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FHA Sexual Harassment Claims: Title VII Applications and Departures through Caselaw and HUD's 2016 Rule

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I. Introduction

Sexual harassment in the housing context gained public and legal attention following the rise in awareness surrounding sexual harassment at work. Accordingly, as courts grappled with sexual harassment claims brought under the federal Fair Housing Act (FHA), they imported standards developed under Title VII of the Civil Rights Act of 1964, which prohibited sex-based discrimination—including sexual harassment—in the workplace. But while some elements of Title VII case law may apply in the housing setting, others do not. This Note considers the fit of Title VII standards imposed on FHA sexual harassment claims by analyzing FHA case law and the 2016 rule issued by the Department of Housing and Urban Development (HUD), which defines sexual harassment under the FHA.

First, this Note traces the development of Title VII sexual harassment law and the adoption of the framework and standards developed for Title VII into FHA case law. Next, it addresses scholarly arguments on the differences between claims brought under the FHA versus Title VII and the need for legal standards tailored to the housing setting. These arguments focus on the heightened privacy rights in and sanctity of the home, unique features of the landlord-tenant relationship, and particular vulnerabilities common to victims of sexual harassment in housing. This Note then discusses decisions that considered the unique context of housing before HUD's 2016 rule and how these differed from case law relying wholly on Title VII standards.

Next, this Note analyzes 24 CFR § 100.600, issued by HUD in 2016. This rule utilizes the Title VII framework for evaluating sexual harassment claims but also considers the unique setting of housing in FHA claims. While this rule may not go far enough in emphasizing differences between harassment at home versus at work, it provides space for courts to consider these differences when adjudicating claims brought under the FHA.

Finally, this Note analyzes FHA sexual harassment cases decided since HUD's 2016 rule to assess how courts are applying this rule. Courts are underutilizing and sometimes outright contradicting 24 CFR § 100.600. Consequently, courts continue to be divided over how closely FHA cases should follow Title VII precedent, and some courts continue to

apply ill-fitting standards to FHA sexual harassment claims. Courts should provide more deference to HUD's rule. Courts should also explicitly and uniformly acknowledge the unique nature of sexual harassment in the housing setting. Until courts account for the differences between harassment at home and harassment at work, standards designed under Title VII will continue to inappropriately constrain relief under the FHA.

II. The Title VII Standard

Title VII of the Civil Rights Act of 1964 makes it illegal "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex" or other protected characteristics.[1] In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines that included sexual harassment within the scope of discrimination prohibited under Title VII.[2] The Supreme Court addressed the issue in 1986, finding in *Meritor Savings Bank, F.S.B. v. Vinson* that sexual harassment is a form of sex-based discrimination.[3] The Court recognized two types of sexual harassment: "quid pro quo" harassment, whereby a perpetrator conditions employment benefits on sexual favors, and "hostile environment" harassment, which does not involve loss of a tangible job benefit but creates an offensive work environment.[4]

In *Meritor*, the Court held that for a hostile environment claim to be actionable, the offending behavior must be both "unwelcome"[5] and "sufficiently severe or pervasive [as] 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[6] Subsequently, some courts interpreted this standard as prohibiting only the grossest behavior such as actions causing serious mental harm.[7] The Court

1. 42 U.S.C. § 2000e-2(a)(1) (2020).

2. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986).

3. *Meritor*, 477 U.S. at 73.

4. Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. 1014, 1017 (2018); *Meritor*, 477 U.S. at 65, 73. The Court made its decision by referencing the Court of Appeals for the District of Columbia Circuit, which previously recognized the hostile work environment claim. *Meritor*, 477 U.S. at 62 (citing Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)). The D.C. Circuit relied on a definition of the two types of claims in the EEOC's 1985 Guidelines on Discrimination Because of Sex. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

5. *Meritor*, 477 U.S. at 68.

6. *Id.* at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (second alteration in original).

7. *See, e.g.*, Snell v. Suffolk Cty., 782 F.2d 1094, 1102–03 (2d Cir. 1986) ("The Fifth Circuit put it succinctly, 'a discriminatory and offensive work environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group

clarified in *Harris v. Forklift Systems, Inc.* that the behavior need not cause psychological injury to the victim to satisfy this threshold.[8]

To meet the "severe or pervasive" standard, offensive conduct must be both subjectively perceived by the victim as hostile and objectively identifiable as such.[9] For the objective prong, courts utilize the perspective of "a reasonable person in the plaintiff's position," considering the totality of the circumstances.[10] Some courts have criticized the reasonable person standard, stating that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[11] One proposed reform is the adoption of a "reasonable woman" standard (for cases involving women victims) to better consider the perspectives of women in determining offensiveness,[12] but only one circuit court has adopted this standard.[13]

workers' may constitute a violation of Title VII."); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 278 (1999) ("the Sixth Circuit decision in *Rabidue v. Osceola Refining Co* . . . limited sexual harassment claims—the very claims declared actionable by *Meritor*—to cases where the harassment had caused (or nearly caused) a nervous breakdown. The *Rabidue* restriction was clearly inconsistent with *Meritor*'s insistence that Title VII reaches 'the entire spectrum' of discriminatory treatment.") (internal citations omitted); White, *supra* note 4, at 1017–18.

8. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

9. *Id.* at 21.

10. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (citing *Harris*, 510 U.S. at 23). The totality of the circumstances test was introduced by the EEOC in 1980: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b) (1985) (cited in Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 69 (1986)). The Eleventh Circuit was the first to cite this test. Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

11. Beliveau v. Caras, 873 F. Supp. 1393, 1397–98 (C.D. Cal. 1995) (quoting Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)) ("Notably, women remain disproportionately vulnerable to rape and sexual assault, which can and often does shape women's interpretations of words or behavior of a sexual nature, particularly if unsolicited or occurring in an inappropriate context.").

12. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984) ("The proper perspective is the objective one of the reasonable victim. Such a standard would protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct . . . . By adopting the woman's point of view as the norm, the courts might heighten male sensitivity to the effects of sexually offensive conduct in the workplace.").

13. *Ellison*, 924 F.2d at 879. *See Beliveau*, 873 F. Supp. at 1397–98 ("The goal is a level playing field[,] and a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. . . . By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.") (citations and internal quotation marks omitted) (quoting *Ellison*, 924 F.2d at 879).

The totality of the circumstances test "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14] In determining whether actions are sufficiently severe or pervasive, courts look for behavior that is recurring.[15] Rarely, a court will consider a single incident sufficient if it is especially severe, but isolated incidents are not typically sufficient.[16]

Under this standard, it is difficult for plaintiffs to succeed on hostile work environment claims. Courts have been quick to emphasize that Title VII is not "a general civility code."[17] For instance, verbal harassment alone—even if highly offensive—typically does not qualify because "mere offensive utterance[s]" are not deemed sufficiently severe.[18] Even when behavior does meet the steep severe or pervasive standard, employers are often still protected from liability. The Supreme Court has recognized an affirmative defense—the *Faragher-Ellerth* defense[19]—that absolves an employer of liability for the harassing actions of an employee if the court finds that (1) the employer exercised reasonable care in preventing and correcting harassment, and (2) the victim "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[20]

Scholars have criticized Title VII case law as being too permissive of sexual harassment in the workplace.[21] Cases where serious misbehavior goes unpunished support the claim that some judicial interpretations of the severe or pervasive standard have set the bar for recovery too high.[22] For example, in *Metzger v. City of Leawood*, a police chief's former employee

14. *Harris*, 510 U.S. at 23.

15. Schnapper, *supra* note 7, at 320–32.

16. *Id.*

17. *See, e.g.*, *Oncale*, 523 U.S. at 81 ("The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment.").

18. Faragher v. City of Boca Raton, 524 U.S. 775, 786–88 (1998) (quoting *Harris*, 510 U.S. at 23).

19. *Faragher*, 524 U.S. at 775; Burlington Indus. v. Ellerth, 542 U.S. 742 (1998).

20. *Faragher*, 524 U.S. at 778.

21. *See, e.g.*, Shauna K. Candia, *The Hostile Work Environment: Are Federal Remedies Hostile, Too?*, 13 U. HAW. L. REV. 537 (1991); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 245 (2018); Karen Fleming-Ginn, *Hostile Work Environment Cases (Employment Law)*, 16 JURY EXPERT 6 (2004); White, *supra* note 4, at 1015.

22. *See* Sara L. Johnson, *When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 U.S.C.A. §§ 2000e et seq.)*, 78 A.L.R. Fed. 252 (1986).

alleged "15 to 18 incidents of unwanted touching . . . three offers for an affair, one inappropriate comment about her bra, [and] an unfriendly atmosphere at work" due to rumors that she was having an affair with the chief, but the court found this conduct insufficiently severe or pervasive to grant her relief.[23] Until 2019, the Seventh Circuit described its extreme position this way: "[t]he workplace that is actionable is the one that is 'hellish.'"[24] Such judicial interpretations weaken Title VII and deprive victims of harassment of its protection.

Scholars have also criticized courts for permitting an "equal-opportunity harasser" to escape liability.[25] The Supreme Court's statement that offensive behavior is not actionable unless "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"[26] has shielded those who harass both men and women. This class-based standard has been recently discarded in *Bostock v. Clayton County*, when the Supreme Court indicated that sexual harassment analysis should be applied to individuals rather than to women or men as a class.[27] The Court recognized discrimination based on sexual orientation or gender identity as sex-based discrimination under Title VII and stated that Title VII applies in circumstances where, for example, a person harasses both a man who is gay and a woman; this removes the unsound safeguard for equal-opportunity harassment.[28]

23. Metzger v. City of Leawood, 144 F. Supp. 2d 1225, 1250 (D. Kan. 2001), described in Johnson, *supra* note 22.

24. Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997) (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)). *But see* Gates v. Bd. of Educ. of Chi., 916 F.3d 631, 632 (7th Cir. 2019) (holding that the "hellish" standard is not one a plaintiff must satisfy). While this change is positive, this standard applied within the Seventh Circuit for two decades.

25. *See, e.g.*, Shylah Miles, Note, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 603 (2001).

26. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)); *see also* White, *supra* note 4; Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) ("The essence of a disparate treatment claim under Title VII is that an employee or applicant is intentionally singled out for adverse treatment on the basis of a prohibited criterion.").

27. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1740–41.

28. *Id.* at 1741, 1754 (2020) ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.").

Scholars further argue that the *Faragher-Ellerth* defense has created "a virtual safe harbor that protects employers,"[29] insulating them from liability. Research indicates that "75% of workplace sexual harassment victims experience[] retaliation after speaking up."[30] Therefore, demanding that victims report the harassment does not seem reasonable. Additionally, many companies' anti-harassment policies have been proven ineffective,[31] further weakening the justification for the defense. Yet, the defense is used to insulate employers from liability with the result that employers are frequently granted summary judgment and relief is barred.[32]

Ultimately, Title VII case law offers inadequate protection to victims and potential victims of sexual harassment at work.[33] When its standards are imposed on the housing context, these failings are exacerbated.

III. Court Decisions Importing Title VII Case Law into FHA Claims

Sexual harassment in the housing setting has received less attention than sexual harassment in the workplace, both publicly and in the courts.

29. Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 675 (2000).

30. Robyn South, *What HR Is Still Facing Two Years into #MeToo*, TLNT (Feb. 13, 2019), https://www.tlnt.com/what-hr-is-still-facing-two-years-into-metoo/.

31. *See, e.g.*, JoAnna Suriani, *Reasonable Care to Prevent and Correct: Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 817 (2018); Lauren B. Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARVARD BUSINESS REVIEW (Aug. 22, 2018), https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court.

