

Congress passed the Multifamily Assisted Housing Reform Act of 1997 (“MAHRA”) to provide HUD with the authority to address the mounting financial challenges of maintaining the aging Section 8 housing stock. MAHRA authorizes HUD to provide owners of Section 8 rental facilities the cash to make necessary upgrades and repairs by refinancing and restructuring the existing debt. *See* Pub L 105-65 Sec. 511 amended by Pub L 106-74; (R. 18, ¶¶ 15-16); (A. 8). HUD coined the initiative the “Mark to Market” program.

In late 2001 New West approached HUD about refinancing ET I under the Mark to Market program. (R. 18, ¶ 15); (A. 8). The applicable regulations provide that Joliet

---

<sup>2</sup> Citations to “(R. \_\_)” refer to docket entries in the appellate record. “(A. \_\_)” refers to a page in Appellant’s separate appendix. “(AttA. \_\_)” refers to Appellant’s required short appendix. “(SA. \_\_)” refers to Appellees’ supplemental appendix.

receive notice of the proposed restructuring and be provided the opportunity to comment. 24 CFR § 410.500 (2002).

Joliet objected to the proposed financial restructuring of Evergreen Terrace. In Joilet's opinion, the 40 year-old campus constituted a blight on the community that posed public safety concerns. (R. 18, ¶ 18); (A. 8). Joliet believed the buildings to be in an unacceptable state of disrepair and that security and safety were completely inadequate. (R. 18, Ex. B); (A. 41). Joliet passed a resolution in which it declared that the buildings, improvements and grounds had become "extremely dilapidated, unsafe, and dangerous, unsanitary, crime infested and a substantial threat to the health, safety and welfare of the residents of Evergreen Terrace..."(*Id.*). The City Manager, Defendant John Mezera, submitted a memorandum to the Mayor, Defendant Arthur Schultz, and the City Council of Joliet regarding Evergreen Terrace. (R. 18, Ex. B); (A. 43-47). In the memorandum, Mezera set forth a litany of problems plaguing Evergreen Terrace over the past several years including hundreds of reports of serious crimes. Mezera stated that it was the opinion of the City's administration that safety and security of Evergreen Terrace is grossly inadequate. (R. 18, Ex. B); (A. 45) In addition, Mezera detailed numerous problems with the physical plant itself including inoperable elevators. (*Id.*).

Joliet was not alone in its opinion that Evergreen Terrace was in need of repairs. An engineering firm engaged by HUD's outside consultants concluded, in a November, 2004, report that Evergreen Terrace was in need of repairs. (R. 18 ¶ 30); (A. 12). New West itself acknowledged the need for repairs; stating in a letter to HUD that "many elements of the property have suffered deferred maintenance and have failed to function

during these past several years...” (R. 18, Ex. C); (A. 96). New West further conceded that new security measures were necessary, noting that “over the past three years much analysis has gone into the development of operating and security plans that we think are necessary to facilitate transition of the property from what it has been to what it must be.” (R. 18, Ex. C); (A. 97). Although New West promised to make the necessary repairs immediately upon closing on a restructuring agreement, HUD insisted that, as part of the restructuring plan, New West retain a consultant to provide additional assurance that the physical improvements to the property would be implemented. (R. 18, Ex. C); (R. 37, Ex. A); (A. 174).

Over Joliet’s objections, HUD’s outside contractor assured New West that a financial restructuring plan would be consummated for Evergreen Terrace. (R. 18, ¶ 30); (A. 12). HUD issued a Restructuring Commitment in May 2003. (R. 18, Ex. A); (A. 27). The Commitment, however, contained a host of contingencies, not the least of which was that New West would undertake certain undisclosed repairs. (R. 18, Ex. A); (A. 36). The May 2003 Restructuring Commitment set an “estimated” closing date of July 15, 2003. (R. 18, ¶ 22); (A. 9). Thereafter, HUD elected to postpone the closing, over New West’s urgings. (R. 18, ¶ 29); (A. 12).

On September 8, 2005, HUD issued a second restructuring commitment to New West (R. 18, ¶ 43); (A. 52). This restructuring agreement superceded the prior commitment. (R. 18, Ex. C); (A. 52) and it adjusted significantly upward the amount of rent New West would receive from HUD. (Compare reflected rents on page A35 with those on A60). At about this time, HUD issued a Housing Assistance Payment renewal

contract to New West. (R. 37, Ex. A); (A. 128). The renewal contract noted the following:

Owner has been advised by HUD's Real Estate Assessment Center That the Project in its present condition does not comply with HUD's requirements for physical condition ...

(R. 37, Ex. A); (A. 128). On November 3, 2006, after filing its notice of appeal, but before submitting its brief, New West closed on a financial restructuring agreement with HUD pertaining ET I and ET II. (SA. 2-3).

Also after this appeal was filed, New West and Joliet settled a lawsuit referenced in paragraph 39 of the amended complaint. (R. 18, ¶ 39); (A. 14). The suit was a debt collection action which Joliet filed in April 2005, seeking payment for the security services provided by the Joliet Police Department at Evergreen Terrace. (*Id.*). The case settled for \$482,000. (SA. 1, 2).

On June 6, 2006, Joliet filed an amended complaint seeking to acquire Evergreen Terrace through its powers of eminent domain. The Amended Complaint specifically provides that Joliet is taking the property subject to HUD's interest. The case is now pending in the district court before Judge Norgle. On November 17, 2006, New West filed an answer and affirmative defenses, the first of which is that the Supremacy Clause preempts Joliet's authority to condemn.

### **SUMMARY OF THE ARGUMENT**

This appeal arises from the District Court's dismissal of claims brought by a developer, New West, against the City of Joliet and certain of its officials under the Fair Housing Act and Sections 1982 and 1983 of the Civil Rights Act.

New West, a for-profit entity, owns and operates Evergreen Terrace, a large housing project in Joliet. New West entered into an agreement with HUD in November 2006, which provided substantial financial incentives to New West to provide low income housing at Evergreen Terrace. It is alleged that Joliet and certain officials delayed the closing of New West's deal with HUD which allegedly caused New West additional financing costs.

Joliet provided HUD with its concerns about Evergreen Terrace; including its public health and safety concerns. It is without question a dilapidated and dangerous place. New West claims that tenants vacated their apartments because Joliet voiced criticism about living conditions at Evergreen Terrace. Joliet's communications with HUD were authorized, if not required, by the relevant HUD regulations governing New West's financial restructuring with HUD.

Joliet initiated condemnation proceedings before New West's deal with HUD closed. Joliet seeks to acquire the property, subject to HUD's interests. The condemnation proceeding is pending before the District Court. New West contends that Joliet's power of eminent domain is in conflict with federal fair housing policies and, therefore, is preempted. This conflict preemption issue is also raised by New West as a defense to the condemnation action.

New West's conflict preemption claims (Counts V and VII) are moot on appeal because those claims are currently being adjudicated by the District Court in the eminent domain case. The declaratory relief New West seeks in this case would serve no purpose because Joliet cannot condemn the property until New West's defenses to the taking are fully adjudicated by the District Court.

The District Court properly dismissed New West's conflict preemption claims for lack of subject matter jurisdiction. The defense of conflict preemption alone does not transform a defense to a state law eminent domain case into a federal case under Section 1331. New West's claims do not fit the exception carved out by *Ex Parte Young* and its progeny because it alleges merely a conflict, and not the deprivation of a federal right by state actors, as required under the exception.

If this Court should find that New West's conflict preemption claims have not been mooted, and federal subject matter jurisdiction does exist, it should affirm the dismissal of Counts V and VII because, as a matter of law, there is no conflict between Joliet's exercise of eminent domain and the federal policies and programs at issue.

The District Court properly dismissed New West's claim alleging an equal protection violation under Section 1983 and its claim alleging a violation of the Fifth Amendment due process clause for failure to state a claim because New West does not allege in the Amended Complaint that any purported constitutional violation was the result of a municipal policy. The Individual Defendants were properly dismissed because they are entitled to qualified immunity from this litigation.

The District Court properly dismissed New West's Section 1982 claim because as a corporate entity, it is not a "citizen", and the plain language of the Statute limits standing to "citizens." Moreover, even if the law allows non-citizens to bring claims under Section 1982 for purported infringements of third-parties' rights under the Statute, the District Court properly determined that New West fails to satisfy the requirements to allow it to assert its tenants' rights in this context. The same standing limitation precludes New West from asserting its tenants' equal protection rights to state a claim

under Section 1983, and provides an alternative ground for affirmance of dismissal of that claim. An alternative basis for dismissal also exists with respect to New West's Section 1983 claim alleging a violation of Fifth Amendment due process—specifically, that clause does not apply to the States, and New West may not, in any event, state a takings claim as a federal cause of action while the eminent domain case is proceeding.

