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.

Appeal From The United States District Court
For the Northern District of Illinois, Eastern Division,
Case No. 05-C-1743
The Honorable Judge Charles R. Norgle

REPLY BRIEF OF PLAINTIFF-APPELLANT NEW WEST

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Argument

I. Standards Applicable On This Appeal From A Motion To Dismiss

As this Court reiterated recently:

> "Any district judge (for that matter, any defendant) tempted to write `this complaint is deficient because it does not contain …' should stop and think: what rule of law *requires* a complaint to contain that allegation?" . . . . [In *Swierkiewicz*] [t]he Court held, and we reiterate, that complaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule. Any decision declaring `this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list in Fed.R.Civ.P. 9(b).

Kolupa v. Roselle Park District, 438 F.3d 713, 714-15 (7th Cir. 2006), *citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (other internal citations omitted, emphasis in original). *See also Thompson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004) ("[t]he federal rules replaced fact pleading with notice pleading. All that the rules require, with a few exceptions inapplicable in this case, such as pleading fraud, Fed.R.Civ.P 9(b), is that a complaint state the plaintiff's legal claim ….").

II. The District Court Erred In Dismissing New West's FHA Claim

A. New West Pled Injury Demonstrating FHA Standing

Defendants concede that prudential standing barriers do not apply to claims under the Fair Housing Act ("FHA") and pay lip service to the extremely liberal standards for pleading standing under the FHA. Brief of Defendants-Appellees ("Response") at 42. Despite this, Defendants maintain that New West failed to plead the requisite injury in fact for FHA standing. They are wrong.

As set forth in New West's initial Brief in this appeal, the FHA grants broad standing to persons injured by *discriminatory housing practices*. Brief of Appellant New West ("Brief"), at 20-25. New West alleges in its FHA claim that it was injured because Defendants' discriminatory conduct:

- caused higher vacancy rates at the property by scaring off existing and prospective tenants, resulting in lower rental income from the property;
- caused higher debt service, financing costs and fees due to the delays in closing the HUD refinancing occasioned by Defendants' misrepresentations to HUD and its agents about the conditions at the property and affordable housing alternatives in the area;
- threatened New West with the loss of Evergreen Terrace; and
- burdened New West with defending baseless lawsuits.

R. 18-2 at 9, 10, 11-12, 15, 17, ¶¶29, 35, 38-42, 56-57 and 69[1]; Brief at12-14.

New West set forth numerous FHA cases where allegations of economic injury — ranging from wrongly-delayed government funding, to money spent on development plans and studies, to lost seed money, to diverted resources, to extra rent, to imminent loss of property — similar to the allegations in its FHA claim were found sufficient to demonstrate injury for FHA standing purposes. *See* Brief at 20, 22-26.

Defendants never address or even mention these cases. They ignore that New West pleads housing discrimination and try to characterize this action as

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[1] "R. ___" refers to citations to a document in the appellate record, where the number following "R" represents the document number listed on the top of each page of the record. The number following "R" may be hyphenated (*e.g.*, "18-2") to mirror the document numbers listed on the top of each page in the record. "R. ___ at ___" refers to a particular page within a record document. "R. ___ at ___, ¶ ___" refers to a particular paragraph on a page within the record document."

a contract dispute, arguing that New West was not injured because it had no right to make HUD close on the refinancing. Not surprisingly, Defendants cite only non-FHA cases by way of support for their argument. *See* Response at 44-46. There is nothing in the FHA that requires such a showing. Defendants' cases — and their argument — are irrelevant to FHA standing.

As this Court has recognized, in the FHA Congress created a right to discrimination-free housing and gave private persons the authority to enforce that right as private attorneys general without running afoul of Article III. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). Here, New West has alleged that Defendants' discriminatory efforts to do away with Evergreen Terrace interfered with affordable housing and in the process cost it time and money. New West therefore alleged injury sufficient to confer FHA standing. Whether or not New West could compel HUD to close on a date certain is immaterial. Accordingly, the District Court erred in dismissing New West's FHA cases for lack of standing.

B. New West States A Claim Under Section 3604

Defendants also argue that New West has pled only "post- acquisition" conduct not actionable under Section 3604 (and therefore not actionable under Section 3617, either) because the conduct of which New West complains took place after New West acquired Evergreen Terrace. Response at 46-48. This argument, too, is wrong.

To begin with, Defendants' argument is based on a faulty premise: New West's acquisition of an affordable housing development is not equivalent to an

individual's acquisition of affordable housing. New West is a continuing provider of affordable housing, not a person already living in affordable housing. It is the potential or existing tenants that Defendants seek to exclude who are the focus of the pre- or post-acquisition analysis.