32. Suriani, *supra* note 31, at 810.

33. Some scholars have expressed hope that the revelation of the prevalence of workplace sexual harassment through the MeToo movement will lead courts to realize that this standard does not adequately protect against or punish sexual harassment. *See, e.g.*, Tippett, *supra* note 21; White, *supra* note 4, at 1015 (citing Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)); Joan C. Williams, et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 224 (2019); L. Camille Hebert, *Is MeToo Only a Social Movement Or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 330–331 (2018) ("The 'MeToo' movement has the potential to change the ways that courts view the seriousness of sexually harassing conduct. When women come forward years and even decades later to report the sexually harassing conduct to which they have been subjected, courts might start to understand that the harassing conduct to which the women were subjected was not 'trivial' conduct quickly forgotten, but serious conduct with long-ranging effects on those subjected to it . . . Women may be able to demonstrate to courts that they subjectively perceived the harassing behavior as harmful and abusive, not merely annoying, when they can detail the effects that the conduct had on their lives. And the similar reactions to similar conduct by other women who have been encouraged to come forward by the 'MeToo' movement may demonstrate the objective reasonableness of those reactions. It might be difficult, or at least unseemly, for courts to assume that a large group of women with similar reactions to sexually harassing behavior are all objectively unreasonable.").

Similar to—and perhaps to a higher degree than—harassment at work, harassment in housing suffers from widespread underreporting.[34] While victims of harassment at work are largely aware that offensive conduct is illegal and can be reported, victims of harassment at home are largely unaware of the illegality or reportability of the conduct.[35] In 2017, the Housing and Civil Enforcement Section of the Department of Justice Civil Rights Division launched an initiative aimed at combatting sexual harassment in housing.[36] This initiative includes a public awareness campaign that, with the partnership of HUD, is aimed at educating the public about what illegal sexual harassment entails and how it can be reported.[37] Hopefully this effort will increase reporting and public awareness surrounding the problem of sexual harassment in housing.

Still, the relative obscurity of this issue has impacted its legal development. As this issue trailed that of harassment at work, courts largely turned to Title VII standards to adjudicate the novel issue of sexual harassment under the FHA. To date, the Supreme Court has not addressed sexual harassment under the FHA, and federal decisions on the topic are relatively sparse.[38]

The Title VII standard was first applied to sexual harassment in housing in *Shellhammer v. Lewallen* in 1985.[39] There, a married couple alleged that their landlord requested nude photos and sex from Mrs. Shellhammer and evicted the couple after her refusal.[40] The Sixth Circuit noted that the magistrate applied Title VII standards due to the lack of precedent under the FHA.[41] The magistrate found sufficient similarities between Title VII and the FHA to justify transposing Title VII standards into the housing context, ruling both quid pro quo and hostile environment

34. *E.g.*, Beverly Balos, *A Man's Home Is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 78 (2004).

35. *See* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 248 (2016).

36. Press Release 17-1093, DOJ, Justice Department Announces Initiative to Combat Sexual Harassment in Housing (Oct. 3, 2017).

37. Press Release 18-960, DOJ, Justice Department Launches Public Awareness Campaign with Victims of Sexual Harassment in Housing (July 23, 2018).

38. *See* Elengold, *supra* note 35 ("After weeding out the cases that did not involve allegations of sexual harassment in housing, I was left with one hundred and two opinions" for both state and federal claims).

39. Shellhammer v. Lewallen, No. 84-3573, 1985 U.S. App. LEXIS 14205 (6th Cir. July 31, 1985).

40. *Id.* at *1–2.

41. *Id.* at *3–4; Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 MO. L. REV. 597, 604 (2018).

claims actionable under the FHA.[42] The Sixth Circuit upheld the magistrate's decision, which applied Title VII's "sufficiently severe or pervasive" standard to the Shellhammers' hostile environment claim and indicated that the landlord's two requests for sexual acts failed to meet that standard.[43] On the quid pro quo claim, the Sixth Circuit noted the magistrate's conclusion that the Shellhammers successfully proved that their eviction was based on Mrs. Shellhammer's refusal to engage in sexual acts.[44] The Sixth Circuit did not discuss any differences between harassment at home versus at work.

Soon after *Shellhammer*, scholars began identifying unique circumstances and harm of harassment in housing, calling into question the suitability of Title VII's case law for housing claims. In the first significant law review article addressing harassment in housing, Regina Cahan stated that harassment at home "may be even more traumatic" than harassment at work.[45] This is because "at work, at that moment or at the end of the workday, the woman may remove herself from the offensive environment."[46] However, "when the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile."[47] Accordingly, the differences between the two settings may render harassment at home more severe than harassment at work.[48]

While the unique attributes of harassment under the FHA may have justified creating a new standard for sexual harassment in that context, other courts followed the Sixth Circuit's lead, utilizing Title VII case law to develop rules for FHA claims.[49] In *Honce v. Vigil*, for instance, the

42. Oliveri, *supra* note 41.

43. *Shellhammer*, 1985 U.S. App. LEXIS 14205, at *4.

44. *Id.* at *4–5.

45. Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1073 (1987).

46. *Id.*

47. *Id.*

48. *See infra* Part IV.

49. Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 782 nn.63–65 (2002) (citing numerous cases agreeing with *Shellhammer*). "Also, to the extent that subsequent cases cited a specific provision within the FHA that was violated by sexual harassment, they, like *Shellhammer*, generally relied on § 3604(b)'s prohibition of discriminatory 'terms and conditions.' None ever mentioned § 3604(c)'s ban on discriminatory statements as a basis for a harasser's possible liability under the FHA." *Id.*

Tenth Circuit accepted wholesale the premise that Title VII case law defines the standard for prevailing on an FHA sexual harassment claim.[50]

> In the employment context an employer violates Title VII by creating a discriminatory work environment, even if the employee loses no tangible job benefits, because the harassment is a barrier to equality in the workplace. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) (employer forcing plaintiff to engage in sex in the workplace created hostile environment). Applied to housing, a claim is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises. The harassment must be "sufficiently severe or pervasive" to alter the conditions of the housing arrangement. *See Hicks*, 833 F.2d at 1413. It is not sufficient if the harassment is isolated or trivial. *Meritor Savings Bank*, 477 U.S. at 65. "'Casual or isolated manifestations of a discriminatory environment . . . may not raise a cause of action.'" *Hicks*, 833 F.2d at 1414 (quoting *Bundy v. Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934, 943 n.9 (D.C. Cir. 1981)). The offensive acts need not be purely sexual; it is sufficient that they would not have happened but for claimant's gender. *Hicks* 833 F.2d at 1415. Evidence of harassment of other female tenants is relevant to plaintiff's claim. *See Id*.
>
> In *Hicks*, we remanded for a determination of whether sexual touching, sexual remarks and threats of violence in the workplace constituted a hostile environment. *Hicks*, 833 F.2d at 1415. Hostile environment claims usually involve a long-lasting pattern of highly offensive behavior. *See, e.g., Bundy v. Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934.[51]

Every case cited here was brought under Title VII, yet the court did not question the appropriateness of extending these holdings to claims brought under a separate statute and arising from offenses in a distinct context.

Similarly, when the Seventh Circuit heard its first case of sexual harassment under the FHA, it denied the claim because it found that the harassment did not "create an objectively hostile housing environment" based on case law from hostile work environment claims.[52] In *DiCenso v. Cisneros*, the landlord came to the victim's door to collect the rent and "began caressing her arm and back. He said to her words to the effect that if she could not pay the rent, she could take care of it in other ways."[53] The

50. Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993).
51. *Id.*
52. DiCenso v. Cisneros, 96 F.3d 1004, 1008–09 (7th Cir. 1996).
53. *Id.* at 1006.

victim slammed the door in the landlord's face, and he responded by standing outside and "calling her names—a 'bitch' and 'whore,' and then left."[54] Subsequently, the landlord asserted that the victim did not pay rent and served a notice to quit the premises.[55] In evaluating the tenant's claim, the Seventh Circuit did not disturb the factual finding that the landlord had committed an act of sexual harassment but stated, "[w]e repeatedly have held that isolated and innocuous incidents do not support a finding of sexual harassment" sufficient to establish a hostile environment.[56] In support, the court cited only cases brought under Title VII and argued that "[c]ommon to all of these examples is an emphasis on the frequency of the offensive behavior. 'Though sporadic behavior, if sufficiently abusive, may support a [discrimination] claim, success often requires repetitive misconduct.'"[57] The court used this Title VII standard to find against the plaintiff:

> In this context, the problem with [the tenant's] complaint is that although [the landlord] may have harassed her, he did so only once. Moreover, [the landlord's] conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII. [The landlord's] comment vaguely invited [the tenant] to exchange sex for rent, and while [the landlord] caressed [her] arm and back, he did not touch an intimate body part, and did not threaten [her] with any physical harm. There is no question that [the tenant] found [his] remarks to be subjectively unpleasant, but this alone did not create an objectively hostile environment.[58]

Here the court applied the Title VII standard without considering whether that standard was suitable for the home setting or whether an act should be considered more severe when occurring at home or by a landlord. The court declared that "[w]e stress in closing that our decision today should not be read as giving landlords one free chance to harass their tenants."[59] But as one scholar pointed out, "[i]t is hard to see, however, how this decision does not establish exactly that standard. Despite the judicial protestations to the contrary, the *Honce* and *DiCenso* cases

54. *Id.*
55. *Id.*
56. *Id.* at 1007–08.
57. *Id.* (quoting Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1345 (7th Cir. 1995)).
58. *Id.* at 1008–09.
59. *Id.* at 1009.

demonstrate that some amount of harassment is acceptable" in the home, just as at work.[60]

Courts largely imported Title VII sexual harassment standards into the housing setting without questioning their fit.[61] As discussed below, special conditions of harassment at home justify developing standards tailored to the FHA to evaluate harassment in housing.

IV. The Unique Nature of Sexual Harassment under the FHA

Scholars have repeatedly asserted that Title VII standards are ill-fitted for sexual harassment claims under the FHA.[62] One reason for this is that the text of the FHA protects against more behavior than does Title VII:

> [C]ourts have simply interpreted the Fair Housing Act (FHA) to prohibit sexual harassment to the same degree—and only to the same degree—as it is prohibited in employment by Title VII of the 1964 Civil Rights Act. This is inappropriate. It is true that the FHA contains a "terms and conditions" provision that parallels the one in Title VII that has been the key to sexual harassment law in employment. But the FHA also contains an additional provision—§ 3604(c)—that bans sexually discriminatory statements in a way that goes well beyond its Title VII counterpart.[63]

Section 3604(c) of the FHA states that it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling

60. Balos, *supra* note 34, at 84.

61. In an interesting exception to this trend, not all courts have accepted that housing discrimination is actionable under the FHA after a tenant obtains a unit (post-acquisition) despite post-hiring claims being universally recognized as falling under Title VII's purview. Title VII lacks explicit language about actionability after hiring, yet some courts have viewed the lack of such language in the FHA as indicating that post-acquisition claims fall beyond its scope. Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 240–242 (2006) (discussing Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) (denying post-acquisition application of § 3604(a))); Spencer Bailey, *Winning the Battle and the War against Housing Discrimination: Post-Acquisition Discrimination Claims under the Fair Housing Act*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 223, 224–25 (2019). *See also* Bloch v. Frischholz, 587 F.3d 771, 776–78 (7th Cir. 2009) (en banc) (recognizing post-acquisition cause of action for constructive eviction).

62. *See, e.g.*, Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 L. & INEQ. 351 (2000); Balos, *supra* note 34; Oliveri, *supra* note 41; Alyssa George, *The Blind Spots of Law and Culture: How the Workplace Paradigm of Sexual Harassment Marginalizes Sexual Harassment in the Home*, 17 GEO. J. GENDER & L. 645, 647 (2016) (asserting that applying Title VII standards "foreclos[es] recovery for many serious invasions of a tenant's privacy and autonomy").

63. Schwemm & Oliveri, *supra* note 49, at 773.

that indicates any preference, limitation, or discrimination based on . . . sex."[64] Scholars Rigel Oliveri and Robert Schwemm argue that while § 3604(c) is similar to Section 2000e-3(b) of Title VII, which makes it unlawful "to print or publish or cause to be printed or published any notice or advertisement . . . indicating any preference, limitation, specification, or discrimination, based on . . . sex,"[65] the provision in the FHA is broader.[66] By extending its prohibitions to discriminatory statements, § 3604(c) provides a source of law that would seem to cover many types of verbal harassment that are in no way addressed by Title VII.[67] For example, even when a tenant already lives in a unit, discriminatory statements by a landlord may include those that express a desire to engage in a sexual relationship with the tenant, thereby conveying a preference related to the continued rental of the home.