New West's prayer for injunctive relief is moot with respect to all claims. New West's sole prayer for injunctive relief seeks relief in the form of an injunction preventing Joliet from interfering with its closing with HUD. New West has closed with HUD, rendering this request moot.

New West lacks Article III standing to assert a claim under the Fair Housing Act because it has not suffered an injury in fact. Therefore, the District Court correctly dismissed this claim for lack of standing. Finally, dismissal of the FHA claim is also appropriate on the alternative basis that New West has failed to state a claim upon which relief can be granted because New West alleges only post-acquisition wrongful conduct by Joliet, and Section 3604 only protects pre-acquisition conduct. Its Section 3617 claim fails because it is predicated on a violation of § 3604. To the extent that the regulation, 24 C.F.R. 100.400, promulgated under Section 3617 would permit a claim, it is invalid as exceeding the scope of the legislation.

## ARGUMENT

### **I. The District Court Properly Dismissed New West's Conflict Preemption Claims.**

#### **A. New West's Conflict Preemption Claims Are Moot On Appeal.**

The District Court properly dismissed New West's conflict preemption claims (counts V and VII) for lack of subject matter jurisdiction. In its conflict preemption claims, New West sought declaratory and injunctive relief to preclude Joliet from exercising eminent domain power or bringing demolition proceedings against ETI. The thrust of New West's claims is that the property is not subject to eminent domain because New West participates in the Section 8 and Mark-to-Market programs. (R. 18, pp. 17-8); (A. 21); (SA. 45). Joliet argued to the District Court and maintains that the conflict preemption issue should be raised and adjudicated in the condemnation case.

Since the District Court's dismissal of this case, New West's conflict preemption claims have become moot, and thus New West's appeal of these claims "must be dismissed as non-justiciable." *Stotts v. Cmty. Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000). The eminent domain case that is the subject of New West's conflict preemption claims is currently pending before Judge Norgle in the District Court (No. 05 C 6746) (the "condemnation case"). On November 17, 2006, New West filed its "Answer and Affirmative Defenses" to the condemnation, asserting conflict preemption as a defense. (SA. 45).

The issues presented by counts V and VII of New West's Amended Complaint are currently being adjudicated the condemnation case. New West suffers no prejudice

if adjudication of the conflict preemption issue occurs in its defense to the condemnation case, and the interest of judicial economy is served by its adjudication in that case.

Moreover, this Court's decision in *Shaikh v. City of Chicago*, 341 F.3d 627, 633-34 (7th Cir. 2003) supports the proposition that the eminent domain case presents the proper forum for adjudication of New West's conflict preemption claims. In that case, this Court, in rejecting a plaintiff's claim that the threat of condemnation could serve as a predicate for civil rights liability, explained that the plaintiff "would have a venue to raise his challenges to the City's actual exercise of their eminent domain power at the earliest opportunity, once the City undertook action in a state court to initiate condemnation proceedings." *Id.* at 633. This Court further observed that it would be "incongruous" to allow "a property owner to avoid . . . state-court condemnation proceedings altogether by seeking preemptive federal civil-rights relief at the first suggestion of a municipality's intent to take the property." *Id.* at 634.

The reasoning expressed by this Court in *Shaikh* applies here. There is no sound reason, and New West offers none, to allow it to maintain a separate cause of action for conflict preemption, while it simultaneously litigates the same issues in the condemnation case pending in the same court. Consequently, whether the District Court correctly dismissed these claims for lack of subject matter jurisdiction is a moot issue.

In Count VII, New West alleges that any "demolition proceeding" would violate the Supremacy Clause for the same reasons. As its basis for bringing Count VII under the Declaratory Judgment Act, New West alleges that, "On August 29, 2005, Joliet gave notice of its intent to initiate demolition proceedings against Evergreen Terrace." (R. 18, ¶ 86). On appeal, New West asserts that "[t]his Court may take judicial notice that

on September 28, 2005, Joliet filed . . . a demolition action against Evergreen Terrace, *Joliet v. Mid-City Nat'l Bank, et al*, Case No. 05 CH 1800.” (NW Br. at 12). New West’s assertion is incorrect.

In fact, Joliet, in Case No. 05 CH 1800 does not seek demolition of Evergreen Terrace. (SA. 50). Rather, it seeks only “an injunction setting forth a time certain for Defendants to make all necessary repairs to the Structures in accordance with all applicable City ordinances.” (*Id.*). Because Joliet has not sought demolition, New West’s claim of conflict preemption with respect to such a proceeding fails to “present an actual controversy” to state a claim for declaratory relief. 28 U.S.C. § 2201 (2007).

**B. The District Court Properly Dismissed New West’s Conflict Preemption Claims For Lack Of Subject Matter Jurisdiction.**

The District Court, in discharging its “independent obligation to satisfy itself that federal subject matter jurisdiction exists before proceeding to the merits,” correctly determined that it lacked subject matter jurisdiction over New West’s Supremacy Clause claims because “it is well-established law in the Seventh Circuit that the Declaratory Judgment Act ‘does not and cannot serve as independent basis for federal jurisdiction.’” (AttA. 6-7) (quoting, *TIG Ins. Co. v. Reliable Research Co.*, 334 F.3d 630, 634 (7th Cir. 2003)).

New West’s conflict preemption claims are based on its allegation that the ordinance authorizing eminent domain and demolition of Evergreen Terrace “impedes the implementation of Congressionally-mandated federal policies.” (R. 18, ¶17). Because New West alleged only conflict preemption, the District Court found

jurisdiction lacking because “only ‘complete preemption effects federal subject matter jurisdiction’” and the Declaratory Judgment Act cannot serve as an independent basis for jurisdiction. (AttA. 7) (*quoting Vorhees v. Naper Auto Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001)). New West claims that the District Court erred in dismissing its conflict preemption claims because subject matter jurisdiction exists under Section 1331 on the basis of *Ex Parte Young*, 209 U.S. 123, 160-62 (1908) and its progeny. (Pl. Br. 29). Section 1331 provides that “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.” 28 U.S.C. § 1331 (2007). The exception carved out by *Ex Parte Young* and its progeny provides “federal courts with jurisdiction over suits to enjoin state officials from interfering with federal rights.” *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983). *Ex Parte Young* may also apply where “the plaintiff seeks declaratory relief against regulation by a state agency and contends that the agency has violated federal law by adopting particular regulations.” *Illinois Ass’n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002).

The *Ex Parte Young* exception does not apply here because New West has not alleged the existence of any federal right or a violation of federal law that entitles it to protection. To the contrary, in its Amended Complaint, New West asserts only a conflict between congressional policy and the Ordinance. (R. 18, ¶ 17). The crux of New West’s conflict preemption claims is that Joliet’s exercise of its eminent domain power “impedes the implementation of Congressionally-mandated federal policies and programs at Evergreen Terrace including the preservation of affordable housing and the Section 8 and Mark-To-Market programs.” (R.18, ¶¶ 74, 89). Because the “policies and

programs” New West relies upon to purportedly confer jurisdiction do not create federal rights, the exception is inapplicable, and the District Court properly dismissed the claims for lack of subject matter jurisdiction.

New West’s claims are legally insufficient. New West purports to bring its conflict preemption claims “pursuant to Section 1983 of the Civil Rights Act and the due process clause of the Fifth Amendment of the United States Constitution to redress state action in violation of the Supremacy Clause of the United States Constitution.” (R.18, ¶¶ 71, 85). It ignores the fact that the Fifth Amendment due process clause does not apply to the States, *Barron v. Baltimore*, 32 U.S. 243, 247 (1933), and “the Supremacy Clause does not of its own force create rights.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989).

More fundamentally, New West ignores that “a statute may influence behavior without creating ‘rights.’” *Zambrano v. Reinart*, 291 F.3d 964, 973 (7th Cir. 2002) (Easterbrook, J., concurring). “Conditional funding is an example[; i]t does not create ‘rules,’ let alone ‘rights,’ for a state is free to turn down money and escape the strings.” *Id.* This principle has been applied to Section 20 of the Housing Act, which this Court held “does not confer rights on tenants; it just gives housing authorities a financial reason to let tenants play a role in management.” *Mungiovi v. Chicago Hous. Auth.*, 98 F.3d 982, 984-85 (7th Cir. 1996).