What the First Amended Complaint actually alleges is that New West is providing "and seeks to continue providing" affordable housing in Joliet, R. 18-2 at 14, ¶52, and that Defendants violated Sections 3604 and 3617 of the FHA by engaging in racially-motivated discriminatory conduct designed to make New West cease renting affordable housing. *Id.* at ¶53. These allegations implicate *access* to housing, *i.e.*, pre-acquisition conduct, and clearly state a claim under Section 3604. *See Halprin v. Prairie Single Family Homes*, 388 F.3d 327, 328-29 (7th Cir. 2004) ("*Halprin*").

C. The HUD Regulation Affording Relief for Post-Acquisition Conduct Is Valid

HUD regulation 24 C.F.R. §100.400(c)(2) (the "Regulation") interprets the FHA and forbids "threatening, intimidating or interfering with persons in their enjoyment of a dwelling". This Court reasoned in *Halprin* that, because interference with the "enjoyment of a dwelling" can take place at any time, the Regulation extends the protection of the FHA to post-acquisition discrimination. *See Halprin,* 388 F.3d at 330.

In *dicta* in *Halprin* Judge Posner did question whether the Regulation went too far. He also recognized that the only appellate decision to squarely address the question to date, *Gonzalez v. Lee County Housing*, 161 F.3d 1290

(11th Cir. 1998), had found it valid. *Halprin*, 388 F.3d at 328-29. In *Gonzalez,* the Eleventh Circuit performed a *Chevron* analysis of the Regulation and determined it was neither an impermissible construction of Section 3617 nor contrary to clearly-expressed Congressional intent. *Id.* at 1305 n.43, *citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Other courts have performed a *Chevron* analysis of the Regulation and reached the same conclusion. *U.S. v. Koch*, 352 F. Supp. 2d 970, 979-80 (D. Neb. 2004) (the Regulation is a reasonable interpretation of Section 3617 and not contrary to Congress' intent in enacting the FHA).

Since *Halprin*, this Court has accepted the Regulation's validity, though in a case where its validity was not disputed. *East-Miller v. Lake County Highway Department*, 421 F.3d 558 (7th Cir. 2005). The District Court has held similarly. *See Halprin v. Prairie Single Family Homes*, 2006 WL 2506223 at *1 (N.D. Ill., June 28, 2006) (in remand of *Halprin,* court noted that defendants explicitly acknowledged that Section 3617 addresses post-ownership discrimination and the "enjoyment of any right" under the FHA) (Rep. Appx., tab 1[2]); *George v. Colony Lake Property Owners Ass'n*, 2006 WL 1735345 at *3 (N.D. Ill., June 16, 2006) (discussing *Halprin* and *Gonzalez* and stating that "[u]nder current case law, the Regulation is valid.") (Rep. Appx., tab 2); *Krieman v. Crystal Lake Apartments Limited Partnership*, 2006 WL 1519320 (N.D. Ill., May 31, 2006) at *9 (citing *Halprin* and stating that, in light of the Regulation, "the Seventh Circuit has recently agreed with sister circuits that contrary to

[2] Citations to "Rep. Appx." refer to Plaintiff-Appellant New West's Appendix filed with this Reply Brief.

the language of § 3617 there need not be a violation of 42 U.S.C. §§ 3603-3606 in order to establish a violation of § 3617") (Rep. Appx., tab 3); *U.S. v. Altmayer*, 368 F. Supp. 2d 862 (N.D. Ill. 2005) (declining to dismiss an FHA complaint based on a challenge to the Regulation's validity).

D. New West's Claim for Injunctive Relief Is Not Moot

Defendants also argue that the claim for injunctive relief under the FHA is moot because New West has closed with HUD on a restructuring loan for Evergreen Terrace I and II. Response at 7, 42. In support, they attach to their Supplemental Appendix the restructuring mortgages. *See id.* at SA. 12-20 and SA. 21-29.

The request for injunctive relief in the FHA claim is not moot. There are to be two closings on Evergreen Terrace, not one. Only the first of the two closings has taken place. Just as this Court may take judicial notice of the recorded restructuring mortgages, *see Driebel v. City of Milwaukee*, 298 F.3d 622, 631 n.2 (7th Cir. 2002); Fed. R. Evid. 201(b)(2), this Court may take judicial notice of the recorded regulatory agreements for Evergreen Terrace I and II, which describe the distinction between the first and second contemplated HUD closings on the properties. *See* Regulatory Agreements, Rep. Appx., tab 4, at Rider ¶10.