Beyond the text of the statutes, there are significant differences between work and home in the law and in practice, and these differences impact the nature of sexual harassment in each setting. Sexual harassment under the FHA should be viewed and adjudicated distinctly based on the unique legal status of the home, the functional differences between the work and housing settings, the particularity of the landlord-tenant relationship, and vulnerabilities that many victims of sexual harassment in housing share. This section will address each of these points.

Efforts to distinguish between these two contexts do not intend "to minimize the effects of sexual harassment in the workplace, or to stratify sexual harassment and rank its severity."[68] Courts can differentiate between harassment in these settings without minimizing the harm to which victims of workplace harassment are subjected. Furthermore, these two types of harassment "are inherently inter-related. As sexual harassment is a form of sex discrimination aimed at perpetuating women's subordination, harassing conduct at work impedes women's ability to fully participate in the marketplace, thereby keeping them in a position of financial vulnerability."[69] This position makes women all the more likely to be preyed on by unscrupulous landlords and housing providers.

64. 42 U.S.C. § 3604(c).
65. 42 U.S.C. § 2000e-3(b).
66. Schwemm & Oliveri, *supra* note 49, at 790.
67. *Id.*
68. Lindemyer, *supra* note 62, at 353.
69. *Id.*

A. The Unique Legal Status of the Home

Because the home has been repeatedly held to occupy a special place in American jurisprudence (and in public opinion), standards designed for employment situations may not be suitable in this special sphere.

Courts have historically recognized that homes are protected by strong legal privacy interests. For example, the Supreme Court has declared that

> [t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."[70]

Scholar Beverley Balos discusses the Supreme Court's recognition of unique privacy interests in the home, stating that "the notion of the special status of the home as a repository of an enhanced right to privacy was articulated by the Supreme Court when it found that the state could not regulate the private possession of obscene material in the privacy of one's own home."[71] Balos goes on to say that "[t]he tradition of attributing a unique status to privacy in the home has continued. The Supreme Court has acknowledged that protecting privacy of the home is of the highest order,"[72] calling it the "last citadel of the tired, the weary, and the sick"[73] and the "one retreat to which men and women can repair to escape from the tribulations of their daily pursuits."[74] The privacy interests attached to the home are unique and suggest that standards tailored to the home setting are appropriate in adjudicating sexual harassment that occurs there.

While the unique legal character of the home has sometimes been tied to or predicated on property ownership, courts should acknowledge the special nature of the home even for victims who do not own their homes. Balos recognizes that "[t]he privileged position of the home in American jurisprudence is tied to . . . the sanctity of property rights" but argues that courts have applied—and still apply—this concept in a manner that chiefly harms women.[75] Courts formerly looked the other way in domestic

70. Payton v. N.Y., 445 U.S. 573, 589 (1979) (quoting U.S. CONST. amend. IV).

71. Balos, *supra* note 34, at 91 (citing Stanley v. Ga., 394 U.S. 557, 565 (1969) ("[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.")).

72. *Id.* (citing Carey v. Brown, 447 U.S. 455, 471 (1980)).

73. *Id.* (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

74. *Id.* at 91–92 (quoting *Carey*, 447 U.S. at 471).

75. Balos, *supra* note 34, at 87, 91–92; *see* Griswold v. Conn., 381 U.S. 479, 484 (1965)

violence cases citing privacy interests,[76] and while they no longer do this, they allow property rights to affect sexual harassment claims in a way that, too, predominantly hurts women:

> While there is a tradition of protecting the home from state intervention, the extent of the protection is determined by the characteristics of the person making the request for protection. Individualized private property and the protection of that property redound to the benefit of the powerful. Poor women tenants do not tend to reap the benefit of the protection of private property when they are subject to sexual harassment in their homes by the landlord. Rather, the landlord's right to engage in the private rental transaction, even if it includes a demand of sex for shelter, and his right to control his private property are protected at the expense of the privacy and security of the tenant.[77]

Balos argues that courts must correct this disparate application of the law and act to protect victims of sexual harassment at home.[78] The longstanding judicial recognition of the "sanctity of the home"[79] should protect victims of sexual harassment at home, regardless of whether they own their homes.

Scholars also point out that, independent of property rights, the home plays a special role in both personal identity and familial relationships: "It fosters intimate relationships and allows family life to flourish. It is also a place of safety and physical comfort. Beyond relational intimacy, the home also functions as a symbol for a feeling of belonging and a place where one can realize one's potential."[80] Judges have recognized this

(quoting Boyd v. United States, 116 U.S. 616, 630 (1886)) (noting that the Supreme Court has referred to the Fourth and Fifth Amendments as "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life'").

76. Balos, *supra* note 34, at 87, ("One of the most powerful societal values that has reinforced the vulnerability of women to domestic violence has been the concept of the private, domestic sphere. Physical abuse of a wife by her husband was deemed a private matter and therefore not appropriate for state intervention. The privileging of privacy connected with the home resulted in a history of judicial decisions that refused to recognize the harm suffered by a victim of domestic violence and therefore a refusal to recognize a legal remedy.").

77. *Id.* at 90 (internal citations omitted).

78. *Id.* at 105.

79. Balos, *supra* note 34, at 89–90 (citing United States v. Oliver, 466 U.S. 170 (1984); Payton v. New York, 445 U.S. 573, 603 (1980) (ruling that the sanctity of the home provides special protection and prohibits warrantless arrest in one's home); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (finding an ordinance prohibiting residential picketing constitutional because "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.") (quoting *Carey*, 447 U.S. at 471))).

80. Balos, *supra* note 34, at 90.

feature and its impact on the legal status of the home. For example, in *Griswold v. Connecticut* Justice Goldberg stated,

> I agree with Mr. Justice Harlan's statement in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 551—552, 81 S.Ct. 1752, 1781: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[81]

The private and familial natures of the home distinguish it from the workplace and entitle it to protections and standards tailored to its unique status.

Another feature of the unique legal status of the home that may apply in the context of sexual harassment of tenants is the implied "covenant of quiet enjoyment," which has been long-recognized as applying to rental contracts unless explicitly contradicted.[82] Through this covenant, "the landlord agrees that the tenant shall peaceably and quietly enjoy the leased premises for the term of the lease. The covenant is breached by the landlord when the enjoyment of the leased premises is substantially interfered with by the landlord [or] those claiming under him."[83] While this covenant is a feature of contract law, some courts have applied it in FHA harassment claims.[84] For example, the Ninth Circuit held that § 3604(b)'s "inclusion of the word 'privileges' implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling."[85] This covenant distinguishes the home setting from work because no similar covenant applies in the workplace. The covenant provides tenants with an expectation of peace and enjoyment that does not exist at work, so some conduct that may be considered insufficiently severe at work to qualify as

81. Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, concurring).

82. *See, e.g.*, C. S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease*, 41 A.L.R.2d 1414 (originally published in 1955); Clarence M. Lewis, *Covenant for Quiet Enjoyment in Lease*, 26 LAWYER & BANKER & CENT. L.J. 80, 80 (1933).

83. Lewis, *supra* note 82, at 80–81. Note that courts have disagreed over whether actual or constructive eviction is required for a breach of the covenant of quiet enjoyment. Barbara J. Van Arsdale et al., 49 AM. JUR. 2D *Landlord and Tenant* § 472 (2020).

84. Bailey, *supra* note 61, at 241.

85. Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009). *But see* Bailey, *supra* note 61, at 241 ("[T]he [Seventh Circuit's] view of what it means for a term, condition, or privilege to be sufficiently connected to the purchase of the property excludes some privileges that one might expect to be included. For example, the court did not recognize a 'privilege of quiet enjoyment' that other courts have found in § 3604(b) because this 'privilege' is granted upon purchasing property.") (discussing Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc)).

sexual harassment discrimination under Title VII may qualify under the FHA by infringing on the victim's covenanted right to peaceful and quiet enjoyment of their rental property.

The home occupies a distinct position in the law. Because the home is legally unique, FHA claims should be evaluated under a standard unique to housing and the context of the home should be given weight when determining the severity of harassment there.

B. Functional Differences Between the Housing and Employment Settings

There are significant functional differences between the workplace and home that impact sexual harassment occurring in each place; these differences further necessitate legal standards tailored to the housing setting.

Fundamentally, one's home is where—of all settings—one ought to have the most control and feel the safest. Unlike a work setting, where business needs and company culture dictate the nature of the physical environment and interpersonal interactions, the occupants of a home are able (or should be able) to control their living space physically, culturally, and interpersonally. Furthermore, physical and legal barriers to entry define the home as off-limits to all whom an occupant chooses not to allow; at work, an employee has little to no control over the comings and goings of others. Accordingly, sexual harassment in one's own home may make a victim feel more violated than would harassment at work by voiding a victim's ability to enjoy the home as a place of physical sanctuary.[86] Likewise, offensive statements may be inherently more objectionable in one's home than in public, rendering judicial instructions against interpreting anti-harassment statutes as "a general civility code" less applicable in the home, where a person should expect to control the manner of civility. The requirement of objective offense may also be less relevant in housing; while the "reasonable person" may be a suitable meter of offensiveness in public, residents determine what is too offensive for their own homes. Courts should recognize and protect victims' rights to dictate the guests, activities, and interactions that occur in their homes.

86. *See* Shirley Darby Howell, *Domestic Violence, Flawed Interpretations of 42 U.S.C. § 1437(D)(L)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment: Making Women Homeless and Keeping Them Homeless*, 13 JONES L. REV. 1, 17 (2008) ("Sexual harassment in the home threatens one's fundamental dignity differently than marketplace harassment," and "harassment in the home subjects the victim to an elevated aspect of terror.").

Additionally, business pressures may disincentivize harassment in ways that the housing setting does not. Work settings typically involve common spaces and multiple employees present; this may disincentivize harassment when it could be overseen and risk the harasser's job or reputation. This pressure is less influential in the housing setting because most tenants interact with their landlords privately. Furthermore, for workplace harassment the competing interests of the harasser and the company clash, but in housing this is often not the case. At work, a perpetrator's desire to harass always conflicts with a company's interest because the harassment risks low productivity, high turnover, and significant legal and public opinion costs to the company. In contrast, such employer-employee conflict usually does not exist in cases under the FHA because most often the harassing landlord is also the owner of the property.[87] Consequently, the pressures on a perpetrator in the workplace to avoid, limit, or hide their harassing behavior may not similarly constrain harassers in housing.[88]

Harassment in housing is also shaped by the fact that a landlord is often the "sole point of contact for the [victims] with respect to their housing,"[89] while victims of harassment at work typically have numerous points of contact.[90] While employers provide anti-harassment trainings that at least notify victims that harassment at work violates the law and company policy, tenants are not typically similarly informed. Neither owner-landlords nor landlords tasked with providing such information on behalf of a housing company are likely to share such information with victims. Without direct contact with a parent company, a tenant does not receive top-down messages or policies against harassment like an employee does. Moreover, formal channels for reporting harassment, standard in the work setting, are typically unavailable when landlords harass and are the sole point of contact for tenants.

87. Lindemyer, *supra* note 62, at 381.

88. While all harassers face risks of criminal sanctions, civil suits, and professional and reputational ruin, this distinction still creates fewer limiting pressures on harassers in housing than at work.

89. Oliveri, *supra* note 41, at 620 ("[a]ll of the women believed that the person who harassed them was the owner of the property and also served as its manager. This meant that the landlord . . . was the sole point of contact for the women with respect to their housing.").

90. This is not to say that these points of contact will always terminate harassment. Numerous Title VII cases involve policies requiring the victim to report harassment to the harasser, and HR departments are sometimes ineffective in stopping or preventing harassment. *See, e.g.*, Robyn South, *What HR Is Still Facing Two Years into #MeToo,* TLNT (Feb. 13, 2019), https://www.tlnt.com/what-hr-is-still-facing-two-years-into-metoo/; Suriani, *supra* note 31. Still, official policies against harassment and channels for reporting are certainly better than none.