Section 8 of the Housing Act is no different—it does not create “rights,” but rather provides fiscal incentives to providers of affordable housing. As with conditional funding, a party, such as New West, “is free to turn down the money and escape the strings.” *Zambrano*, 291 F.3d at 973 (Easterbrook, J. concurring). *See also James v.*

*Vatierra*, 402 U.S. 137, 140 (1971) (noting that although “the Federal Government has offered aid to state and local governments for the creation of low-rent public housing . . . the federal legislation does not purport to require the local governments to accept [it.]”); see also *Neighborhood Research Inst. v. Campus Partners for Cmty. Urban Dev.*, 212 F.R.D. 364, 371 (S.D. Oh. 2002) (holding that MAHRA does not create a private right of action).

New West’s contracts also fail to create any “federal rights” that would confer jurisdiction over its conflict preemption claims. Cf., *Nott v. Aetna U.S. Healthcare, Inc.*, 303 F. Supp. 2d 565, 571-72 (E.D. Pa. 2004) (holding that contractual right of reimbursement “is not transformed into a federal right”). Consequently, New West cannot invoke the jurisdiction of the federal courts under *Ex Parte Young* and its progeny.

The District Court applied the correct analysis in determining whether it had subject matter jurisdiction over New West’s conflict preemption claims. (AttA. 7-8). The District Court properly observed that while “New West alleges a ‘conflict preemption’ issue, between the Joliet state ordinance, and federal housing laws . . .”[o]nly ‘complete preemption effects federal subject matter jurisdiction.’” (*Id.* at 7, citing, *Vorhees*, 272 F.3d at 403.) The District Court found that, “according to the well-pleaded complaint rule,” New West’s claim of conflict preemption “does not provide a basis for federal jurisdiction.” *Id.*, citing, *Adkins v. Illinois Central R.R. Co.*, 326 F.3d 828, 835 (7th Cir. 2003).

New West’s contention that, “[c]omplete preemption is relevant *only in the context of removal*” (Pl.Br. 32-33) (emphasis original) is wrong. If the exception carved

out in *Ex Parte Young* and its progeny does not apply, there is no basis for jurisdiction other than the Declaratory Judgment Act, 28 U.S.C. § 2201. Further, it is beyond dispute that the well-pleaded complaint rule applies to the suits brought under that Act, which, like the removal statutes, does not provide an independent basis for subject matter jurisdiction. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 (1978) (Rehnquist, J., concurring).

**C. Even If The District Court Has Subject Matter Jurisdiction Of New West's Conflict Preemption Claims, Those Claims Are Properly Dismissed Under Rule 12(b)(6) Because No Conflict Exists.**

Even if the Court finds that the District Court had subject matter jurisdiction over New West's claims of conflict preemption, those claims were nonetheless properly dismissed for failure to state a claim. In the proceedings below, Joliet moved for dismissal of these claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because, as a matter of law, no conflict exists and the City's power of eminent domain has not been abrogated by federal low-income housing legislation. If this Court should find dismissal improper on the 12(b)(1) ground relied on by the District Court, it may nonetheless affirm on this alternative 12(b)(6) basis. *See, e.g., Massey v. Helman*, 196 F.3d 727, 738 (7th Cir. 2000) (*affirming* a dismissal under 12(b)(1) on 12(b)(6) ground).

New West contends that Joliet cannot exercise its power of eminent domain against its property because, though privately-owned, the property is the subject of a contractual relationship between New West and HUD. The essence of New West's

claim is that Joliet is powerless to condemn its property because it would “extinguish federally-sponsored affordable housing at Evergreen Terrace.” (R. 18, ¶¶ 75-76, 90-91).

New West’s allegation that the eminent domain proceeding will “extinguish federally-sponsored affordable housing at Evergreen Terrace” is untrue. New West attempts to create a conflict that does not exist. Joliet seeks to condemn the property subject to HUD’s interests. (Case No. 05-C-6746 Dckt entry No. 53) Joliet is committed to providing affordable housing, consistent with HUD’s objectives and policies. The Ordinance passed by the Joliet legislature authorizing condemnation is consistent with the congressional goal embodied in MAHRA “[of] aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a) (2005). In the same vein, the Joliet Ordinance provides that “it is in the public interest that the redevelopment of the Subject Property include affordable housing” and seeks to “eliminate the blight conditions existing on the property.” (SA. 76). Because “local legislation will be preempted only if it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” “there is no conflict preemption here, where the local ordinance does not conflict with, but rather embraces and promotes the goal of the federal law. *South-Suburban Housing Center v. Greater South Suburban Bd. of Realtors*, 713 F. Supp. 1068, 1099 (N.D. Ill. 1988) (*aff’d in part, rev’d in part*, at 935 F.2d 868) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In determining whether conflict preemption exists, “the ‘ultimate touchstone’ is congressional purpose.” *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 746 (7th Cir. 2005) (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Courts defer to a presumption that “in all circumstances, ‘Congress does not intend to supplant state law’[; t]his is particularly true where a party claims that federal law bars state action in areas of

traditional state regulation.” *Frank Bros., Inc. v. Wisconsin Dep’t of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005), quoting *New York State Cnf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Fundamental powers of the State, such as eminent domain and police power, will not be deemed superceded by federal law “unless that was the clear and manifest purpose of Congress.” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002). The Supreme Court has recognized eminent domain as such a traditional power of the State. *Hayfield Northern R.R., Co., Inc. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 632 (1984). In *Hayfield*, the Supreme Court held that to usurp a State’s power of eminent domain, Congress must “unmistakably ordain” that it so intended. *Hayfield*, 467 U.S. at 632. This principle applies in this case. New West’s title to Evergreen Terrace is subject to the State’s “superior title” because Congress has not “unmistakably ordained” otherwise.

This Court has warned private landowners that “[e]very person who acquires or occupies land does so at the risk of being evicted by the exercise of the superior right of the government or its delegate to acquire its interest upon payment of just compensation.” *Shaikh*, 341 F.3d at 631.

The conflict preemption analysis in this case begins with a presumption against the usurpation of Joliet’s eminent domain power. There is no evidence of congressional intent that can be found in MAHRA. Nor the relevant HUD regulations contain any evidence of Congressional intent to abrogate this power. In fact, the programs and policies New West rely on merely comprise a fiscal incentive program, pursuant to which private parties like New West contract with HUD and are furnished with above-market rents in exchange for accepting low-income tenants. See generally 42 U.S.C. § 1437f (2007). See also *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993) (describing

section 8 program generally). The decision to enter into a contract under MAHRA is a voluntary business decision, and that decision does not serve to expropriate the State's power of eminent domain. *Forest Park II v. Hadley*, 336 F.3d 724, 728-30 (8th Cir. 2003) (*noting* Congressional measures to retain elective structure of section 8 programs). *Cf.*, *Knapp v. Smiljanic*, 847 F. Supp. 1428, 1435 (W.D. Wis. 1994), *aff'd at Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272 (7th Cir. 1995) (observing that “[t]he obligation not to refuse to rent to a Section 8 voucher holder arises from the execution of the Section 8 agreement and acceptance of Section 8 benefits and not from a national moral consensus”).

In *James v. Vatierra*, 402 U.S. 137, 140 (1971), the Supreme Court rejected a supremacy clause challenge to a state law on grounds that it conflicted with section 8. In summarily rejecting the Supremacy Clause claim, the Court explained, “the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether this aid should be accepted.” *Id.* The same is true of MAHRA; Congress never expressed an intent to abrogate the eminent domain powers of the State's local authority over privately-owned Section 8 properties.

The relevant HUD-issued regulations also do not support New West's claims. In fact, the regulations contemplate that property may be condemned. For example, Congress and HUD have enacted statutes and regulations enumerating the circumstances under which an owner of a federally assisted housing development can prepay its mortgage and cancel its mortgage insurance policy. 24 C.F.R. Pt. 248 (2005). In defining “prepayment,” however, HUD explicitly exempts prepayment pursuant to eminent domain proceedings from the otherwise applicable requirements. Specifically,

the Regulation defines “Prepayment” as “[p]repayment in full of a mortgage or a partial prepayment or series of partial prepayments that reduces the mortgage term by at least six months, except where the prepayment in full or partial prepayment results from the application of condemnation proceeds.” 24 C.F.R. § 248.101 (2005) (emphasis added). The regulation, thus, accounts for condemnation of housing projects, such as Evergreen Terrace, which participate in federal affordable housing programs. Moreover, HUD approval, which the Regulations purport to require before certain actions may be taken, is explicitly not required for “any release of property from a mortgage lien with respect to . . . a public taking of such property by condemnation or eminent domain.” 24 C.F.R. 245.405 (2005) (emphasis added).