III. The District Court Erred In Dismissing New West's Supremacy Clause Claims

A. The District Court Had Federal Question Jurisdiction

The District Court had subject matter jurisdiction over New West's claims that, because of the substantial federal interest in the property,

Defendants' efforts to condemn, demolish or otherwise interfere with Evergreen Terrace were preempted by the Supremacy Clause. In its initial Brief, New West set forth unambiguous and controlling United States Supreme Court and Seventh Circuit authority and relevant precedent from other courts expressly holding that under *Ex Parte Young* federal courts have federal question jurisdiction over suits by plaintiffs seeking declaratory or injunctive relief from efforts by local officials to impose regulations on them that interfere with and therefore are preempted by federal law. *See* Brief at 29-31.

Defendants never address this authority. Instead, they insist that there is no subject matter jurisdiction over the Supremacy Clause claims because New West has not alleged complete preemption. *See* Response at 13-17. They are mistaken.

As demonstrated by the authority set forth in New West's Brief, the complete preemption exception to the well-pleaded complaint rule has no application here: it is only relevant to a federal question jurisdiction analysis in a case involving removal jurisdiction. *See* Brief at 33. *See also Virgil v. Reorganized M.W. Co., Inc.*, 156 F. Supp. 2d 624, 630 (S.D. Miss. 2001) ("Courts should not blur the important distinction between the jurisdictional doctrine of complete preemption and the more familiar defense of ordinary preemption. `Stated simply, complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court.'") *citing A.S.I Worldwide Comm. Corp. v.*

WorldCom, Inc., 115 F. Supp. 2d 201, 205 n.6 (D.N.H. 2000) (*quoting BLAB TV v. Comcast Cable Comm., Inc.* 182 F.3d 851, 854-55 (11th Cir. 1999). Defendants offer no contrary authority. Indeed, one of their cases, *Nott v. Aetna*, 303 F. Supp. 2d 565, 568-69 (E.D. Pa. 2004), recognizes that complete preemption is a removal jurisdiction inquiry. Response at 16.

Defendants similarly argue that, because the Declaratory Judgment Act and Supremacy Clause do not independently confer jurisdiction, New West had to plead another statute conferring upon it a federal right or private cause of action to establish jurisdiction. The Supreme Court has expressly rejected this argument. *See* Brief at 30, *citing Verizon Maryland, Inc. v. Public Service Commission,* 535 U.S. 635, 636-37, 643-46 (2002) (it is immaterial for jurisdictional purposes whether the federal law in question provides for a private right of action and "the inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim").

B. The Supremacy Clause Claims Are Not Moot

Defendants also urge that New West's Supremacy Clause claims are moot on appeal because the District Court below has dismissed them. Response at 2, 8, 11. These arguments make no sense.

The most obvious problem with Defendants' mootness theory is that they admit that the claims present a live controversy when they ask that the claims be decided in the condemnation case where they are "currently being adjudicated." Response at 11. New West's Supremacy Clause claims are not moot. They have not been resolved or ceased to exist. As this Court has

stated, the test for mootness is "whether the relief sought would, if granted, make a difference to the legal interest of the parties." *Air Line Pilots Ass'n International v. UAL Corp.*, 897 F.2d 1393, 1396 (7th Cir. 1990). It would certainly make a difference to New West if it succeeded on its claims: Defendants' efforts to condemn, demolish and impose other preempted regulations on Evergreen Terrace would cease.

Further, as the party asserting mootness, Defendants bear the burden of persuading. *Wisconsin Right To Life v. Schober*, 366 F.3d 485, 491 (7th Cir. 2004). Defendants have not met that burden because they offer no relevant authority for their mootness argument. *Stotts v. Community Unit School District*, 230 F.3d 989 (7th Cir. 2000), Response at 11, is plainly distinguishable. There, because he had graduated and was no longer eligible for basketball, a player's challenge to the constitutionality of a regulation prohibiting team members from having tattoos was declared moot.

Defendants also, under the guise of arguing mootness, argue that the Supremacy Claims should be deferred for adjudication in the later-filed condemnation case, insisting that this would serve the interests of judicial economy and not be prejudicial to New West. Response at 11-12. Defendants offer no authority to support either the contention that claims in a prior-filed federal lawsuit should be deferred until they can be adjudicated in a related, later-filed federal lawsuit or the contention that a defendant has the right to determine when and where a plaintiff's claims are adjudicated.

Defendants cite *Shaikh v. Chicago*, 341 F.3d 627 (7th Cir. 2003), arguing that it supports the proposition that the eminent domain case is the proper forum for adjudication of New West's Supremacy Clause claims. Response at 12. It does not. *Shaikh* involved an attempt to preempt state court eminent domain proceedings by filing unsubstantiated civil rights claims under Sections 1981, 1982 and 1983 and was decided on a more developed record than here. The *Shaikh* court repeatedly emphasized the absence of any evidence of racial *animus* or other discriminatory intent in the case despite discovery and specifically distinguished cases involving allegations or evidence of equal protection or due process violations based on "invidious racial, religious, ethnic, or other discrimination actionable under §1983". *Shaikh,* 341 F.3d at 634. New West's claims, by contrast, involve the type of allegations of intentional discrimination that the *Shaikh* court thought would alter the outcome in that case.