These differences between the housing and employment settings render Title VII standards inappropriate when applied without distinction to housing cases. Oliveri illustrates this point with an example from the Eleventh Circuit:

> In another case, *Tagliaferri v. Winter Park Housing Authority*, the plaintiffs alleged that the maintenance man at their apartment complex set up a video camera at their bedroom window, photographed them while they were outside, and made obscene gestures at them. A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit was asked to review the district court's dismissal of the case for failure to state a claim under the FHA. The panel relied heavily on a Title VII sexual harassment case, *Mendoza v. Borden*, in which the plaintiff alleged a hostile work environment based, in part, on the allegation that her supervisor was constantly watching, following, and staring at her. The *Mendoza* court found that this behavior did not constitute severe or pervasive conduct because "the everyday observation of fellow employees in the workplace is also a natural and unavoidable occurrence when people work together in close quarters or when a supervisor keeps an eye on employees." Despite the fact that there are profound contextual differences between a woman being watched by her supervisor at work and having the maintenance man of her apartment building set up a video camera facing her bedroom window, the *Tagliaferri* court failed to note this distinction and upheld the lower court's dismissal in a per curiam opinion.[91]

This illustrates how judges permit a range of behaviors that are truly unreasonable in housing when they restrict analysis of FHA claims to decisions made in the separate context of work. In adopting Title VII standards and denying FHA-based claims by comparing harassment at home to that in the workplace, courts have failed to offer the protection that the FHA should provide.

C. The Distinctiveness of the Landlord-Tenant Relationship

Scholars have also argued that the nature of the landlord-tenant relationship indicates special conditions that should be considered in the housing context.[92] As Oliveri declared, "blind reliance on employment law

91. Oliveri, *supra* note 41, at 607 (citations omitted) (discussing Tagliaferri v. Winter Park Hous. Auth., 486 Fed. Appx. 771 (11th Cir. 2012); Mendoza v. Borden, Inc., 195 F.3d 1238, 1248 (11th Cir. 1999)).

92. *See, e.g.*, George, *supra* note 62; Balos, *supra* note 34. While sexual harassment may also be perpetuated by other tenants (*see, e.g.*, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018); G.B. v. Dipace, No. 1:14-CV-0500 (DNH/CFH), 2019 U.S. Dist. LEXIS 51459

doctrines and precedents in the housing context fails to recognize that conduct that may appear harmless or less offensive in the workplace can become much more threatening when committed inside a woman's home by someone who literally holds the keys."[93]

First, the tenant-landlord relationship is unique in the amount of control a landlord has over tenants' physical safety. Landlords have keys to tenants' living spaces, guaranteeing unfettered access.[94] Furthermore, "[u]nlike at the workplace, the landlord can also use his access to threaten the tenant's family members."[95] Given the common characteristics of victims (described in Part IV.D.) as women who are often heads of their households, this presents unique safety risks that do not apply to harassment in the work setting. Not only does sexual harassment at home carry the risk of a victim losing housing for herself and her dependents, it also carries the risk of subjecting dependents to harassment either directly or indirectly. Dependents may witness the victim receiving unwanted touching or sexual requests and may overhear threats and insults directed at the victim. Even more concerning, a harassing landlord could use his key to gain access to dependents, including when the victim is not home. Victims who face this risk are reasonable in feeling that harassment is more threatening at home than at work.

Second, while harassment at work may involve a power imbalance, harassment by a housing provider always includes a significant disparity in the power of the parties. And since shortages in low-income housing are greater than shortages in jobs,[96] the power differential between tenants and landlords is wider than at work as tenants are more replaceable than

(N.D.N.Y. Mar. 27, 2019)), this Note does not address the issue of liability under the FHA.

93. Oliveri, *supra* note 41, at 605.

94. While laws restrict landlord access to dwellings without prior notice except in emergencies, harassment victims describe landlords entering their homes without consent or notice. "[A] common aspect of sexual harassment in the home involves the landlord using his keys to enter the tenant's home uninvited." George, *supra* note 62, at 660–61.

95. *Id*.

96. *See, e.g.*, *Housing Cost Burden for Low-Income Renters Has Increased Significantly in Last Two Decades,* NATIONAL LOW INCOME HOUSING COALITION (July 06, 2020), https://nlihc.org/resource/housing-cost-burden-low-income-renters-has-increased-significantly-last-two-decades; Patrick Sisson, Jeff Andrews & Alex Bazeley, *The Affordable Housing Crisis, Explained: Blame Policy, Demographics, and Market Forces*, CURBED, https://www.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment (last updated Mar. 2, 2020, 12:46 PM); Alexia Fernández Campbell, *The US Is Experiencing a Widespread Worker Shortage. Here's Why*, VOX (Mar. 18, 2019, 5:10 PM) https://www.vox.com/2019/3/18/18270916/labor-shortage-workers-us. Low-income housing is referenced because the majority of victims of sexual harassment in housing are in poverty. *See supra* Part IV.D. Note that employment figures predate the 2020 economic downturn, but high unemployment will increase demand for the limited low-income housing available.

employees. Oliveri discusses the unique power dynamic between landlords and tenants:

> This application of the Title VII standards to the home ignores the vastly different power structure that exists in the home. While sexual harassment in the workplace often involves supervisors or other superiors who have some level of control, the power differential between a landlord and a tenant, especially a poor tenant who receives government housing assistance, is far greater. Landlords are able to exercise power over their tenants by selecting and evicting tenants, setting the rent, and deciding which services to provide or withhold. The power imbalance between landlords and tenants is especially dramatic when affordable housing is limited and low-income tenants have few alternative housing options; in these circumstances, a tenant's threat to vacate is weakened by the landlord's ability to quickly replace the tenant, and withholding rent may simply provide the landlord with a basis for eviction. Knowing that many low-income tenants would fear the loss of their current housing if they resisted or reported harassment, more than the harassment itself, may lead some landlords to target this population.[97]

Because tenants risk losing their housing and landlords are aware of tenants' vulnerabilities, landlords are able to prey on these vulnerabilities to identify and exploit victims.

The landlord-tenant relationship is unique and justifies a unique standard for harassment under the FHA. "What is most frequently and gravely overlooked by the courts in addressing the sexual harassment of women in their homes is the nature of the harassing conduct itself as inextricable from the context of the home. Acts of harassment in this intimate setting are per se severe."[98] This reality should encourage courts to tailor FHA standards to account for the unique relationship between the harasser and victim in housing.

D. Vulnerabilities Common to Victims of Sexual Harassment in Housing

Many victims of sexual harassment in housing share common characteristics making them especially vulnerable. Like in the employment setting, most victims of sexual harassment in housing are women. This is unsurprising given historical and present discrepancies in power and property ownership[99] and the fact that women bear the

97. George, *supra* note 62, at 662 (citations omitted).

98. Lindemyer, *supra* note 62, at 352.

99. *See, e.g.*, Lucas Hall, *Portrait of an American Landlord*, LANDLORDOLOGY, https://www.landlordology.com/portrait-american-landlord-infographic/ (last updated Mar. 14, 2015)

disproportionate burden of pervasive sexual violence in society.[100] Beyond this, though, the uniqueness of harassment in housing likely creates a narrower pool of victims than in the employment setting.

Nearly all reported victims of sexual harassment under the FHA are indigent.[101] "Being a low-income tenant or experiencing poverty is a key factor in being vulnerable to sexual harassment in housing."[102] Poverty and gender interact because "women experience poverty at a disproportionate rate in our society."[103] In Cahan's groundbreaking 1987 article, she discovered that "[o]f the sexual harassment reports in the survey for which specific characteristics were included, seventy-five percent of the women possessed annual incomes under $10,000, twenty-three percent between $10,000-$20,000 and the remaining two percent between $20,000-$30,000."[104] Such poverty leaves women particularly vulnerable to exploitation surrounding housing when the risk of losing whatever housing they can afford often means homelessness.[105]

Many victims are also the heads of their households: "Looking at the descriptions of the plaintiffs in the reported federal cases reveals that they are poor women, often providing the only support for their families and

(revealing that only 15% of American landlords are female).

100. *See, e.g.*, Rape, Abuse & Incest National Network, *Victims of Sexual Violence: Statistics*, RAINN.ORG, https://www.rainn.org/statistics/victims-sexual-violence (last visited Sep. 18, 2020).

101. Oliveri, *supra* note 41, at 610.

102. Balos, *supra* note 34, at 97; *see also* Elengold, *supra* note 35, at 253 ("Scholars who have specifically written about sexual harassment in rental housing have nearly all found that poverty is a critical factor in assessing a female tenant's susceptibility to sexual harassment. . . . Statistics and case law establish that poverty is, indeed, a primary risk factor for experiencing sexual harassment in rental housing.").

103. Balos, *supra* note 34, at 97.

104. Cahan, *supra* note 45, at 1067 (citation omitted). For context, the poverty level in 1987 for a family of four was set at $11,000. U.S. Bureau of Labor Statistics, Family Poverty Status and Family Poverty Level Variables, NATIONAL LONGITUDINAL SURVEYS, https://www.nlsinfo.org/content/cohorts/nlsy79/other-documentation/codebook-supplement/nlsy79-appendix-2-total-net-family-3 (last visited Mar. 22, 2020). *See also* Kathleen Butler, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175 (1989) ("Limited by their low incomes, ten million households headed by women must live in substandard housing.").

105. Balos, *supra* note 34, at 97. Because of their poverty, many victims qualify for housing assistance in the form of Section 8 Vouchers or public housing. Quigley v. Winter, 598 F.3d 938, 947, 954 (8th Cir. 2010); Oliveri, *supra* note 41, at 618–19. There is some debate about whether these forms of assistance actually increase vulnerability to harassment. "Many scholars assert—without evidence—that women are more likely to be harassed if they use vouchers or live in public housing. In reality, it appears that receiving housing subsidies makes a poor woman no more likely to be harassed and . . . may improve her outcomes if she is harassed." Oliveri, *supra* note 41, at 618–19. The reason that victims who receive subsidies may have better outcomes is that the subsidies supplement rent, making recipients more able to stay current on rent than they could without the subsidies. Accordingly, landlords may be less able to evade liability for evicting subsidy recipients because the common pretext of failure to pay rent is less available. *Id.*

often facing homelessness."[106] This is also unsurprising given that "[f]emale-headed households are more than twice as likely as all U.S. households to face poverty (27.9 percent vs. 12.3 percent)."[107] Many of these women are single mothers who remain in a housing situation despite harassment in order to keep children housed.[108]

Accordingly, women of color may be more likely than their white counterparts to become victims of sexual harassment in housing.[109] The grim economic situation for female-headed households "is compounded for women of color, who experience both sex and race discrimination. Census data show that households headed by single Indigenous, Latina, African American, and Native Hawaiian women have an even higher risk of poverty (39.7 percent, 37.4 percent, 34.7 percent, and 31.2 percent, respectively)."[110]

Scholar Kate Elengold discusses how these statistics have interplayed with the image of a deviant landlord to ignore the plight of Black women facing particular structural vulnerability to sexual harassment in housing.[111] She analyzes what she calls the "dirty old man" narrative: the image of the perpetrator "as a man acting outside of the standards of society and the law. Because the term 'dirty old man' is often employed as a means of encouraging, explaining or excusing behavior that is outside of cultural norms, [it]. . .risks trivializing the crime of sexual harassment."[112] This narrative ignores the pronounced history of structural access to Black women's homes and bodies and combines with the historical Black "Jezebel" myth to uniquely harm Black women tenants in a way that is underrecognized.[113] While "[t]he landlord's access to tenants,

106. Balos, *supra* note 34, at 97.

107. Bread for the World, *Fact Sheet: Hunger and Poverty in Female-Headed Households* (May 2019), https://www.bread.org/sites/default/files/downloads/hunger-poverty-female-headed-households-may-2019.pdf. *See also* Balos, *supra* note 34, at 97 ("[I]n 1998 the U.S. Census Bureau reported that 12.7% of the general population was living in poverty while 29.9% of female-headed households were living in poverty.").

108. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1094 (10th Cir. 1993) (Seymour, dissenting); Quigley v. Winter, 598 F.3d 938, 944 (8th Cir. 2010); Krueger v. Cuomo, 115 F.3d 487, 489 (9th Cir. 1997).