In addition, Section 18 of the Federal Housing Act, as well as Regulation 970, 24 C.F.R. Pt. 970 (2005), concern the demolition and disposition of public housing projects. In particular, Regulation 970 details the administrative steps and prerequisites to demolition or disposition of a public housing project. 24 C.F.R. Pt. 970 (2005). The Regulation, however, does not apply to demolition or disposition occurring pursuant to condemnation by a public body. 24 C.F.R. § 970.2 (2005). Indeed, the Regulation explicitly provides that it does not apply to disposition or demolition due to “[a] whole or partial taking by a public or quasi-public entity through the exercise of its power of eminent domain.” *Id.* (emphasis added).

The applicable regulations are “not only devoid of any expression of intent to pre-empt state law,” but assume that privately owned federally assisted projects are subject to the condemnation power of the sovereign. *See California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987) (*finding* no conflict preemption where regulations expressly contemplated the coexistence of federal and state law). In *California Coastal Commission*, the Supreme Court observed, “[i]t is

appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity: “because agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.” *Id.*

## **II. The District Court Properly Dismissed New West’s Claims Brought Under 42 U.S.C. §§ 1982 and 1983.**

The District Court dismissed New West’s Section 1983 claims, which were predicated on a purported violation of the equal protection clause (count III) and a purported violation of the fifth amendment due process clause (count VI), for failure to allege that “Joliet’s ‘campaign’ to discriminate against African-American residents of Evergreen Terrace was an express policy or widespread practice within the city.” (AttA. 9). New West appeals this decision, focusing its argument on the equal protection claim. (Pl. Br. 33, 37).

New West argues that, regardless of whether it failed to properly plead liability under *Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978), the District Court improperly dismissed its equal protection claim against the Individual Defendants in their personal capacities. (Pl. Br. 35-36). New West clearly fails to state a claim under *Monell*. In addition, the claims against Individual Defendants in their personal capacities were properly dismissed because they are immune from liability for those claims pursuant to the doctrine of qualified immunity.

In addition to failing under *Monell*, New West’s civil rights claims were properly dismissed for additional reasons presented to the District Court. New West lacks standing under Section 1982 because, as the District Court held, it is not a “citizen.”

New West's claims are also legally deficient because it cannot satisfy the prudential standing requirements to assert claims on behalf of the tenants of Evergreen Terrace. Finally, Count VI of the Amended Complaint, purporting to state a claim under Section 1983 for violation of the Fifth Amendment due process clause, fails to state a claim as a matter of law.

**A. The District Court Properly Dismissed New West's Claims Brought Under Section 1983 For Failure To Allege A Municipal Policy.**

The District Court correctly dismissed New West's Section 1983 claims against Joliet and its officials (in their official capacities) under *Monell*, 436 U.S. 658, 690-94. (AttA. 9). *Monell* holds that a municipality may not be held liable under section 1983 under a *respondeat superior* theory of liability. *Id.* at 691. Instead, "in order for a claimant to prevail on a Section 1983 claim against a municipal corporation, he or she must establish that the violations *were part of a custom or policy of the municipality.*" *Looper Maintenance Serv. Inc. v. City of Indianapolis*, 197 F.3d 908, 912 (7th Cir. 1999) (emphasis in original). There are three types of municipal policy recognized by courts: "1) an express policy; 2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; and 3) the actions of a person with final policymaking authority." *Id.* (internal citations and quotes omitted).

New West does not, and cannot, allege in its Amended Complaint, nor does it argue on appeal, that the purported constitutional deprivation resulted from either "an express policy" of Joliet, or "a widespread practice . . . constitut[ing] a custom or usage

with the force of law.” *Id.* It is New West’s contention that Joliet “may be named as a defendant without [New West having to] plead[] a policy or practice,” because it names Joliet’s mayor, city manager and deputy city manager as defendants. They are alleging to have: made various negative comments about Evergreen Terrace, attended meetings concerning the future of Evergreen Terrace, and submitted to HUD, at HUD’s behest, an alternative housing plan. (Pl. Br. 35-36). In its brief, New West concludes, without support, or citation to any allegation of its Amended Complaint, that these defendants “were Joliet’s final ‘policymakers.’” (Pl. Br. 36). Thus, New West purports to satisfy *Monell* under the third type of “municipal policy”—“the actions of [] person[s] with final policymaking authority.” *Looper*, 197 F.3d at 912.

New West fails to allege in its Amended Complaint that the mayor, city manager, and deputy city manager are in fact Joliet’s “final policy-makers.” Consequently, it fails as a matter of law to state a claim for municipal liability under section 1983. *See Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734-35 (7th Cir. 1994), *superseded by statute on other grounds as recognized by, Endres v. Indiana State Police*, 334 F.3d 618, 626-27 (7th Cir. 2003). (“[I]t must first be alleged adequately that a defendant is a final policymaker. Only then can a court proceed to the question of whether the single act or decision of that defendant constituted municipal policy.”), *followed by Looper*, 197 F.3d at 913 (*affirming* dismissal where plaintiff “failed to allege that any named *individual* possessed final policymaking authority and that such an *individual* denied him a constitutional right within the meaning of 42 U.S.C. § 1983”) (emphasis original). *Accord, Horwitz v. Bd. of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 619-20 (7th Cir. 2001) (*affirming* dismissal where the complaint lacked “even . . . ‘bare allegations’

from which to string together an argument that the individual [d]efendants enjoyed final decision-making authority”).

The Individual Defendants are not in fact “final policymakers.” “Deciding whether a specific official has final policymaking authority is a question of state law.” *Horwitz*, 260 F.3d at 619. An “understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official’s functions under relevant state law.” *Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1061 (7th Cir. 1998) (quoting *McMillian v. County, Ala.*, 520 U.S. 781, 786 (1997)). A final policymaker is an official endowed by state law with the “authority to adopt rules for the conduct of government.” *Killinger v. Johnson*, 389 F.3d 765, 771 (7th Cir. 2004).

Under Illinois law, none of the officials named in New West’s Complaint possess the “authority to adopt rules for the conduct of [the City of Joliet.]” *Id.* To the contrary, it is established by the relevant provisions of the Illinois Municipal Code that the Defendants are not final policymakers.

The Municipal Code defines the mayor of Joliet as the “chief executive,” and does not endow the office with any authority to delineate policy or rules of government for the city. *See* 65 ILCS 5/3.1-15-10 (2007); 65 ILCS 5/3.1-35-5 (2007). Similarly, under the Illinois Municipal Code, a municipal manager, such as Defendant Mezera, lacks the requisite “authority to adopt rules” for Joliet’s conduct to subject him to liability in his official capacity, or to satisfy *Monell’s* policy requirement. *See* 65 ILCS 5/5-3-7(1), (6) (2007). Rather, the City Manager “merely has the power to enforce municipal laws and ordinances and has no right to vote at [city council] meetings.”

*Kaupus v. Village of University Park*, No. 02 C 3674, 2003 WL 22048173, 92 Fair Empl. Prac. Case (BNA) 1236 (N.D. Ill. Sept. 2, 2003), *citing* 65 ILCS 5/5-3-7(1), (6) (2007). Because Mezera, as the City Manager, is clearly not a final policy maker under Illinois law, it follows that the Deputy City Manager, Defendant Shepard, is likewise precluded from “adopt[ing] rules” and defining policies for the City of Joliet, and thus is not a “final policymaker.”

Accordingly, the Individual Defendants in their official capacities were properly dismissed by the District Court. *See, e.g., Duda*, 133 F.3d at 1061 (*dismissing* constitutional claims asserted against individual defendants in their official capacities where the defendants were not “final policymakers”).

New West endeavors to avoid *Monell* by arguing, “a court may hold a municipality liable for a single act if such a policymaker engages in impermissible conduct.” (Pl. Br. 36). That contention fails here for an additional reason—none of the conduct that New West alleges the Individual Defendants to have undertaken could be reasonably construed as a constitutional violation. In other words, New West fails to allege “that the defendants deprived [it] of a right secured by the Constitution . . . of the United States,” as required to state an equal protection claim under section 1983. *Lekas v. Briley*, 405 F.3d 602, 606 (7th Cir. 2005). *Cf., Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 20 (N.D. Ill. 1984) (*dismissing* section 1983 claim against the city on basis of police officers’ conduct where “the officers did not violate the plaintiff’s constitutional rights, [and thus], it ma[de] no difference whether they acted pursuant to a municipal policy [because t]here [was] no basis for a section 1983 against anyone if the

plaintiff was not deprived of some right secured by the Constitution or laws of the United States.”).

The cases New West cites for support only serve to underscore the deficiency of its allegations. For instance, the allegations at issue in *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000) stand in stark contrast to those contained in New West’s Amended Complaint. In *Brokaw*, this Court allowed the *pro se* plaintiff’s claim for an unconstitutional seizure to go forward where the plaintiff alleged that the Mercer County Sheriff himself forcibly and wrongfully removed the plaintiff, as a four year old child, from his home. This Court had previously held that under Illinois law a Sheriff is a “final policymaker.” *Id.* at 1013. Unlike the Plaintiff in *Brokaw*, New West does not allege any constitutional deprivation, much less that any purported constitutional deprivation was undertaken by a final policymaker.