C. New West Pled Conflict Preemption

Though they concede earlier that the "District Court properly observed" that "New West alleges a 'conflict preemption' issue …." Response at 16, Defendants' final argument in favor of affirmance of the dismissal of New West's Supremacy Clause claims is that New West did not adequately plead a conflict between federal housing law, regulation and policy and their desire to condemn or otherwise do away with Evergreen Terrace.[3] It is not persuasive.

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[3] Defendants also devote time to the importance of state sovereignty and the eminent domain power. Numerous courts, however, have held that local governments were prohibited under the Supremacy Clause from foreclosing on, condemning or otherwise

Defendants lead off by claiming that, because their amended condemnation complaint seeks to take Evergreen Terrace "subject to HUD's interest," there is no conflict. Response at 7, 8, 18. There are a number of flaws with this argument. This argument does not accept the allegations of the First Amended Complaint. It could not: the original complaint in this action was filed six months before, and the First Amended Complaint weeks before, Joliet ever filed the condemnation case. Brief at 14-15. This argument is disingenuous. Joliet initially chose not to name HUD as a party to the condemnation action and later fought to reverse the District Court's decision to add HUD -- to the point of seeking mandamus from this Court. *See id*. at 13.

This argument is also untrue. Joliet cannot condemn Evergreen Terrace "subject to HUD's interest". New West alleges as much in its Answer to the Amended Complaint for Condemnation, attached as Exhibit 4 to Defendants' Supplemental Appendix. *See* Response, SA. 41 and SA. 45. More importantly, HUD itself rejects the notion that Joliet can condemn the property subject to HUD's interest. This Court may take judicial notice of HUD's filed Answer to the Amended Complaint for Condemnation, where it states:

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regulating in a fashion that interferes with federal programs' property in which there is a federal interest. *See* R. 36-1 at 3-7, citing cases. *See also Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (holding that condemnation is regulation, regardless of whether it is an exercise of state police power to promote public safety and that federal railroad law preempted state condemnation proceeding). Defendants also take pains to characterize New West's interests and rights as voluntary and purely economic, *see* Response at 19-20. These characterizations contradict MAHRA, which recognizes New West as a "partner" in the federal government's affordable housing program. *See* Brief at 28, *citing* MAHRA § 511(a)(2)(A), (B) and (6).

> The contractual right to approve or disapprove the conveyance transfer, or encumbrance of [Evergreen Terrace] is therefore a property interest of HUD. The taking of the Subject Property by the City of Joliet would necessarily effect a conveyance, transfer or encumbrance of that property without HUD's consent and would therefore necessarily constitute a taking that was not "subject to all rights and interests" of HUD.

Rep. Appx., tab 5, at ¶¶31, 33.

Defendants next claim that the Ordinance is actually consistent with MAHRA because it "embraces and promotes" the goals of federal housing law. Response at 18. The Ordinance does contain a statement that the redevelopment of Evergreen Terrace ought to include affordable housing. *Id.* That is not enough, however, to demonstrate that New West has not stated a conflict preemption claim. Housing code enforcement cases hold that local codes must give way to federal interest *even if* the local codes track comparable federal regulation and *even if* they embrace similar goals. *See United States v. City of St. Paul*, 258 F.3d 750, 752-54 (8th Cir. 2001). Similarly, where parallel state programs or laws impose additional burdens on a federal program, they must fall, regardless of their "goal" or "purpose":

> [The Defendants] argue that the state statutes do not impede the goal of federal law because both the state and federal statues have the same underlying purpose of providing low-income housing. While we recognize that these statements may be true, these arguments do not address the principal problem with these state statutes – they fly in the face of the Constitution's Supremacy Clause.... Simply, state statutes may not interfere with the implementation of a federal program by a federal agency.

Forest Park v. Hadley, 336 F.3d 724, 732 (8th Cir. 2003).

The Ordinance authorizes the condemnation and demolition of Evergreen Terrace. The question is whether eminent domain or condemnation will impair

or burden the operation of MAHRA and federal housing programs at Evergreen Terrace. It will; indeed, it was designed to do precisely that. MAHRA was enacted with eligibility requirements, preservation purposes and mechanisms for local input. It does not provide that, after HUD rejects local input, local governments may override the requirements and become the owner with a non-preservation objective. Defendants' effort to do so conflicts with federal law and programs. Moreover, the Ordinance contains other findings, including that "similar facilities across the nation have been plagued by similar conditions and that a consensus has emerged that such facilities threaten public health and safety and should be redeveloped." *See id.*, Defendants' Supplemental Appendix at SA 76. HUD itself has asserted that these "purported factual findings ... contradict findings and policies embodied in federal statutes" including MAHRA and the Emergency Low Income Housing Preservation Act of 1987. *See* Rep. Appx., tab 5, at ¶14.