109. Elengold, *supra* note 35; Lindemyer, *supra* note 62; George, *supra* note 62, at 647 ("tenants who are most at risk of being harassed by their landlords are low-income women of color who depend on government assistance for the continuity of their housing situation."); Oliveri, *supra* note 41, at 617 ("The women who reported experiencing harassment by their landlords were disproportionately likely to be racial minorities.").

110. Bread for the World, *supra* note 107.

111. Elengold, *supra* note 35.

112. *Id.* at 229.

113. *Id.* at 230, 269, 272–73 ("A landlord's access to his female tenants and their families is

of course, is generally the same, regardless of the tenant's race," Black women "are burdened by the cultural myth of the Black Jezebel and the historical ways in which Black women have been subjected to sexual assault in the private sphere without protection or recourse," making the landlord's access even more dangerous than for other women.[114] Courts should consider both the unique setting of the home and the unique vulnerability of Black women in adjudicating FHA claims.

While sexual harassment victims under both Title VII and the FHA are likely to be women, the particular nature of harassment in the housing context involves certain other characteristics common to victims. The acute vulnerability of women sharing these characteristics should be considered by courts in evaluating the nature and severity of harassment in their housing arrangements.

V. Court Decisions Considering the Unique Setting of the Home in FHA Sexual Harassment Claims before HUD's 2016 Rule

Before HUD issued 24 CFR § 100.600 in 2016, some courts considered the unique setting of the home in their analysis of sexual harassment claims brought under the FHA.[115] Cases considering the special nature of harassment in housing will hereinafter be referred to as "Housing Context Cases." The approach of the Housing Context Cases has been applied by a minority of courts, but it models how courts can consider the particular nature of harassment in housing, even when adopting the Title VII framework.

structural, not a result of a deviancy. In other words, a landlord has access to a tenant and her family due to the legal rights inherent in the landlord-tenant relationship and economic and racial hierarchies throughout American history."). Elengold explains the Jezebel myth: "Since the days of slavery, African American women have been confronted with the myth that Black women are promiscuous and hyper-sexual, often referred to as the Jezebel myth. . . . The institutional acceptance of the Jezebel myth leads to dual outcomes: excusing the sexual abuse of Black women and silencing resistance." *Id.* at 244, 269.

114. *Id.* at 269.

115. Elengold, *supra* note 35, at 252 ("Although courts have not gone as far as scholars and advocates would like in recognizing how residential sexual harassment invades the sanctity of the woman's home, the concept has gained some traction in case law. Of the more than one hundred court opinions on residential sexual harassment, twelve courts explicitly highlighted or discussed the fact that the harassing conduct occurred in the woman's home, a place where she should feel safe and secure. That count does not include factual assertions that would indicate the invasion of the sanctity of a woman's home (i.e. illegal use of passkey or plaintiff's fear of defendant at home) without further discussion by the court. Cahan's argument has been cited favorably by three federal district courts, HUD, and at least two state and federal trial and appellate briefs.") (internal citations omitted) (discussing Cahan, *supra* note 45).

The earliest Housing Context Case was *Beliveau v. Caras*.[116] The District Court for the Central District of California considered the following facts on a motion to dismiss:

> Beliveau noticed that Rickell [the resident manager] was staring at her while she was laying out by the apartment pool in her bathing suit. During that same time period, Rickell "began making off-color, flirtatious and unwelcome remarks to Beliveau." Also during this time frame, Rickell "went to Plaintiff's apartment to repair a water leak in her shower, when he thereafter called her into the bathroom, proceeded to put his arm around her, told her she was an attractive woman, he would like to keep her company any time, and made a remark about her breasts, referring to them as 'headlights.'" Beliveau pushed him away, and he "grabbed her breast, and, after being pushed away again, grabbed her buttock as she walked away from him."[117]

The *Beliveau* court recognized the special nature of the home setting in denying the landlord's motion to dismiss:

> [This] incident of offensive touching . . . if proved, would constitute a sexual battery under California Civil Code § 1708.5. *Any* such touching would support a sexual harassment claim under the federal Fair Housing Act. Particularly where, as here, the alleged battery was committed (1) *in* plaintiff's own home, where she should feel (and be) less vulnerable, and (2) by one whose very role was to provide that safe environment, defendants' contention that plaintiff has failed to allege "conduct that was so severe or pervasive to 'alter the conditions' of plaintiff's housing environment" and has failed to "allege an 'abusive' housing environment" resulting from defendants' conduct is not well-taken. There are few clearer examples of classic sexual harassment than an unpermitted, allegedly intentional, sexual touching. Under no circumstances should a woman have to risk further physical jeopardy simply to state a claim for relief under [the FHA]. Plaintiff has adequately alleged the requisite offensive housing environment.[118]

This consideration of both the unique setting of the home and the landlord-tenant relationship was revolutionary as it recognized heightened egregiousness of such behavior occurring at home. Cases alleging similar facts are sometimes dismissed under the Title VII standard as "isolated events" combined with "mere offensive utterances."[119] Notably, the court

116. Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995).

117. *Id.* at 1395 (internal citations omitted).

118. *Id.* at 1398.

119. Schnapper, *supra* note 7, at 310–11 (Being "too mild to give rise to a Title VII claim, is labeled, or more accurately dismissed, as 'offensive,' 'merely offensive,' 'merely mildly offensive,'

also referred to the Ninth Circuit's acceptance of the "reasonable woman" standard under Title VII, further indicating its willingness to interpret the harassment as the victim would.[120]

While this decision offered significant protection for victims, its influence has been fairly limited. California district courts have applied it, but before HUD's 2016 rule only three other courts explicitly referenced *Beliveau*'s analysis of the uniqueness of the housing setting.[121]

Despite the limited application of the *Beliveau* court's reasoning in federal cases, consideration of the uniqueness of harassment at home gained traction in 2010 when a federal circuit court first applied similar reasoning in *Quigley v. Winter*:

> Quigley presented sufficient evidence of numerous unwanted interactions of a sexual nature that interfered with Quigley's use and enjoyment of her home. Quigley testified Winter subjected her to unwanted touching on two occasions, made sexually suggestive comments, rubbed his genitals in front of her, placed several middle of the night phone calls to her home, made repeated unannounced visits, and, on one occasion, while Winter lay on Quigley's couch, had to be told to leave her home at least three times before he complied. We

'vulgarity,' 'merely vulgar,' 'tasteless,' 'distasteful,' 'insensitive,' or 'inappropriate.'") (internal citations omitted) (citing Shepherd v. Comptroller Pub. Acct., 168 F.3d 871 (5th Cir. 1999); Harrington v. Boysville of Michigan, Inc., No. 97-1862, 1998 U.S. App. LEXIS 9796, at *14 (6th Cir. May 13, 1998) (unpublished disposition); Bermudez v. TRC Holdings, Inc, 138 F.3d 1176, 1181 (7th Cir. 1998); Black v. Zaring Homes, Inc., 104 F.3d 822, 826 (6th Cir. 1997); Walker v. Soc. Health Ass'n, Inc., No. 94-3801, 1995 U.S. App. LEXIS 38830, at *5 (6th Cir. Dec. 21, 1995) (unpublished disposition); Thomas v. Shoney's Inc., No. 94-1443, 1995 U.S. App. LEXIS 16456, at *5 (4th Cir. July 5, 1995) (unpublished disposition); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430, 431 (7th Cir. 1995); Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1010 (7th Cir. 1994); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996); Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1143–44 (7th Cir. 1997)).

120. *Beliveau*, 873 F. Supp. at 1397–98 (citing Ellison v. Brady, 924 F.2d 872, 79–80 (9th Cir. 1991)).

121. Reeves v. Carrollsburg Condo. Unit Owners Ass'n, No. 96-2495(RMU), 1997 U.S. Dist. LEXIS 21762, at *21 (D.D.C. Dec. 18, 1997) ("Plaintiff Reeves has shown a sufficient basis for bringing a sexual harassment suit. . . . It is noteworthy that at least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace. See *Beliveau*, 873 F. Supp. at 1397 n. 1."); Williams v. Poretsky Mgmt., 955 F. Supp. 490, 498 (D. Md. 1996) ("[A]lthough courts have looked to employment cases to determine housing claims, the settings are not completely analogous. At least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace. See *Beliveau*, 873 F. Supp. at 1397 n.1."); Richards v. Bono, No. 5:04-cv-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *21–*22 (M.D. Fla. May 2, 2005) ("[T]he allegations in the complaint are more than sufficient to set forth a claim for severe and pervasive sexually hostile conduct. On various or multiple occasions, Mr. Bono exposed himself, demanded sex, ejaculated in front of her, grabbed her buttocks and breasts, kissed her, pushed her against the wall, knocked her to the ground, and fingered her underpants. This behavior is all the more egregious in that it was committed in the Plaintiff's own home.").

> emphasize that Winter subjected Quigley to these unwanted interactions in her own home, a place where Quigley was entitled to feel safe and secure and need not flee, which makes Winter's conduct even more egregious.
>
> . . . .
>
> Winter's conduct was reprehensible. Quigley lived alone with small children at the time of Winter's harassment, and she had few, if any, alternative housing options. Quigley's financial vulnerability was evidenced by her need for Section 8 housing vouchers. Winter held a certain level of power over Quigley and her family. Winter repeatedly subjected Quigley to inappropriate conduct during Quigley's tenancy, and Winter's conduct was unquestionably intentional and more than churlish. Most significant, Winter's conduct intruded upon Quigley's sense of security in her own home.[122]

The Eighth Circuit's decision is remarkable for its consideration of several of the above-discussed factors that render harassment in the housing context unique, including the legal status of the home, the landlord-tenant relationship, and vulnerabilities common to victims. The court utilized the framework derived from Title VII,[123] but its assessment that the harassment was particularly severe given the home setting indicated a departure from strictly applying Title VII standards.

After *Quigley*, some other courts embraced the idea that FHA sexual harassment claims should be considered in light of factors unique to housing.[124] Despite these Housing Context Cases, other courts continued to apply Title VII standards without distinction. Courts that did consider the housing setting faced the task of justifying their outcomes in light of FHA case law that failed to do so. For example, the District Court for the Eastern District of California in *Salisbury v. Hickman* noted that

> Defendants argue that the evidence in this case is no more egregious than that in *DiCenso* and *Honce*. To be sure, the complained-of harassment in this case was generally confined to two specific incidents, and like *DiCenso* and *Honce*, this case did not involve any violence,

122. Quigley v. Winter, 598 F.3d 938, 947, 954 (8th Cir. 2010).

123. While it did not explicitly mention Title VII, it applied the "severe or pervasive" standard that was imported in early FHA sexual harassment cases. *Id.* at 946–47.

124. Salisbury v. Hickman, 974 F. Supp. 2d 1282, 1292–93 (E.D. Cal. 2013); Sharon T v. New Directions, Inc., No. 2:15-cv-04239-SVW-E, 2016 U.S. Dist. LEXIS 5646 (C.D. Cal. Jan. 12, 2016) ("[A]n agent in the housing context may gain access to a victim's home and inflict violence upon the victim after the victim has reported harassment. Moreover, a tenant faces the risk of homelessness, which is arguably more severe than the risk of unemployment. . . . while there are certainly similarities between Title VII and the FHA, there are also significant differences.").

> overt threat of physical force, or touching of intimate body parts. Nevertheless, a close look at the circumstances surrounding the two incidents in this case reveals . . . factors that, when viewed in the light most favorable to Ms. Salisbury, distinguishes this case and could well lead a fact finder to conclude that Mr. Crimi's conduct constituted severe sexual harassment.
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> . . . .
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> . . . . [P]erhaps most importantly, the second major incident of harassment on March 29, 2012, took place in Ms. Salisbury's own home. Courts have recognized that harassment in one's own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment.
>
> . . . .
>
> Finally, while this fact does not distinguish this case from *DiCenso* or *Honce*, it is nonetheless worth noting that Mr. Crimi is not any ordinary resident at Arrowhead; he is the community's on-site manager. Generally speaking, sexual harassment by someone in a position of authority is more likely to be emotionally and psychologically threatening. . . . Presumably, as the on-site manager, Mr. Crimi is first in-line to respond to any issue that might interfere with Ms. Salisbury's use and enjoyment of her residence, such as a rent dispute or a request for repairs. Mr. Crimi's ability to influence Ms. Salisbury's well-being thus adds yet another degree of severity to Mr. Crimi's conduct.[125]

By considering the housing context, the court reached a different result than in *DiCenso* and *Honce* despite similar harassing behavior. This recognition that similar acts may be more severe in the housing context than at work is critical for appropriately assessing and remedying harm to victims in the housing setting.