In summary, the District Court’s dismissal of New West’s Section 1983 claims is firmly supported by law and should be affirmed on several, independent grounds.

**B. The Claims Against The Individual Defendants In Their Individual Capacities Were Properly Dismissed Under The Qualified Immunity Doctrine.**

Joliet argued below that the claims against the Individual Defendants in their individual capacities were barred by qualified immunity. While the District Court did not address that argument in its ruling, the Individual Defendants were properly dismissed in their individual capacities as well, on the basis of qualified immunity. As set forth in Joliet’s motion to dismiss, the Individual Defendants are qualifiedly immune from the constitutional claims New West purports to state against them in their

individual capacity. Thus, the dismissal of the Individual Defendants in their individual capacities should be affirmed.

Consideration on appeal of whether qualified immunity bars New West's claims is appropriate although not considered by the District Court. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478, n.20 (1979) (a "prevailing party . . . [is] free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court . . ."); *Payne ex rel. Hicks v. Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998) ("Indeed, 'in the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'"). This principle is of particular relevance here, where a denial of immunity by the district court would be immediately appealable under the collateral order doctrine. *See Feldman v. Bahn*, 12 F.3d 730, 731-32 (7th Cir. 1993) (order denying motion to dismiss on qualified immunity grounds immediately appealable under collateral order doctrine).

Qualified immunity is properly addressed at the pleadings stage. *See, e.g., Spiegel v. City of Chicago*, 106 F.3d 209 (7th Cir. 1997); *Feldman*, 12 F.3d 730 (reversing district court's failure to grant motion to dismiss on the basis of qualified immunity). As the Supreme Court has emphasized, qualified immunity is "an immunity from suit rather than a mere defense to liability," and thus should be resolved at the earliest possible stage of the litigation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

“A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendants’] conduct violated a constitutional right?” *Saucier*, 533 U.S. at 201. “If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.” *Id.* Such is the case here. Taking all of New West’s allegations concerning the actions of the Individual Defendants as true, the facts alleged fail to demonstrate that the Individual Defendants violated a constitutional right.

The Mayor, Defendant Schultz, is alleged only to have made “misleading” statements relating to safety concerns at Evergreen Terrace, and to have submitted (at HUD’s behest), an alternative plan, based on the use of Section 8 vouchers. (R. 18, ¶¶ 19, 24). Similarly, the only allegations relating to Defendant Mezera accuse him of making “misstatements” regarding safety concerns at Evergreen Terrace (*Id.*, ¶ 24), and referring to the presence of “gangbangers” at Evergreen Terrace (*Id.*, 35). Defendant Shepard is alleged to have participated in a meeting with HUD, where alternatives to continuing Evergreen Terrace as a low-income housing project were discussed and to have participated in a meeting with representatives of New West. (*Id.*, ¶¶ 24, 34). These allegations do not even come close to stating a constitutional violation.

Should the Court proceed, “the next sequential step is to ask whether the right was clearly established.” *Saucier*, 533 U.S. at 201. The Supreme Court has held that in making this determination, the right must be framed relevant to the context of the particular case; “[t]his inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Id.* That is, “[t]he

contours of the right must be sufficiently clear that a reasonable official would know that what he is doing violates that right.” *Id.* at 202, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *Accord, Townsend v. Vallas*, 256 F.3d 661, 672 (7th Cir. 2001).

Even assuming, *arguendo*, that New West’s unnamed tenants, whose constitutional rights it seeks to assert in this action, endured a violation of their rights under the equal protection clause, those “rights” were not “clearly established” so as to defeat the Individual Defendants’ entitlement to qualified immunity. In fact, relevant HUD regulations explicitly endorse Joliet’s participation and input as part of the restructuring process under the mark-to-market program. *See* 24 C.F.R. § 401.500 (2002); 24 C.F.R. § 401.501 (2002).

Thus, “the state of the law at the time of the alleged events at issue” did not give Joliet’s officials “fair warning that their treatment of the plaintiff[] was unconstitutional.” *White v. City of Markham*, 310 F.3d 989, 993 (7th Cir. 2002) (*affirming* grant of qualified immunity on motion to dismiss where defendants would not have reason to know that their actions were unconstitutional).

The Individual Defendants could not possibly have conceived of the possibility that their comments or attendance at meetings would be interpreted as a constitutional violation, rendering them liable under the Civil Rights Act. No “reasonable official would understand that” any of the actions that New West alleges the Individual Defendants to have taken violated the right of equal protection. *See Townsend*, 256 F.3d at 672.

In responding to the Individual Defendants’ assertion of qualified immunity, New West argued to the District Court that “[t]he essence of the claim for damages is

that Defendants have discriminated against New West (and its largely African-American tenants) on the basis of race by attempting to restricting [sic] access to affordable housing . . . “ and “[t]his conduct violates equal protection guarantees of the Fourteenth Amendment.” (R. 54, p. 13). New West’s response misapplies the construct of the qualified immunity inquiry. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court rejected the contention that, in the context of qualified immunity, the constitutional right should be framed in such a general manner; illustrating as follows:

For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of ‘clearly established law’ were to be applied at this level of generality . . . [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

*Id.* at 639. The mere allegation that the Individual Defendants’ conduct imposed a deprivation of equal protection thus will not strip them of their immunity. *See Duda*, 133 F.3d at 1062 (*finding* defendants qualifiedly immune and noting that “[plaintiff], in his amended complaint, did not carry his burden of showing that it was clearly established at the time the defendants acted that they had an affirmative obligation to act as [plaintiff] alleges they were obliged to.”).

In summary, qualified immunity shields the Individual Defendants (in their individual capacities), from New West’s claims as a matter of law. The Defendants’

qualified immunity is an independent basis to affirm the District Court’s dismissal of New West’s claims against the Individual Defendants in their individual capacities.

**C. New West Lacks Standing To Assert A Claim For A Violation of Section 1982 Because It Is Not A “Citizen”**

Joliet moved the District Court to dismiss count II of the Amended Complaint because, as a corporate entity, New West lacked standing to assert a claim under 42 U.S.C. § 1982. Section 1982 provides, “all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” By its plain language Section 1982 applies only to “citizens.” While corporate entities, such as New West, are “persons”, it is unassailable that they are not “citizens.” *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 884 (O’Connor, J. dissenting) (noting distinction between “persons” and “citizens” in fourteenth amendment context). The District Court properly held that “New West is precluded from bringing an action under § 1982” because it is not a “citizen.” (AttA. 8-9).

On appeal, New West abandons its argument below that the word “citizen” is “irrelevant” to the statute, contending now that Congress, in limiting the statute to “citizens,” did not intend to limit who could bring an action under the statute. (Pl. Br. 38). Citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235-37 (1969), New West claims that “one need not be a member of the protected class to sue for injury sustained as a result of discrimination against the class.” (Pl. Br. 38).

*Sullivan*, however, does not confer upon non-citizens the right to assert a cause of action under section 1982. Rather, the Supreme Court allowed Sullivan, a white plaintiff—indisputably a “citizen” under Section 1982—to bring claims under Sections 1981 and 1982 under a theory that he had suffered discrimination in the form of retaliation as a result of his dealings with an African-American citizen. *Id.* at 237. See also *Humphries v. CBOCS West, Inc.*, No. 05-4047, WL 60876, at \*12, 99 Fair Empl. Prac. Case. (BNA) 872 (7th Cir. Jan. 10, 2007) (*holding* that “a plaintiff may maintain a cause of action under section 1981, where the plaintiff has suffered retaliation for advocating the rights of those protected under section 1981”).

*Sullivan* did not hold that a non-citizen has standing to assert a Section 1982 claim. Nor, did *Sullivan* hold that a non-citizen could assert the rights conferred on a citizen by that statute. In fact, Sullivan was joined as a plaintiff by the African-American citizen with whom he sought to contract. *Sullivan*, 396 U.S. at 235. The *Sullivan* decision is in no way supportive of New West’s attempt to recover for a purported infringement of tenants’ rights under Section 1982.