Defendants' final argument is that New West has not alleged conflict preemption because HUD regulations "do not support New West's claims" as they "contemplate the party may be condemned." Response at 20. They point to isolated references to "eminent domain" or "demolition" in the hundreds of HUD-related regulations as evidence of HUD's general and universal consent to submit to local eminent domain proceedings. *Id.* at 20-22.

This is not a proper analysis on a motion to dismiss. The Supremacy Clause claims in the First Amended Complaint allege generally that Defendants are "imped[ing] 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. 18-2 at 18, 20, ¶¶ 74, 89. This is more than enough to satisfy federal notice pleading requirements. *See, e.g., Thompson v. Washington*, 362 F.3d at 970-71, *supra*. None of the cases Defendants cite suggest otherwise. They do not involve motions to dismiss. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577 (1971) (appeal of summary judgment); *James v. Valtierra*, 402 U.S. 137 (1971) (appeal from judgment entered by three judge panel); *South-Surburban Housing Center v. Greater South Suburban Board of Realtors*, 713 F. Supp. 1068 (N.D. Ill. 1989), *aff'd in part, rev'd in part by*, 935 F.2d 868 (1991) (trial).

The references in the HUD regulations to which Defendants refer do not in any event demonstrate that there is no conflict between federal housing law and policy and Defendants' desire to condemn Evergreen Terrace. They are not direct discussions, but rather oblique references in definitional provisions with little or no relationship to Evergreen Terrace or the programs under which it operates. The first reference occurs in the context of a regulation concerned with the circumstances under which an owner may prepay its mortgage and extinguish any HUD lien. The sole word or phrase upon which Defendants rely is in the definition section where prepayment is defined to exclude from "condemnation proceeds" sums applied to a mortgage. 24 C.F.R. §248.101. The second reference occurs in the context of application requirements for site conversions such as when project-paid utilities are converted to tenant-paid

utilities or residential units are converted to non-residential. The regulations note that the requirements of the subsection do not apply to a public taking by condemnation or eminent domain. 24 C.F.R. §245.405(c). The third reference occurs in provisions that govern public housing demolition. The regulations exclude from their reach a wide variety of impairments, including the taking of such local housing authority property by eminent domain or demolition. 24 C.F.R. §970.2.

IV. The District Court Erred in Dismissing New West's Civil Rights Claims

A. The Section 1983 Claims

Count III of the First Amended Complaint describes the intentional efforts by Defendants to close Evergreen Terrace and remove its low income African-American residents from Joliet. R. 18-2 at 1-13, 15-16, ¶¶ 1-47, 61-64. Thus, it pleads a violation of the Fourteenth Amendment and states a cause of action under 42 U.S.C. §1983. *See Jacobs v. City of Chicago*, 215 F. 3d 758, 774-75 (7th Cir. 2000). Nonetheless, the District Court dismissed Count III in its entirety.

1. The Individual Officers

Although the District Court ignored entirely New West's claims against individual officers, Defendants argue that the District Court's dismissal of individual damage claims survives because the officers are entitled to qualified immunity "as a matter of law." Response at 24. This is incorrect.

The rationale for extending qualified immunity to public officials is to insulate them from liability for frivolous claims or novel constitutional

developments of which such officers could not have been informed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Speigel v. City of Chicago*, 106 F. 3d 209, 212 (7th Cir. 1997). That rationale is inapplicable here. New West's claims are not frivolous, and the idea that a coordinated, aggressive campaign to exclude African-Americans from leasing affordable housing might violate the Fourteenth Amendment is hardly new. For over a century it has been constitutionally clear that if a public official interferes with housing opportunities on the basis of race, that official may be held accountable. The Civil Rights Statutes — passed in the aftermath of the Civil War — made explicit the principle that all persons may enjoy the benefits of housing without the specter of discrimination on the basis of race. Since the passage of the Thirteenth Amendment there has been considerable precedent that manipulating housing availability, harassment of tenants, and interference with real estate contracts — all in furtherance of racial exclusion — is forbidden. *See Jones v. Alfred H. Meyer*, 392 U.S. 409 (1968); *Progress Development Corporation v. Mitchell*, 286 F. 2d 222 (7th Cir. 1961); *Dailey v. City of Lawton*, 425 F. 2d 1037, 1040 (10th Cir. 1970); *see also Village of Arlington Heights v. Metropolitan Housing Development Corporation, et al.*, 429 U.S. 252 (1977). These prohibitions have been incorporated into the FHA as well as many other statutes and regulations. *See Dews et al. v. The Town of Sunnyvale Texas*, 109 F. Supp. 2d 526, 570 (N.D. Tex. 2000). Even without reference to race, city officials may run afoul of the Fourteenth Amendment by arbitrary enforcement of housing codes. *Armendariz v. Penman*, 75 F. 3d 1311, 1327-28

(9th Cir. 1996) (city officials not entitled to qualified immunity from claims of arbitrary code enforcement brought by low income property owners).