VI. How 24 C.F.R. § 100.600 Applies and Distinguishes Title VII Standards

In 2016, HUD published a rule entitled "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act."[126] This regulation "specifies how

125. Salisbury v. Hickman, 974 F. Supp. 2d 1282, 1292–93 (E.D. Cal. 2013) (internal citations omitted).

126. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (codified at 24 C.F.R. § 100 (2020)).

HUD will evaluate complaints of quid pro quo ('this for that') harassment and hostile environment harassment under the Fair Housing Act."[127] The rule was also intended to "provide for uniform treatment of Fair Housing Act claims raising allegations of quid pro quo and hostile environment harassment in judicial and administrative forums."[128] The Rule applies to harassment based on any protected class, including sex.[129] This Note's analysis is limited to Subpart H: 24 C.F.R. § 100.600 Quid pro quo and hostile environment harassment (hereafter known as "the Rule") in the sexual harassment context.

In the Rule's Background section, HUD recognizes the history of adjudicating FHA harassment claims using Title VII standards and admits that the fit is not perfect:

> [W]hen deciding harassment cases under the Fair Housing Act, courts have often looked to case law decided under Title VII . . . [b]ut the home and the workplace are significantly different environments such that strict reliance on Title VII case law is not always appropriate. One's home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one's home can be far more intrusive, violative and threatening than harassment in the more public environment of one's work place. Consistent with this reality, the Supreme Court has recognized that individuals have heightened expectations of privacy within the home.
>
> This rule therefore formalizes standards to address harassment in and around one's home and identifies some of the differences between harassment in the home and harassment in the workplace. While Title VII and Fair Housing Act case law contain many similar concepts, this regulation describes the appropriate analytical framework for harassment claims under the Fair Housing Act.[130]

Importantly, this displays HUD's acceptance of the Housing Context Cases' analysis that harassment at home is qualitatively different from harassment at work and should be adjudicated by considering the nature of the housing setting. The Rule solidifies the application of Title VII standards to the FHA in some ways while distinguishing it in others. While it addresses some issues debated among courts,[131] it does not fully resolve

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 63,055–56 (internal citations omitted).

131. For example, the Rule is clear by forbidding interference of the "use or enjoyment of a dwelling" (language not found in the FHA itself) that post-acquisition discrimination is actionable under the FHA. 24 C.F.R. § 100.600(a)(2) (2020). *See supra* note 61.

the matter of how closely Title VII case law should apply to harassment in the home. This Note will consider each subsection of the Rule in turn to identify which elements are borrowed from Title VII case law and which are not.

A. Subsections Applying to Both Quid Pro Quo and Hostile Environment Claims

Subsection (b) of the Rule clarifies that harassment need not include physical harm to violate the FHA.[132] While physical harm is not required by the text of either statute, some courts have denied claims under the FHA—like under Title VII—because the type of touching was not considered offensive enough[133] or because the alleged behavior did not involve physical touching and was thus considered insufficiently severe or pervasive.[134] This clarification protects victims by recognizing that non-physical harassment still creates fear, anxiety, and emotional distress, especially when occurring in the home.[135]

In subsection (c), the Rule clarifies that a single incident may violate the FHA if it meets the standard for either type of harassment.[136] While courts technically recognized this before the Rule, they sometimes demanded a series of offenses to find hostile environment under the FHA.[137] For example, in *Rich v. Lubin*, the District Court for the Southern District of New York stated that "[i]solated or sporadic sexually inappropriate acts are not sufficiently pervasive and severe to constitute sexual harassment under the FHA."[138] This stance was imported from Title VII cases.[139] The Rule's acceptance of claims based on one incident was

132. 24 C.F.R. § 100.600(b) (2020).

133. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996).

134. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1090–91 (10th Cir. 1993).

135. *See supra* Part IV.B.

136. 24 C.F.R. § 100.600(c) (2020).

137. *See supra* Part III. *DiCenso*, 96 F.3d at 1008–09; Macias v. Lange, No. 14cv2763-GPC(JMA), 2016 U.S. Dist. LEXIS 44907, at *26 (S.D. Cal. Apr. 1, 2016) ("One or two occasions of sexual harassment is not enough to create a hostile environment.").

138. Rich v. Lubin, No. 02 Civ. 6786 (TPG), 2004 U.S. Dist. LEXIS 9091, at *12 (S.D.N.Y. May 20, 2004).

139. *Id.* (citing Abrams v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y.1988) (FHA case analogizing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 64 (1986)); Anonymous v. Goddard Riverside Cmty. Ctr. No. 96 Civ. 9198 (SAS), 1997 U.S. Dist. LEXIS 9724, at *12 (S.D.N.Y. July 10, 1997) (FHA case citing Title VII case Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986) to hold that "a single incident of harassment cannot give rise to a hostile environment claim.")). *But see* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277, 280 (4th Cir. 2015) (en banc) ("[A]n isolated incident of harassment can amount to discriminatory changes in the terms and conditions of

also accepted in the Housing Context Cases[140] and is justified given the differences in the housing and employment contexts. As described above, harassment may be inherently more severe in the housing setting than at work, which should lower the requisite pervasiveness of the offensive conduct. The standard is "severe *or* pervasive," and severity and pervasiveness relate inversely such that more severe conduct need be less pervasive to qualify (or not pervasive at all if a single act is very severe).[141] Furthermore, the identity of most housing harassers as owner-landlord[142] justifies actionability based on one act because knowledge of and ability to respond to harassment are typically more direct than in the work setting.[143] The Rule takes a positive step in incorporating the *Beliveau* court's reasoning that "[u]nder no circumstances should a woman have to risk further physical jeopardy simply to state a claim for relief."[144]

B. Quid Pro Quo Harassment

Subsection (a)(1) establishes that quid pro quo harassment consists of:

> [A]n unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to: The sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.[145]

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employment if that incident is extremely serious.") (internal punctuation omitted).

140. Beliveau v. Caras, 873 F. Supp. 1393, 1398 (C.D. Cal. 1995).

141. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("We first note that the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."). See King v. Bd. of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir.1990) ("Although a single act can be enough . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."). This is a Title VII case, indicating that courts are wrong to require more than one incident even under Title VII. Notably, the court in *Rich v. Lubin* erred in calling the standard "severe *and* pervasive."

142. Lindemyer, *supra* note 62, at 381 ("[A]s evidenced in the majority of residential sexual harassment claims addressed in federal courts, vicarious liability is infrequently controverted because the owner/landlord and the harasser are often one and the same person.").

143. This may relate to the disapplication of the Faragher-Ellerth defense to the housing setting. 24 C.F.R. § 100.600 (a)(2)(ii) (2020) (discussed below). The affirmative defense essentially allows that "for employers of harassing supervisors . . . the first bite is free." Grossman, *supra* note 29, at 671. This is even less appropriate in the housing context.

144. *Beliveau*, 873 F. Supp. at 1398.

145. 24 C.F.R. § 100.600(a)(1) (2020).

This definition aligns with judicial recognition that implicit requests or demands qualify as quid pro quo claims.[146] The *Honce* court—citing a Title VII case—stated that "'[q]uid pro quo' harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors."[147]

This language also addresses a difficulty that has plagued quid pro quo claims under the imported Title VII standard. Some courts have only recognized quid pro quo claims where an adverse action was actually taken, not merely threatened.[148] As one scholar stated,

> As under Title VII, in the housing context, the threat of adverse consequences based on a refusal to submit to sexual demands is not sufficient to state a quid pro quo claim. Instead, the tenant must demonstrate that she has already suffered tangible harm . . . This standard directs the court's attention to the tenant's reaction to the sexual demands and requires that a tenant wait until adverse actions have occurred rather than empowering the court to act based on inappropriate conduct by a landlord.[149]

However, the *Quigley* court and others have not explicitly required an adverse action for quid pro quo claims.[150] In accordance with these cases, the text of the Rule does not require that an adverse action be taken after a request is made in order for a victim to state a quid pro quo claim.

Further justification for this departure from Title VII case law comes from section 3604(c) of the FHA, "which adds to the prohibitions against statements indicating illegal preferences, limitations, and discrimination a ban on statements indicating 'an intention to make any such preference,

146. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1089 (10th Cir. 1993).

147. *Id.* (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987)); *see also* Quigley v. Winter, 598 F.3d 938, 947 (8th Cir. 2010).

148. George, *supra* note 62, at 661–62; *see, e.g.*, West v. DJ Mortg., LLC, 164 F. Supp. 3d 1393, 1399 (N.D. Ga. 2016) ("Because the landlord deprived the tenant of certain benefits of the tenancy after she denied his sexual advances, her FHA quid pro quo sexual harassment claim survived summary judgment.") (discussing Grieger v. Sheets, No. 87 C 6567, 1989 WL 38707, at *5 (N.D.Ill.1989)).

149. George, *supra* note 62, at 661–62 (internal citations omitted).

150. Quigley v. Winter, 598 F.3d 938, 947–48 (8th Cir. 2010) ("[W]hen Quigley inquired about the likelihood of receiving her deposit back from Winter, Winter fluttered his hand against Quigley's stomach and said, 'My eagle eyes have not seen everything yet.' The jury could reasonably infer Winter was telling Quigley the return of her deposit was conditioned upon Winter seeing more of Quigley's body or even receiving a sexual favor, which would amount to 'quid pro quo' sexual harassment."); United States v. Hurt, 676 F.3d 649, 654 (8th Cir. 2012) ("Several witnesses testified Bobby solicited sexual favors in exchange for housing or utilities, which, if believed, would constitute quid pro quo sexual harassment.").

limitation, or discrimination'"—a phrase that Title VII does not include.[151] This prohibits statements expressing a landlord's intent to violate the FHA, even if not acted on.[152] "Thus, for example, where a landlord makes a statement threatening a tenant with eviction if she does not have sex with him but does not carry out this threat," the landlord violates the FHA "even if traditional Title VII analysis would lead to the conclusion that he has not engaged in quid pro quo harassment."[153] Accordingly, the text of the FHA supports the Rule's refusal to require an adverse action.

This clarification is significant because it identifies the problematic conduct as solely the landlord's. The Rule's recognition that the landlord is culpable upon requesting certain favors shifts the focus away from the acts themselves, thereby combatting the impulse to view victims as willing participants in or partially responsible for sexual activity with the harasser. Placing culpability with landlords is proper given the common vulnerabilities of victims of sexual harassment in housing and the power differential between them and their landlords.[154] Scholars have recognized that landlords—knowing the financial difficulties that most victims face—consider their requests for sexual favors to be part of the negotiating practice surrounding their tenants' housing.[155] For example, Oliveri states that "what was contemplated by the landlords was not a 'romantic relationship' in any sense but a surprisingly straightforward commercial transaction—bartering sex for housing."[156] Such a transactional approach is one-sided and wrong. In fact, Balos argues that such behavior is likely criminal: "The solicitation by landlords of sex in exchange for rent is arguably soliciting illegal prostitution. However, once the behavior is labeled sexual harassment, the criminal nature of the act is concealed. By protecting the landlord's private business dealings, the courts have . . . helped to disguise sexual violence."[157] The illegality of landlords' requests for sex should not be masked. Oliveri adds that "[i]t is difficult to imagine our legal system tolerating any other setting in which purveyors of a

151. Schwemm & Oliveri, *supra* note 49, at 806 (quoting 42 U.S.C. § 3604(c) (2020)).

152. *Id.*

153. *Id.* at 808.

154. *See supra* Parts IV.C., IV.D.