New West’s contention that non-citizens may bring a cause of action for the infringement of a citizen’s Section 1982 rights makes little sense because it would render the distinction between “persons” and “citizens” a nullity—“noncitizens” would be able to assert claims under Section 1982, notwithstanding the distinction, deeply embedded in the law between “persons” and “citizens.” The flaw in New West’s argument is illustrated by analogy to the distinction between “persons” and “citizens” under the fourteenth amendment. “Persons” are granted rights under the due process and equal protection clauses, while “privileges and immunities” are restricted to “citizens.” In that

context, a corporate entity, such as New West (a “person”, but not a “citizen”), may assert due process and equal protection claims, but it is undeniably precluded from asserting a claim under the privileges and immunities clause. New West advances no argument supporting a departure from this distinction in the context of Section 1982, and there is no logical reason to treat standing under Section 1982 differently. *See Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948) (“Observing that “[i]t is clear than in many significant respects the [civil rights] statute and the [Fourteenth] Amendment were expressions of the same general congressional policy.”)

New West also cites this Court’s decision in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) in arguing that non-citizens can assert claims under section 1982. (Pl. Br. 38). That decision involved an appeal of a judgment on a jury verdict, which did not differentiate between the claim asserted under the Fair Housing Act and the Section 1982 claim. *Village of Bellwood*, 895 F.2d at 1525. While this Court did not expressly preclude standing under Section 1982, it also did not sanction the sort of third-party standing New West seeks to assert here.

In *Park View Heights Corporation v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) this Court likewise did not analyze the issue of whether a non-citizen can bring an action under Section 1982. Instead, the Court merely presumed the existence of standing under the statute in that case. *Id.* at 1214. *See Comtel Technologies, Inc. v. Paul H. Schwendener, Inc.*, No. 04-3870, 2005 WL 433327, at \*5 (N.D. Ill. Feb. 22, 2005) (Moran, J.) (*holding* that plain language of Section 1982 precludes claim by corporate entity and observing that *City of Black Jack* did not consider or analyze issue of standing under section 1982).

In summary, New West is not a “citizen” for purposes of Section 1982. Its claims are precluded by the plain language of the statute, and the District Court properly dismissed Count II of the Amended Complaint on that basis.

**D. New West’s Civil Rights Claims Brought Under Sections 1982 and 1983 Were Properly Dismissed Because New West Lacks Standing To Assert The Rights Of Third-Parties.**

New West concedes its inability to maintain a claim under Section 1982 on its own behalf. It argues that, notwithstanding it is not a “citizen,” New West can assert a cause of action under the statute on behalf of the unidentified tenants of Evergreen Terrace, whose rights to rent there were purportedly denied by Joliet. (Pl. Br. 38-40). Even, assuming, *arguendo*, that this is the law, the District Court properly held that “New West has not met the requirements in order to bring this action on behalf of the residents of Evergreen Terrace. New West is not a home-owners association who is interested in the well-being of the tenants . . . [rather,] New West brings this action to protect its financial interest in the federal housing subsidies.” (AttA. 8).

Thus, even assuming that New West has suffered an injury sufficient to satisfy the requirements of Article III standing, well-established principles of prudential standing preclude New West from appropriating any purported claim belonging to the tenants under Section 1982. (AttA. 8-9). These same prudential standing principles likewise bar New West from asserting any claim on behalf of the tenants under Section 1983 and provide an additional basis for affirmance of the dismissal of New West’s

Section 1983 claims. *See, e.g., Payne ex rel. Hicks v. Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998) (court may affirm on any ground presented to the district court).

The law is clear that “not everyone injured by the violation of a statute will be permitted to redress the violation.” *Clay v. Fort Wayne Community Schools*, 76 F.3d 873, 878 (7th Cir. 1996) (*quoting North Shores Gas Co. v. E.P.A.*, 930 F.2d 1239, 1242 (7th Cir. 1991)). Rather, “[a]n important purpose of the rules of standing is to identify the best placed plaintiff and give him a clear shot at suit.” *Id.* When a putative plaintiff seeks to bring a claim by asserting the rights of others not before the court, standing, while “not precluded, . . . is ordinarily substantially more difficult to establish.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). “Third-party representation is a prudential consideration, requiring [the Court] to consider ‘whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.’” *Clay*, 76 F.3d at 878 (*quoting Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)).

To qualify for third party standing New West must demonstrate that it is the “best placed plaintiff” to assert the tenants’ rights. *Clay*, 76 F.3d at 878. Courts have identified three factors to be considered in determining “whether the litigant has shown the necessary prudential consideration[:] . . . (1) the relationship between the litigant and the person whose rights are being asserted; (2) the ability of the person[s] to advance [their] own rights; and (3) the impact of the litigation on third party interests.” *Caplin & Drysdale v. United States*, 491 U.S. 617, 623, n.3 (1989). Application of these factors to the allegations of the Amended Complaint demonstrates that New West lacks standing to assert claims based on the rights of the tenants.

First, with respect to the relationship between New West and the tenants—New West is financially driven, receiving above-market rents paid largely by HUD on behalf of the tenants, and in part by the tenants. (R. 18, ¶¶ 11-12); (A. 7-8). In contrast to the plaintiffs in cases cited in its brief, New West does not bring this claim as an association or a not for profit organization dedicated to the advancement of the rights of low-income housing residents. *See Clifton Terrace Assoc. v. United Tech. Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991) (drawing same distinction and holding that owner of federally-subsidized low-income housing project lacked standing to assert claims of its tenants).

With respect to the ability of the residents to assert their own rights, New West argues that “[t]he tenants are predominantly young, African-American, and very poor” and therefore it would be “unlikely” that they would be able to assert their own civil rights claim. (Pl. Br. 40). New West’s only assertion warranting a response—that the tenants cannot protect their own interest because they are “very poor”—lacks merit. This bald assertion ignores the Congressional solution to the burden of litigation expenses with respect to putative civil rights plaintiffs—42 U.S.C. § 1988, which provides for the recovery of attorneys fees by plaintiffs with meritorious civil rights claims. New West presents no argument as to why, in light of Section 1988, the tenants would not be able to assert their own rights. The assertion that the tenants are predominantly African-American is confusing. If New West is suggesting that tenants cannot protect their own interests because they are African-American, that is false on its face, and if there is some other reason for New West’s assertion, it is not evident.

The third factor to be considered in conferring third-party standing, the impact of the litigation on the tenants’ interests, also underscores the District Court’s ruling that

New West “has not met the requirements” of prudential standing. (AttA. 8). New West’s interest in asserting the tenants’ rights is solely for its own pecuniary gain. (*See, id.*). The tenants’ interest, on the other hand, is in procuring the safest and best affordable housing option possible. It is far from a truism that the tenants’ preference would be to remain at the dilapidated Evergreen Terrace. Without any tenant before the Court, New West should not be endowed with the benefit of such a presumption. *See Lauer Farms, Inc. v. Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 553 (E.D. Wis. 1997) (*holding* that a developer’s economic interest in tenants’ ability to reside in development insufficient to confer third-party standing).

It is, at the very least, plausible that the tenants do not wish to assert their rights (assuming, *arguendo*, that they would be able to bring a cause of action) because they would find an alternative affordable housing option preferable to Evergreen Terrace. By New West’s own allegations, the physical condition of Evergreen Terrace was merely “acceptable” (R. 18, ¶ 21); (A. 9) and there is a “need for certain repairs and upgrades.” (R. 18, ¶¶ 19, 31); (A. 9). Also according to New West’s allegations, Joliet’s alternative housing plan largely “relied upon [section 8] market vouchers.” (*Id.* ¶ 26). There is nothing to suggest that the tenants would not prefer a market voucher, which would allow them to choose their own housing, as opposed to remaining at Evergreen Terrace. Because no tenant is a party to this suit, there is no basis for determining that their interests in safe, sanitary affordable housing are aligned with New West’s financial interest in the rental subsidies.

Courts have been reluctant to permit third-party standing. This Court has stressed that “[o]ne of the prudential reasons against third party standing is that ‘the courts should

not adjudicate rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.”“ *South-Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 880 (7th Cir. 1991), quoting *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).

As this Court has also consistently recognized, the “third-parties themselves [are] usually . . . the best proponents of their own rights.” *Id.*; *Clay*, 76 F.3d at 878 (refusing to allow plaintiffs to bring constitutional claims on behalf of third-parties based on determination that “[c]learly the African-American [third-parties] are the plaintiffs best suited to bring claims regarding infringement of their own constitutional rights”).

New West places substantial emphasis on the district court decision of *United States General, Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D. Ill. 1977). (Pl. Br. 22-23). Tacitly criticizing Joliet and the District Court for failing to cite this decision, New West argues that it presents “[p]erhaps the clearest discussion of standing in this setting.” (Pl. Br. 22). New West ignores the court’s holding, contained in the same “clear[] discussion of standing” (*id.*)—applying prudential standing principles and rejecting the developer’s attempt to assert civil rights claims. *USG, Inc.*, 432 F. Supp. at 354 (contrasting standing under the FHA with standing under the civil rights statutes because, unlike the FHA, “[n]one of the[] general civil rights statutes waives the prudential rule barring third-party standing”).