These principles, of course, are not foreign to Defendants. Not only are they held to the knowledge of such law by virtue of holding public office but in the past Joliet and its officials have been sued for their efforts to exclude minorities by manipulating real estate development and restricting affordable housing. *See U.S. General, Inc. v. City of Joliet*, 792 F. 2d 678 (7th Cir. 1986). To argue, under these circumstances, that Defendants are entitled to qualified immunity because of the novel nature of the rights asserted, is as intellectually dishonest as it is unpersuasive.

Defendants drill down to the lowest possible fact base – phone calls, meetings, fraudulent statements – in an effort to argue that they had no idea that *particular acts* might be actionable. Response at 28-30. Were this the law, every variable fact pattern would confer immunity because fact patterns are never absolutely identical. The appropriate analysis sets the individual acts in context. Here, that context was the denial to low-income African Americans of housing — something that has been forbidden for a very long time. Moreover, as this Court has observed, officials may be on notice that their conduct violates established law even in novel circumstances. *McGreal v. Ostrov*, 368 F.3d 657, 683 (7th Cir. 2004). The Supreme Court has rejected the requirement that previous cases be fundamentally similar before officials can be held to know their conduct was unlawful. The salient question is whether the state of the law gave these officials fair warning. *Hope v. Pelzer*, 536 U.S.

730, 741 (2002) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning and . . . may apply with obvious clarity to the specific conduct in question even though the 'very action in question has [not] been previously held unlawful,'" *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). There is no question but that the defendants had adequate warning that their exclusionary conduct was constitutionally suspect.

In addition, the conduct alleged in the First Amended Complaint is far more offensive than the description offered by Defendants in support of qualified immunity. Not only was there harassment, threats, and obstruction but the officers intentionally lied to and fraudulently misrepresented the state of Evergreen Terrace to HUD, to the media and to the underwriters of the refinancing effort. *See, e.g.*, R. 18-2 at 5, 7-10, ¶¶ 17, 18, 25, 26, 32, 35. *See also* Rep. Appx., tab 5, at ¶¶8, 9, 11, 13 (Joliet's allegations as to the conditions at the property have "no rational basis in fact). Such public deception in the service of race discrimination is inconsistent with the immunity to which public officials may be entitled.

Finally, dismissal at the pleading stage on immunity grounds is inappropriate in any but the most exceptional cases. *Alvardo v. Litscher*, 267 F. 3d 648, 651 (7th Cir. 2001). Qualified immunity typically depends on the facts of the case, since a plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity. Thus, such matters are better left to factual development after the pleading phase. *Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) notes that

"summary judgment is the right way to handle claims of immunity," and (as quoted in *Alvarado*) qualified immunity is "almost always a bad ground for dismissal," at the pleading stage. *Alvarado,* 267 F.3d at 652. [4]

2. The City of Joliet

Joliet itself may be found liable because the mayor, the city manager and the deputy city manager are all named as defendants with the power to set policy for the City. In such settings, even a single act may confer liability. *Brokaw v. Mercer County*, 235 F. 3d 1000, 1010-11 (7th Cir. 2000). Moreover Joliet did, in fact, participate by ratifying the actions of its executives. The efforts of the Mayor to close Evergreen Terrace and to exclude African-American tenants from housing was endorsed and encouraged by resolutions passed by the City Council at the urging of the named individual defendants. Brief at 12. *Monell v. Department of Social Services*, 436 U.S. 658 (1978) was designed to prevent municipalities from being held responsible for the acts of individual officials where the municipality was not a participant in the actionable conduct. It is an effort to ensure that the doctrine of *respondeat superior* does not creep into the jurisprudence of Section 1983. Here such divergence between the acts of the city and the acts of its officers does not exist.

Defendants' response is that New West did not plead a policy or practice as *Monell* requires and did not demonstrate that the mayor, the city manager and the deputy city manager have the power to set policy for Joliet. Further,

[4] The First Amended Complaint also seeks declaratory relief against the individual officers. *See* R. 18-2 at 15-16, 21-22, ¶¶ 61-65, 93A-F. Such prospective claims are outside the reach of the qualified immunity doctrine. *Denius v. Dunlap*, 330 F.3d 919, 928 (7th Cir. 2003).