155. Oliveri, *supra* note 41, at 623. *See also* Balos, *supra* note 34, at 87 ("The sexual exploitation manifested itself as a market exchange for rent, in other words, he would take sex in the place of cash for rent. By renting to her without an agreement to lower the rent to an amount the tenant could afford, the landlord is making the exchange of sex for rent part of his entitlement as landlord.") (discussing Krueger v. Cuomo, 115 F.3d 487 (9th Cir. 1997)).

156. Oliveri, *supra* note 41, at 623.

157. Balos, *supra* note 34, at 98.

commercial good or service—medical care or food, for example—routinely try to barter for sex. Yet this is the reality for a significant number of poor women" when attempting to secure housing.[158] The Rule recognizes that the act of requesting sex in exchange for housing benefits is inherently wrong, regardless of how the victim responds to the coercive request.

C. Hostile Environment Harassment

Turning to hostile environment claims, HUD's definition of hostile environment discrimination borrows heavily from Title VII standards but also adopts language introduced specifically for the housing context.

In subsection (a)(2), the Rule applies Title VII case law's "sufficiently severe or pervasive" language to the FHA, but the Rule's application of this standard differs from that imported without distinction from Title VII case law.[159] The *Honce* court held that the FHA prohibits conduct that is "'sufficiently severe or pervasive' to alter the conditions of the housing arrangement" by "unreasonably interfer[ing] with use and enjoyment of the premises."[160] HUD's Rule, on the other hand, states that

> [h]ostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction.[161]

HUD arguably accepts a lower bar than the one set in *Honce* by not explicitly requiring that the harassment "alter the conditions of the housing arrangement." This change is supported by the Housing Context Cases.[162] Furthermore, the Rule drops "unreasonably" from *Honce*'s interference condition, which may also be interpreted as accepting a lower bar of what

158. Oliveri, *supra* note 41, at 634.

159. 24 C.F.R. § 100.600(a)(2) (2020); *see* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).

160. Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993) (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987)).

161. 24 C.F.R. § 100.600(a)(2) (2020).

162. *See* Quigley v. Winter, 598 F.3d 938, 946–47 (8th Cir. 2010) (quoting the alteration requirement but ruling that "there was sufficient evidence to support a hostile housing environment claim if a reasonable jury could find Quigley proved by a preponderance of the evidence Winter subjected her to unwelcome sexual harassment, and the harassment was sufficiently severe or pervasive so as to interfere with or deprive Quigley of her right to use or enjoy her home.").

type of interference violates the FHA.[163] This change is directly indicated by the text of the FHA as section 818 prohibits interference of protected rights without an unreasonableness qualifier.[164] It is also supported by Housing Context Cases.[165] Moreover, the Rule retains the "use or enjoyment" language from *Honce*—itself a departure from Title VII case law originating with section 818 of the FHA[166]—but takes a broader view than the *Honce* court about what is protected against interference. The language of what is protected comes from section 804 of the FHA, but the Rule adds "or enjoyment" to "of services or facilities in connection therewith."[167] This language clarifies, as not all courts have recognized, that what is statutorily protected from interference under the FHA extends beyond the dwelling to enjoyment of any facilities or services whose use is linked to the property.[168] Together, these choices convey that what is affected need not be a feature central to the housing agreement but rather the plaintiff's experience within the housing arrangement.

This subsection also states that "[h]ostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction."[169] This is in line with Title VII case law.[170]

Notably, this section does not include any language indicating that harassment must subject persons of only one sex to offensive conditions to violate the FHA.[171] Therefore, the Rule does not protect an "equal-opportunity harasser." This Title VII loophole was adopted in *Honce*[172]

163. This may also appear to abandon the objectivity requirement derived from Title VII, but the Rule addresses this standard in subsection (a)(2)(i)(C) (discussed below).

164. 42 U.S.C. § 3617 (2020) (FHA § 818) ("It shall be unlawful 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.").

165. *Quigley*, 598 F.3d at 946–47; Salisbury v. Hickman, 974 F. Supp. 2d 1282, 1290 (E.D. Cal. 2013) ("to prevail on a hostile housing environment claim a plaintiff must establish that she was subjected to (1) unwelcomed (2) sexual harassment that was (3) sufficiently severe or pervasive so as to interfere with or deprive the plaintiff of her right to use or enjoy her home.").

166. 42 U.S.C. § 3617 (2020) (FHA § 818).

167. 42 U.S.C. § 3604 (2020) (FHA § 804(b)); 24 C.F.R. § 100.600(a)(2) (2020).

168. For example, a rental may include access to a gym or an internet service—enjoyment of these, not just provision of them, could be covered here.

169. 24 C.F.R. § 100.600(a)(2) (2020).

170. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 64 (1986) ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").

171. 24 C.F.R. § 100.600 (2020).

172. Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993) ("The landlord's behavior here was eccentric, and probably unwarranted, but was not directed solely at Ms. Honce. Other tenants of both sexes endured similar treatment. Because the conduct was neither sexual nor directed solely at women,

but had been rejected by some courts in both the Title VII and FHA settings since.[173] Furthermore, HUD makes clear in its response to public comments that sex-based discrimination under the FHA includes harassment based on sexual orientation and gender identity, which contradicts the permissibility of the equal-opportunity harasser.[174] Oliveri argues that, following *Bostock*, this interpretation of the FHA should be accepted by courts.[175] She states that this would "be a welcome development for housing equity, considering the significant discrimination that gay, lesbian, and transgender individuals experience in housing and the dearth of legal protections in place for them."[176]

In subsection (a)(2)(i), the Rule adopts Title VII's totality of the circumstances test for adjudicating the severe or pervasive standard.[177] It includes factors derived from Title VII case law as well as factors tailored

it is not actionable under the hostile housing environment theory.").

173. *See, e.g.*, Miles, *supra* note 25, at 614 ("Other federal courts have rejected the defense outright by replacing disparate treatment with an individual analysis of the 'because of sex' element.").

174. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,055 (Sept. 14, 2016) (codified as 24 C.F.R. § 100.600 (2020)). HUD traces a line of Title VII developments indicating this position. "HUD agrees with the commenters' view that the Fair Housing Act's prohibition on sex discrimination prohibits discrimination because of gender identity. In *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII's prohibition of sex discrimination to encompass discrimination based on nonconformance with sex stereotypes, stating that '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' Taking note of *Price Waterhouse* and its progeny, in 2010, HUD issued a memorandum recognizing that sex discrimination prohibited by the Fair Housing Act includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion, 'clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.' Following the EEOC's decision, the Attorney General also concluded that: the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. . . . HUD reaffirms its view that under the Fair Housing Act, discrimination based on gender identity is sex discrimination. Accordingly, quid pro quo or hostile environment harassment in housing because of a person's gender identity is indistinguishable from harassment because of sex. HUD, in its 2010 memorandum, also advised that claims of housing discrimination because of sexual orientation can be investigated under the *Price Waterhouse* sex-stereotyping theory. Over the past two decades, an increasing number of Federal courts, building on the *Price Waterhouse* rationale, have found protections under Title VII for those asserting discrimination claims related to their sexual orientation." *Id.* (internal citations omitted).

175. Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Under the Fair Housing Act After* Bostock v. Clayton County, 69 KANS. L. REV. 1 (forthcoming Feb. 2021) ("This is an obvious next step given the similar language, structure, and purpose of both statutes, and the courts' long tendency to use Title VII cases to guide their interpretation of the FHA.").

176. *Id.*

177. 24 C.F.R. § 100.600(a)(2)(i) (2020) ("Whether hostile environment harassment exists depends upon the totality of the circumstances."); see *supra* Part II for discussion of the totality of the circumstances test.

to FHA claims.[178] The factors that the Rule borrows from Title VII case law include the nature, context, severity, scope, frequency, and duration of the conduct.[179] The Rule provides two additional factors to be considered: the "location of the conduct, and the relationships of the persons involved."[180] In the Housing Context Cases, courts have considered both the location of the harm and the landlord-tenant relationship in evaluating the harassment.[181] While these factors have been considered in determining liability within the employment context,[182] they are not included in the totality of the circumstances test under Title VII.[183] This change is certainly a step toward demanding consideration of the unique context of harassment in housing, but the question is whether HUD went far enough.

On the one hand, these two factors give courts room to consider the particular harm of harassment occurring within the home and/or by a landlord. It is significant that these factors are included in the totality of the circumstances test as opposed to being merely acknowledged in the factual background section. This invites courts to discuss the sanctity of the home, privacy rights within the home, evidence relating to the special power a landlord has over a vulnerable victim, and other aspects unique to harassment under the FHA in weighing a claim. Accordingly, a court is

178. *Id.*

179. *Id.*; *see, e.g.*, Meritor, 477 U.S. at 67; Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). "Duration" first considered in federal appellate courts in Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 715 (3d Cir. 1997).

180. 24 C.F.R. § 100.600(a)(2)(i)(A) (2020).

181. *See* Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995); Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010).

182. For example, location is considered in whether the conduct falls within the scope of employment. *See, e.g.*, Ferris v. Delta Air Lines, Inc., 277 F.3d 128 (2d Cir. 2001) (rape of female flight attendant by male co-worker in hotel was within the work environment because the hotel stay was reserved by the airline for the flight crew between assigned flights). The relationship between the parties is used to determine whether the employer will be (1) strictly liable (i.e., supervisor took tangible employment action), (2) subject to the Faragher-Ellerth defense (i.e., not-tangible action by supervisor), or (3) based on negligence (i.e., harassment by co-workers).

183. However, these factors have been included by the District Court for the Northern District of Georgia in a claim of intentional infliction of emotional distress: "the undersigned distills three general principles for analyzing intentional infliction of emotional distress claims premised on sexual harassment. First, courts must examine the totality of the circumstances in evaluating such a claim. Second, the following factors are relevant in evaluating whether the conduct is extreme or outrageous: (1) the pervasiveness of the conduct; (2) the relationship between the harasser and the plaintiff (i.e., prior romantic relationship, supervisory relationship); (3) the severity of the conduct; (4) the frequency of the conduct; (5) the amount, duration, and length of physical contact; (6) the location of the conduct (i.e., in public or in private); and (7) the physically threatening nature of the conduct." Long-Hall v. U.S. Ready Mix, No. 1:08-CV-1546-CAP-AJB, 2010 U.S. Dist. LEXIS 149796, at *117–18 (N.D. Ga. Feb. 2, 2010) (internal citations omitted).

free to find that these considerations help a victim meet the "severe or pervasive" standard, including placing particular weight on them within the totality of the circumstances test.

On the other hand, the Rule does not indicate that courts need to consider such points and does not give the newly identified factors any particular weight. Courts may consider the location and relationships in a given situation without acknowledging any added harm in harassment that happens at home or by a landlord. In other words, HUD succeeded in bringing these factors into the analysis but fell short of explicitly identifying the unique level of harm attached to them. For example, the Rule does not state that harassment at home is or can be inherently more severe than similar conduct at work. The Background section recognizes this, but such language is omitted from the text of the Rule itself and therefore its power is diminished.[184] Specifically, courts need not, in discussing these factors, consider privacy rights, jurisprudence on the sanctity of the home, information about special vulnerabilities of tenants and likely victims, or other concepts or data that may indicate heightened egregiousness of harassment in housing compared to the employment context. Accordingly, it is not clear from the Rule if harassment in housing needs to be any less egregious to qualify as "severe or pervasive" under the FHA than under Title VII. By failing to address the unique harm of harassment at home in the Rule's text, HUD did not provide needed guidance on weighing or analyzing the added factors.

During the Rule's public comment period, commenters requested that HUD explicitly incorporate the unique nature of harassment in housing into the totality of the circumstances test.[185] Commenters asked that the Rule state as an additional factor in (a)(2)(i)(A) "the heightened rights in or around one's home for privacy and freedom from harassment" or, alternatively, "the heightened reasonable expectation of privacy and freedom from harassment in one's home."[186] Another commenter requested that this subsection "expressly state that conduct occurring in one's home may result in a violation of the Fair Housing Act even though

184. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,055 (Sept. 14, 2016) (codified as 24 C.F.R. § 100.600 (2020)). The Background section is included in the *Federal Register* but not in the *Code of Federal Regulations*, which limits its visibility and power.