In conclusion, to the extent the tenants’ rights under the equal protection act or Section 1982 have been infringed at all, it is their prerogative to assert those rights, and no valid incapacity precludes them from doing so.

**E. New West Cannot State A Claim Under Section 1983 For A Violation Of The Fifth Amendment Due Process Clause.**

In Count VI of its Amended Complaint, New West purports to state a claim “pursuant to Section 1983 of the Civil Rights Act and the due process clause of the Fifth Amendment of the United States Constitution because of Joliet’s attempt to exercise its eminent domain powers in violation of the Illinois Constitution.” (R. 18,. ¶ 80); (A. 22). As previously addressed, the District Court properly dismissed this claim on *Monell* grounds. Although New West has abandoned that claim on appeal, Joliet presented an additional basis for dismissal to the District Court, and affirmance of the District Court’s dismissal of Count VI is likewise warranted on this ground. *See, e.g., Churchich*, 161 F.3d at 1038.

It is well established that the due process clause of the Fifth Amendment does not apply to the States. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833). Accordingly, New West cannot assert claim for a violation of the Fifth Amendment against Joliet, a subdivision of the State. Nor, can New West state a claim against Joliet for any purported violation of the Illinois Constitution under Section 1983, which indisputably protects only those rights, privileges and immunities conferred by the federal constitution, or, in certain instances, federal statute. *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992) (“violations of state law . . . are insufficient to state a claim under § 1983”).

Setting aside New West’s defective pleading of the Fifth Amendment due process clause, any attempt to state a due process claim pursuant to the Fourteenth Amendment, which does bind the States, would likewise fail as a matter of law. A claim

brought under Section 1983 that asserts a purported infringement of a right expressly provided by the Constitution must be brought pursuant to the specific constitutional provision granting the right, and not the Fourteenth Amendment due process clause. In this case, the provision that is claimed to have been violated would be the takings clause of the Fifth Amendment. *C.f. Graham v. Connor*, 490 U.S. 386, 394 (1989). *See also Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003) (“substantive due process is not ‘a blanket protection against unjustifiable interferences with property’”).

Finally, even if New West had framed Count VI as a violation of the Fifth Amendment takings clause, any such claim would fail. *Forseth v. Village of Sussex*, 199 F.3d 363, 369-70 (7th Cir. 2000) (holding that under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a litigant must avail itself of all remedies afforded by state law before resorting to the federal courts for relief from a purportedly unconstitutional taking).

In conclusion, there are additional, independent grounds for affirmance of the District Court’s dismissal of Count VI of the Amended Complaint that were raised below, but were not addressed by the District Court.

**III. The District Court Properly Dismissed  
New West’s Fair Housing Act Claim**

**A. New West’s Claim For Injunctive Relief Is Moot.**

New West seeks injunctive and monetary relief for conduct by Joliet, allegedly in violation of the Fair Housing Act (“FHA”), specifically 42 U.S.C. Sections 3604 and 3617 (count I). The District Court dismissed New West’s FHA claim for lack of

standing. New West argues at great length on appeal that a claim under the FHA may be brought by non-tenants. (Pl. Br. 19-27). Joliet does not dispute that under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), prudential standing barriers do not apply to the claims brought under the Fair Housing Act. Nonetheless, New West's FHA claim is not cognizable.

New West asked the District Court to “[e]njoin Defendants from further wrongful efforts to delay the closing of the deal with HUD.” (R. 18-2 at 21, ¶ F.) On November 3, 2006, however, after the court entered judgment in Joliet's favor and New West noticed this appeal, New West *did* close on a restructuring loan through the Mark-to-Market program. (SA. 12, 21). The closing extinguishes any live controversy concerning New West's entitlement to an injunction, depriving this Court of Article III jurisdiction to review the dismissal of that claim. It is moot. *See United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1014, 1016 (7th Cir. 1994) (where insurer sued civil rights commission under contract with HUD to enjoin it from investigating insurer's redlining practices prohibited by the FHA, HUD's post-judgment withdrawal of commission's authority to pursue that investigation mooted insurer's injunctive claim on appeal; “there no longer exist[ed] any action for [the insurer] to attempt to enjoin”). For even if this action were to be reversed and remanded, no amount of injunctive relief the district judge could award could prevent Joliet from purportedly delaying the closing—an event that has already occurred.

Because it would be pointless to grant the injunction sought by New West now or in the future, this Court's appellate jurisdiction is confined to reviewing the district court's dismissal of New West's remaining claims for declaratory relief and damages.

As set forth below, dismissal of those claims is the correct result.

**B. New West Lacked Standing  
To Assert A Claim Under the FHA.**

As New West concedes, Article III standing requires that Plaintiff suffer an injury-in-fact. (NW Br. P. 19); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury-in-fact “must be an invasion of a concrete and particularized legally protected interest.” *McConnell v. F.E.C.*, 540 U.S. 93, 227 (2003). The injury from which New West allegedly suffered was from purported closing delays, but, New West did not have a right to close on the contract, and thus, the injury, if any, was “not to a legally cognizable right” of New West’s. *Id.* at 227. Therefore New West lacks standing to sue.

The “delay injury” for which New West seeks to recover is premised upon an asserted contractual right to have HUD discharge its “binding Restructuring Commitment to close the transaction,” and, to do so *without* delay. (R. 18, ¶¶ 22, 24); (A. 9-10). Joliet is accused of wrongfully invading that right through a “campaign of intimidation” to get HUD to “agree[] to hold off on the closing,” to “try to stop HUD from closing” and ultimately, to attempt to “induc[e] [HUD] to renege on its commitment to close.” (R. 18, ¶¶ 24, 29 37, 45); (A. 9-10, 12, 14, 16). Yet the 2003 and 2005 Restructuring Commitments attached to the amended complaint contradict New West’s own allegations. They prove, to the contrary, that New West never had any colorable right to require HUD to close the deal—or more precisely—it never had any colorable right to require HUD to close *sooner than it did*.

The Restructuring Commitment expressly states that it “shall not be effective or enforceable against [HUD]” until all conditions precedent are satisfied. (R. 18, Ex. A; A. 32, ¶ 17); (R. 18, Ex. B; A. 57, ¶ 17). There is no reciprocal agreement that the Commitments are binding *upon HUD*. Significantly, the commitments also provide: “Any approval or decision of [HUD] pursuant to this Commitment shall be in [HUD]’s *sole and absolute discretion*.” ((R. 18, Ex. A; A. 32, ¶ 19); (R. 18, Ex. B; A. 53, ¶ 19) (emphasis added).)

The foregoing provisions amply demonstrate that “[a]lthough labeled a ‘commitment’ letter, [HUD] did not in fact commit” to close the refinancing; instead, it agreed at most to close “*subject to a number of conditions*.” *Runnemedede Owners, Inc. v. Crest Mortgage Corp.*, 861 F.2d 1053, 1054 (7th Cir. 1988). In short, HUD’s “commitments” to New West had no more effect than the sort of “conditional letter of commitment” described in *Runnemedede*. *Id.* at 1056. If anything, they had less effect. For notwithstanding an owner’s fulfillment of the conditions precedent set forth in a HUD restructuring commitment, HUD regulations still warn the owner that “HUD *may elect* not to permit continued consideration of the Restructuring Plan *at any time prior to closing*” on certain other grounds. 24 C.F.R. § 401.403(b)(2) (2003) (emphasis added).

In this case, New West does not so much as allege, even in conclusory terms, that it satisfied the conditions precedent necessary to give rise to an enforceable obligation on HUD’s part to perform, or to make the 2003 or 2005 Restructuring Commitments effective as contracts. *See* Fed R.Civ. P. 9(c). To the contrary, the record discloses that New West was still negotiating the conditions to be imposed by HUD as late as July 2005. On July 17, Plaintiff requested that HUD approve the repayment from the

replacement reserve fund of a proposed loan from its general partner. (A. 96.) On July 29, Plaintiff undertook to retain a HUD-approved consultant to help it implement certain undertakings proposed in its earlier letter. (A. 100.) These conditions were incorporated by HUD into the September 2005 Restructuring Commitment. (A. 65, ¶ 48C).

Without satisfying the conditions precedent, New West had no cognizable right to require HUD to close the transaction at all, much less to close the transaction before the commitments expired. *See Diamond v. United States*, 657 F.2d 1194, 1195-96, 1197-98 (Ct. Cl. 1981) (developer could not maintain breach-of-contract claim against HUD for allowing insurance “commitment” to expire where developer had failed to satisfy conditions precedent); *see also Althin CD Med., Inc. v. W. Suburban Kidney Ctr., S.C.*, 874 F. Supp. 837, 840-42 (N.D. Ill. 1994) (holding that plaintiff lacked Article III standing to sue where its legal rights depended upon contractual conditions precedent that it had failed to satisfy).