Defendants argue that the Illinois Municipal Code suggests that these officers named as defendants do not have policymaking powers as a matter of law and that therefore the claims against Joliet itself fail.

The discriminatory and disruptive acts of which New West complains are predominantly executive actions. The intimidation, the efforts to block the closing with HUD, the harassment by police and the initiation of groundless compliance litigation and demolition proceedings, and fraudulent representations to state and federal agencies arise from the ultimate acts of administrative officers. And for these, the mayor, the city manager the deputy city manager are the final administrative policy makers. The mayor, city manager and his deputy are the ultimate authority for the enforcement of all laws, exercise control over all departments, and have the power to hire and fire any appointee who works for Joliet. 65 ILCS § 5/5-3-7. The mayor is "the chief executive officer" who shall "take care that the laws and ordinances are faithfully executed." 65 ILCS § 5/3.1-35-5. Both the mayor, the city manager and his deputy have the power to (a) direct that the law department file actions, (b) direct that the police department take certain actions, (c) represent the city in public meetings or conversations with other agencies – whether state or federal. Indeed, Illinois law recognizes that the mayor shall be recognized as the "official" head of the city in its dealings with the state. 65 ILCS § 5/5-3-1.

It was the Mayor, the City Manager and the Deputy City Manager that held themselves out to be and spoke for Joliet in meetings with federal agencies. It was the Mayor, the City Manager and the Deputy City Manager

that made the representations on behalf of Joliet to the refinancing underwriters and the media. It was (and still is) these individual defendants who characterize themselves as speaking for Joliet to New West. It is, therefore, an entirely reasonable inference from the pleadings that the mayor, the city manager, and deputy city manager are, as a factual matter, the final authorities for Joliet's administrative actions in this case. Moreover, the City Council itself ratified the individual Defendants' efforts to restrict affordable housing. It did so by giving effect to the threats to take the property by passing resolutions seeking to seize Evergreen Terrace by eminent domain and condemnation. In effect Joliet's city council embraced the exclusionary efforts of the individual defendants by its authorization of improper legal proceedings. This is clearly sufficient to impose liability on Joliet itself.

B. The Section 1982 Claims

Count II of the First Amended Complaint describes intentional acts of race discrimination against "citizens" that interferes with or prohibits their leasing or continued occupancy of affordable housing in Joliet. New West is entitled to seek relief from such conduct for its own injury pursuant to 42 U.S.C. § 1982. New West may also bring such claims on behalf of the tenants of Evergreen Terrace given the closeness of New West's relationship to the tenants, the ability of any judgment to afford effective relief to the tenants, and the ability of New West to best represent a low-income community in a serious fight with a well-financed municipality.

Defendants argue that because New West is not a "citizen," it may seek no recovery under Section 1982. Response at 32. Defendants do not contest New West's allegations of injury, only that it is not a proper party under Section 1982.

To understand why Defendants are incorrect, it is important to recognize the distinction between members of the protected class – *e.g.*, "citizens" – and those who may bring an action for injury to the members of the protected class – *e.g.*, "persons." The two are not synonymous. A person need not belong to a protected class to sue under the Fourteenth Amendment or federal civil rights statutes so long as they themselves have suffered injury. *See Homan v. City of Reading*, 963 F.Supp. 485, 491 (E.D. Pa. 1987). *See also Warth v. Seldin*, 422 U.S. 490, 505 (1975) ("When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.")

This court and others have allowed church organizations, developers, and advocacy organizations – none of which are citizens – to pursue actions to recover damages or for equitable relief under Section1982 for acts of discrimination against the protected class. Thus, for example, in *Shaare Tefilia Congregation v. Cobb,* 481 U.S. 615, 616-17 (1987), the United States Supreme Court permitted a Jewish congregation to assert the rights of its congregants in a §1982 challenge to anti-Semitic slogans, phrases and symbols directed at the

synagogue. The Shaare Tefilia Congregation sued individually and on behalf of its members, as New West does here.

Similarly, this Court in *Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Stop Treaty Abuse-Wisconsin, Inc., et al.,* 991 F.2d 1249 (7th Cir. 1993), permitted a non-citizen Indian tribe to sue under Section 982 to enjoin protester interference with tribal rights to engage in off-reservation hunting and gathering on public lands. In an extended discussion of the merits, this Court did not question or hesitate to affirm the right of the tribe to proceed. Indeed, the Court reinstated the preliminary injunction entered by the District Court in favor of the tribe. *Id.* at 1264; *see also Village of Bellwood v. Dwivedi*, 895 F. 2d 1521, 1526 (7th Cir. 1990); *Hudson Valley Freedom Theatre v. Heimback*, 671 F. 2d. 792, 705-07 (2d Cir. 1982); *Park View Heights Corporation v. City of Black Jack*, 467 F. 2d 1208 (8th Cir. 1972).

The propriety of New West pursuing such claims is supported by the language of 28 U.S.C. §1343, the jurisdictional statute that governs claims asserted under Section 1982. The jurisdictional statute provides that the district court has jurisdiction over civil rights actions undertaken by any *person* even though the protected class may be more narrowly defined. New West is such a person.

With regard to New West's standing to assert the rights of third party tenants, Defendants urge this court to adopt the District Court's conclusion that "New West provides no evidence to suggest that Evergreen Terrace residents are unable to prosecute this case themselves." R. 85-1 at 7. This is

hardly the test for standing at this stage of the proceeding, but the Defendants embrace the concept wholeheartedly, speculating on various reasons why tenants might not want to participate. Response at 37. This is a matter far better left to further factual development.

Warth v. Seldin, *supra*, and its progeny affirm the right of a party to represent the interest of a third party as an exception to the general rule that a party may not assert the rights of others. Courts permit such actions "where defendant's action adversely affects an existing relationship between plaintiff and the third party or when the third party is somehow inhibited from asserting its own rights." *U.S. General, Inc. v. City of Joliet*, 432 F. Supp. at 350. Here, of course, the actions of Defendants have a pervasive impact on the relationship between New West and its tenants. If Defendants are successful, the landlord-tenant relationship will be severed —as it already has been in several instances. In response to Defendants' campaign of harassment, numerous tenants have left Evergreen Terrace. More will do so. R. 18-2 at 15, ¶¶56, 57. Indeed, the threat of homelessness is very real given that Defendants have kept affordable housing alternatives to a minimum in an effort to keep low income African-Americans from moving into the area. *Id.* at 13, 15, ¶¶45-47, 56-57. Such representational standing is suspect where the party at issue itself has sustained no injury. *See Warth*. That is not the case here. New West has alleged specific and concrete injury to itself.

The District Court's conclusion that New West did not prove that the tenants were unable to defend themselves is inappropriate on a motion to

dismiss for the reasons stated in New West's initial brief. It is, however, entirely appropriate to infer from the allegations of the First Amended Complaint that New West stands in the best position to challenge Defendants' misconduct and may do so by asserting the claims of Evergreen Terrace tenants as well as its own claims to appropriate equitable relief.

C. New West Does Not Appeal the Dismissal of Count VI

New West does not challenge the dismissal of Count VI and did not argue the point in its initial Brief. *See* Brief at 3. That should end the matter. But Defendants will not let it rest.

It is unclear why Defendants seek to brief the dismissal of Count VI and identifies this as an issue on appeal. *See* Response at 3, 22, 23, 40-41. It appears to be motivated by a desire to inject the "ripeness" requirements applicable in takings cases under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) into New West's claims more generally. The effort doesn't succeed. Where a party alleges discriminatory conduct constituting a *bona fide* equal protection claim under §1983 (Count III) or a *bona fide* §1982 claim (Count II) or a FHA claim (Count I), or seeks equitable relief in a Supremacy Clause challenge, a *Williamson* deference to state proceedings is not applicable.

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 16, 2007

Respectfully submitted,

By: ______________________________

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

Certificate of Compliance With Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6516 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 XP, in 12-point font for text, 11-point font for footnotes, and using Bookman Old Style font.

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Dated: February 16, 2007

CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Claudette P. Miller, certify that materials contained in the Reply Appendix are not available in searchable Portable Document Format as described in Circuit Rule 31(e)(3). Accordingly, Plaintiff-Appellant shall submit a digital version of only the Reply Brief to the Court, and shall submit a paper version of the Reply Appendix to the Court, as described in Circuit Rule 31(e)(1).

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PROOF OF SERVICE

I, Claudette P. Miller, an attorney, hereby state that two (2) copies of Reply Brief Of Plaintiff-Appellant New West, one (1) electronic copy of Reply Brief Of Plaintiff-Appellant New West on CD-ROM (virus free) in Portable Document Format as described in Circuit Rule 31, and one (1) copy of Plaintiff-Appellant's Appendix to Reply were served upon the Attached Service List via hand delivery where feasible, or by depositing same in a sealed box, postage prepaid, in the U.S. Mail at 3500 Three First National Plaza, Chicago, Illinois 60602, on February 16, 2007.

I, Claudette P. Miller, an attorney, hereby state that fifteen (15) copies of Reply Brief Of Plaintiff-Appellant New West, and ten (10) copies of Plaintiff-Appellant's Appendix to Reply were delivered to the United States Court of Appeals for the Seventh Circuit via hand delivery on February 16, 2007. One (1) copy of Reply Brief Of Defendant-Appellant New West was uploaded to the Seventh Circuit via the Internet as described in Circuit Rule 31(e)(2).

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