Finally, it is telling that the commitments provide no mechanism to compel HUD to close at any time, or against its will. If New West failed to perform “within the time frames contemplated under this Commitment,” HUD had the right to declare the commitments “null and void and of no further force or effect.” (A32 ¶ 14, A57 ¶ 14.) But if HUD failed to perform in a timely way, New West had no reciprocal right to unilaterally void the contract as a means to pressure HUD to close at any time prior to the expiration of the deal. Under these circumstances, New West cannot establish an injury-in-fact because it never had any “legally and judicially cognizable” right to require HUD to close the deal sooner than it did. *See Aurora Loan Services, Inc. v.*

*Craddieth*, 442 F.3d 1018, 1022-24 (7th Cir. 2006).

More fundamentally, New West's claim fails because Joliet had no control over HUD. Joliet could not prevent HUD from closing on the Restructuring Commitment. In *Shaikh v. City of Chicago*, the plaintiff sued the city under sections 1981 and 1982, alleging that the city had violated his civil rights by interfering with its purchase of a HUD-owned property by threatening to condemn the property after the purchase. 341 F.3d 627, 629 (7th Cir. 2003). In rejecting the claims, this Court stated, "[the plaintiff's] §§ 1981 and 1982 claims fail for a more fundamental reason: Because the City had no power directly to affect HUD's proposed sale of the property to Shaikh, it did not unlawfully or unconstitutionally impede upon Shaikh's ability to purchase the building." *Id.* The same is true here. Joliet had no power to dictate HUD's behavior, and thus New West's FHA claim fails—it is predicated entirely on Joliet's exercise of a power it never possessed. In other words, New West has not suffered an injury in fact sufficient to satisfy the standing requirements of Article III, and its FHA claim was properly dismissed.

### **C. New West Fails To State A Claim Under the FHA.**

Even if New West can overcome its lack of Article III standing, the trial court's dismissal of the FHA claims should be affirmed on the alternative ground, initially raised by Joliet below, that New West has failed to state a claim under 42 U.S.C. §§ 3604 and 3617. All of the actions purportedly taken by Joliet indisputably occurred subsequent to New West's acquisition of Evergreen Terrace. It is undisputed; however, that Section 3604 of the FHA only applies to pre-acquisition conduct. *Halprin v. The*

*Prairie Single Family Homes of Dearborn Park Association*, 388 F.3d 327 (7th Cir. 2004) (Posner, J.).

The other Section upon which New West relies, Section 3617, gives rise to a cause of action only in the event of a breach of any of §§ 3603, 3604, 3605, or 3606. Section 3617 renders unlawful any efforts “to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” 42 U.S.C. § 3617 (2005) (emphasis added).

New West argues that Section 3617, when read *in conjunction with HUD regulation 24 C.F.R. § 100.400(c)(2)*, does not require a violation of Section 3604 and thereby affords relief for both pre- and post-acquisition rental conduct. (Pl. Br. 21 (emphasis added)). While this is the actual holding in *Halprin*, the court seriously questioned the validity of the HUD regulation; but because the Defendant in *Halprin* waived any challenge to the regulation, the Court allowed the Plaintiff’s claim under § 3617 to stand, although there was no independent claim under § 3604. In this case, however, Joliet invited the lower court to declare § 100.400(c)(2) invalid.

In *Halprin* this Court observed that the regulation is invalid because it defies the plain language of the statute. See Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 46 (1997) (“[a]gencies, like the courts, are required to defer to the plain meaning rule, and the failure of an agency to do so is reversible by a court”).

Judge Posner noted the regulation effectively “cuts *section 3617* loose from *section 3604*, contrary to the language of *section 3617*.” This Court should follow Judge Posner’s *dicta* in *Halprin* and find that regulation 24 CFR 100.400 is invalid.

An agency’s power “to prescribe rules and regulations . . . is not the power to make law- for no such power can be delegated by Congress- but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.” *Commissioner v. Clark*, 202 F.2d 94, 98 (7th Cir. 1953). When an Agency transgresses the bounds of the statute by “creat[ing] a rule out of harmony with the statute, [the regulation] is a mere nullity.” *Id.*

New West argues that its claim is based on current and future rentals, not post-acquisition conduct. In fact, its claim is based on the alleged interference with its contract with HUD, which is post-acquisition conduct that cannot support a claim under Section 3604.

New West’s claims based on post-acquisition conduct fail to state a cause of action under § 3604. Accordingly, New West has failed to state a claim under the plain language of §3617. To the extent that regulation 24 CFR 100.400 would permit a claim that is not authorized by Congress, the regulation is invalid.

**CONCLUSION**

For the foregoing reasons, the District Court’s final Order dismissing New West’s First Amended Complaint and granting Defendants’ motion should be reversed in its entirety and this case should be reinstated in the District Court.

Dated: February 2, 2007

Respectfully submitted,

The City of Joliet, an Illinois municipal corporation, Arthur Schultz, both individually and officially as the Mayor of Joliet, John M. Mezera, both individually and officially as the City Manager of Joliet, and Jim Shapard, both individually and officially as Deputy City Manager of Joliet, Defendants

By: \_\_\_\_\_  
One of Their Attorneys

Peter A. Silverman (6196081)  
Carl A. Gigante (6185561)  
Catherine M. Towne (6287549)  
Figliulo & Silverman, P.C.  
10 S. LaSalle Street, Suite 3600  
Chicago, IL 60603  
312/251-4600

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)**

Certificate of Compliance With Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 12.5-point font for text, 11-point font for footnotes, and using Times New Roman font.

---

Peter A. Silverman  
Attorney for Defendants-Appellees

Dated: February 2, 2007

**CIRCUIT RULE 31(e)(1) CERTIFICATION**

I, Peter A.Silverman, certify that the materials contained in the Appendix are not available in searchable Portable Document Format as described in Circuit Rule 31(e)(3). Accordingly, Defendants-Appellees shall submit a digital version of only the brief to the Court, and shall submit a paper version of the Appendix to the Court, as described in Circuit Rule 31(e)(1).

---

Peter A. Silverman  
Attorney for Defendants-Appellees

Dated: February 2, 2007

**PROOF OF SERVICE**

I, Peter A. Silverman, an attorney, hereby state that two (2) copies of Brief Of Defendants-Appellees, one (1) copy of Supplemental Appendix Of Defendants-Appellees and one (1) copy of Brief of Defendants-Appellees on CD-ROM (virus free) in Portable Document Format as described in Circuit Rule 31 were served upon the Attached Service List via in-hand delivery where feasible, or by depositing same in a sealed box, postage prepaid, in the U.S. mail at 10 South LaSalle Street, Chicago, Illinois 60603, on February 2, 2007.

I, Peter A. Silverman, an attorney, hereby state that fifteen (15) copies of Brief Of Defendants-Appellees and ten (10) copies of Supplemental Appendix Of Defendants-Appellees were delivered to the United States Court of Appeals for the Seventh Circuit via hand delivery on February 2, 2007. One (1) copy of Brief Of Defendants-Appellees was uploaded to the Seventh Circuit via the Internet as described in Circuit Rule 31(e)(2).

---

Peter A. Silverman

**SERVICE LIST**

Claudette P. Miller (cpmiller@uhlaw.com)  
F. Thomas Hecht (fthecht@uhlaw.com)  
Ungaretti & Harris LLP  
3500 Three First National Plaza  
Chicago, IL 60602

**DEFENDANTS-APPELLEES' SUPPLEMENTAL APPENDIX  
PURSUANT TO CIRCUIT RULE 30(b)**

<b>TAB</b>	<b>SUPPLEMENTAL APPENDIX PAGE</b>	<b>DATE</b>	<b>DESCRIPTION</b>
<b>1</b>	<b>SA1 - SA11</b>	12/29/06	SETTLEMENT AGREEMENT AND RELEASE
<b>2</b>	<b>SA12 - SA20</b>	11/03/06	MORTGAGE RESTRUCTURING MORTGAGE ET I
<b>3</b>	<b>SA21 - SA29</b>	11/03/06	MORTGAGE RESTRUCTURING MORTGAGE ET II
<b>4</b>	<b>SA30 - SA47</b>	11/08/06	DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO JOLIET'S AMENDED COMPLAINT FOR CONDEMNATION
<b>5</b>	<b>SA48 - SA74</b>	09/28/05	COMPLAINT
<b>6</b>	<b>SA75 - SA81</b>	10/04/05	ORDINANCE NO. 15298