185. *Id.* at 63,063.

186. *Id.*

the same conduct in one's place of employment may not violate Title VII."[187] HUD responded:

> HUD declines to add language regarding individuals' heightened rights within the home for privacy and freedom from unwelcome speech and conduct to the rule text in § 100.600(a)(2)(i)(A). The non-exhaustive list of factors included in § 100.600(a)(2)(i)(A) identifies circumstances that can be demonstrated with evidence during the adjudication of a claim of hostile environment harassment under the Act. Evidence regarding the "location of the conduct," as explicitly identified in § 100.600(a)(2)(i)(A), is a critical factor for consideration and will allow courts to take into account the heightened privacy and other rights that exist within the home when determining whether hostile environment harassment occurred. For similar reasons, HUD also declines to add language stating that harassing conduct may result in a violation of the Fair Housing Act even though such conduct might not violate Title VII. HUD believes that by establishing a hostile environment harassment standard tailored to the specific rights protected by the Fair Housing Act and by directing that hostile environment claims under the Act are to be evaluated by assessing the totality of the circumstances—including the location of the unwelcome conduct and the context in which it occurred—the final rule ensures that courts consider factors unique to the housing context when making the fact-specific determination of whether the particular conduct at issue violates the Act. Therefore, while HUD agrees that unwelcome conduct in or around the home can be particularly intrusive and threatening and may violate the Fair Housing Act even though the same or similar conduct in an employment setting may not violate Title VII, HUD does not believe the proposed additions to § 100.600(a)(2)(i)(A) are necessary.[188]

HUD is wrong here. The divergence between cases applying the Title VII standard strictly and the Housing Context Cases indicates that the proposed additions are necessary—or would at least be very helpful—in providing clarity to courts. Since cases like *DiCenso* and *Honce* are still valid, they will likely continue to be used to maintain an inappropriately high bar for recoverability, blocking many victims from recovering based on the Title VII standard. HUD is correct that the language of § 100.600(a)(2)(i)(A) "will allow courts to take into account the heightened privacy and other rights" of the home, but the failure to explicitly acknowledge the distinctiveness of harassment in housing in the text of the Rule fails to "ensure[ ] that courts consider factors unique to the

187. *Id.*
188. *Id.*

housing context."[189] HUD has left it to courts to decide whether the location and relationships involved in harassment at home render the harassment any more severe than those in an employment, and courts will likely continue to disagree on this point.

In subsection (a)(2)(i)(B), the Rule explicitly states that psychological harm is unnecessary to state a claim.[190] As mentioned, this point was clarified by the Supreme Court in the employment context.[191] Claimants under the FHA have largely avoided misguided demands for extreme psychological damage for a claim to be actionable.[192]

In subsection (a)(2)(i)(C), the Rule specifies that the severe or pervasive standard is evaluated "from the perspective of a reasonable person in the aggrieved person's position."[193] This is a shift from Title VII case law's standard of what "a reasonable person would find hostile or abusive,"[194] which was adopted in *DiCenso*.[195] The "reasonable person in the aggrieved person's position" standard isn't as specific as the Ninth Circuit's "reasonable woman" standard[196] in recognizing that women frequently experience harassment and may interpret such treatment differently than men. However, it provides space for courts to consider common vulnerabilities of victims, including those beyond gender. The Rule can be read as considering either the viewpoint of each victim or the perspective of a low-income woman who exhibits characteristics of vulnerability common to victims under the FHA. Since many victims share characteristics of gender, economic vulnerability, status as head of household, and sometimes race, it is appropriate for courts to consider the perspective of a person in these circumstances. This may shift the analysis away from the image of a deviant landlord with sexual interest in a particular tenant to one of a landlord strategically preying on specific victims based on their vulnerabilities and the power differential between the parties. This interpretation allows courts to challenge the "dirty old man" narrative and give greater consideration to the systemic forces

189. *Id.*

190. 24 C.F.R. § 100.600(a)(2)(i)(B) (2020).

191. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993) (resolving circuit split on the requisite psychological harm, with some circuits, such as the Sixth Circuit in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), requiring the conduct to seriously affect the victim's psychological well-being).

192. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993).

193. 24 C.F.R. § 100.600(a)(2)(i)(C) (2020).

194. *Harris*, 510 U.S. at 21.

195. DiCenso v. Cisneros, F.3d 1004, 1008 (7th Cir. 1996).

196. Ellison v. Brady, 924 F.2d 872, 879–80 (9th Cir. 1991).

driving vulnerability to sexual harassment, particularly for women of color.[197]

Finally, in subsection (a)(2)(ii), HUD clarifies that the *Faragher-Ellerth* defense is not available under the FHA.[198] This is in line with the few courts that have considered this issue.[199] This departure from the Title VII standard is certainly positive for victims. As mentioned, scholars have long critiqued the affirmative defense under Title VII as a back door for employers to escape liability.[200] HUD is right to acknowledge that housing providers should not be granted a similar back door as significant functional differences between the two settings render the affirmative defense inappropriate under the FHA.[201]

Ultimately, HUD's Rule resolves questions about the fit of Title VII case law in the FHA context in some respects but not others. While the Rule utilizes the Title VII framework that has been incorporated into FHA case law, it also includes language promoting consideration of features of harassment unique to housing, as supported by the Housing Context Cases. Still, it does not go far enough in guiding courts to consider the special nature of the home when evaluating harassment occurring there. The Rule offers some benefits to victims, but it fails to fully account for the unique harms attached to harassment in housing.

VII. Case Law Since HUD's 2016 Rule

24 CFR § 100.600 went into effect on October 16, 2016. Since then, federal courts have infrequently cited the Rule and even less frequently applied the Rule in determining whether harassment qualifies for recovery under the FHA. This section analyzes relevant federal cases discussing sexual harassment under the FHA since HUD's Rule.[202] From these cases

197. Elengold, *supra* note 35, at 229.

198. 24 C.F.R. § 100.600(a)(2)(ii) (2020).

199. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 863 (7th Cir. 2018) ("Because the text of the FHA does not spell out a test for landlord liability, we look to analogous anti-discrimination statutes for guidance. One natural point of reference is Title VII . . . We recognize, however, that there are some potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord. We thus refrain from reflexively adopting the Title VII standard and continue our search for comparable situations."); Richards v. Bono, No. 5:04-cv-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *31 (M.D. Fla. Apr. 26, 2005) ("The Court has found no cases applying *Faragher* to a Title VIII action for sexual harassment.").

200. *See supra* Part II.

201. *Id.*

202. Cases focusing on liability issues stemming from harassment perpetrated by someone

it is clear that the Rule has been underutilized by courts to distinguish FHA claims from those brought under Title VII.[203]

In *West v. DJ Mortgage, LLC*, the District Court for the Northern District of Georgia referenced the Rule in recognizing a sexual harassment claim under the FHA and in addressing vicarious liability, including noting the Rule's rejection of the affirmative defense.[204] But in evaluating whether the plaintiff had presented a valid question for the jury on whether the actions against her were sufficiently severe or pervasive, the court did not mention the Rule. Still, the court reasoned that one incident of the property/leasing manager grabbing the plaintiff's vagina could be independently severe enough to present the question to the jury (though the manager also made multiple requests for nude pictures and other sexual advances).[205] The court did consider the setting of the harassment, stating that "[a] reasonable jury could conclude that these interactions—particularly in the intimate context of Ms. West's home and security, as opposed to her place of employment—went beyond '[s]imple teasing,

other than the property owner are generally excluded from this discussion. *See, e.g.*, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018); G.B. v. Dipace, No. 1:14-CV-0500 (DNH/CFH), 2019 U.S. Dist. LEXIS 51459 (N.D.N.Y. Mar. 27, 2019). Another noteworthy issue falling beyond this discussion is the Second Circuit's decision in *Francis v. Kings Park Manor, Inc.*, which cites a regulation HUD issued in 1989 to support a holding that post-acquisition claims apply under sections 3604 and 3617, but it did not consider the Rule in reaching this conclusion. 944 F.3d 370, 375–78 (2d Cir. 2019); *see supra* notes 61, 131. The dissent does mention the Rule in a footnote, but only in discussing liability issues under 24 C.F.R. § 100.7(a)(1). *Id.* at 378 n.7 (Livingston, J., dissenting). Judge Livingston argues that section 100.7(a)(1) "deserves no deference because it misinterprets the FHA's text, finds no support in precedent, and relies on a flawed analogy to Title VII." *Id.* at 394 (Livingston, D., dissenting).

203. It is worth noting that the Rule was issued soon before the presidential election of 2016 and that the Trump Administration clearly expressed its disfavor of regulations. *See, e.g.*, Charles S. Clark, *The Trump Administration's War on Regulations*, GOVERNMENT EXECUTIVE, https://www.govexec.com/feature/trump-administrations-war-regulations/ (last visited Oct. 21, 2020); Keith B. Belton & John D. Graham, *Deregulation Under Trump*, REGULATION, Summer 2020, at 14, https://www.cato.org/sites/cato.org/files/2020-06/regulation-v43n2-5.pdf. This may have impacted parties' and courts' reluctance to rely on the Rule. This reluctance may decrease under future administrations, though Trump's appointees to the Supreme Court may influence the Court's future decisions on the subject. *See* Tim Ryan & Alexandra Ellerbeck, *Trump Appointees Vocal at Hearing on Agency Deference*, COURTHOUSE NEWS SERVICE (Mar. 27, 2019), https://www.courthousenews.com/trump-appointees-vocal-at-hearing-on-agency-deference/; Dino Grandoni, *The Energy 202: How Amy Coney Barrett may make it harder for environmentalists to win in court*, WASHINGTON POST (Sept. 28, 2020, 6:20 AM), https://www.washingtonpost.com/politics/2020/09/28/energy-202-how-amy-coney-barrett-may-make-it-harder-environmentalists-win-court/. *But see* Davis Wright Tremaine, *Trump Track: Chevron Deference Thrives?*, JD SUPRA (July 26, 2019), https://www.jdsupra.com/legalnews/trump-track-chevron-deference-thrives-25186/ ("[It] would appear that deference to the administrative state is firmly implanted in our judicial system, no matter the ideology of the Administration in office.").

204. West v. DJ Mortg., LLC, 271 F. Supp. 3d 1336, 1351, 1357 (N.D. Ga. 2017).

205. *Id.* at 1352–55.

offhand comments, and isolated incidents that are viewed only as annoying or offensive.'"[206] But in reaching its decision, the court stated that "the conduct must be 'serious, persistent, and explicitly humiliating or threatening conduct.'"[207] Requiring "explicitly humiliating or threatening conduct" is not in line with the Rule.

In *Godwin v. Senior Garden Apartments*, the District Court for the District of Nevada laid out the standard for actionability for sexual harassment under the FHA but did not mention HUD's Rule.[208] The court found that the plaintiff's allegations of "repeated, unwanted sexual invitations, suggestions, and demands, and that her refusal to accede led to her eviction" sufficiently stated a claim under the FHA.[209]

In *Greater New Orleans Fair Housing Action Center v. Kelly*, the District Court for the Eastern District of Louisiana referred to the Rule to verify that a claim of sexual harassment is actionable under the FHA but did not use the Rule to identify the legal framework for evaluating such claims.[210] The court's application of the severe or pervasive standard relied heavily on *DiCenso* and *Honce*, including citing *DiCenso* to support that "one discrete instance of harassment [is] not sufficient to create a hostile housing environment," in direct opposition to the Rule.[211] The court found that the plaintiff stated a valid claim in asserting that the landlord grabbed her buttocks, made suggestive remarks, and "'peered into [her] apartment windows when she was home and repeatedly entered her apartment without warning and without her consent,' including once while she was in the shower."[212] The court analogized the case to *Quigley* and also considered evidence that the landlord engaged in similar behavior with other female tenants.[213] While this touches on the Rule's factors of relationships and location, the court did not directly invoke these or specifically weigh them in making its decision.

206. *Id.* (alteration in original) (quoting Butler v. Carrero, No. 1:12-cv-2743-WSD, 2013 U.S. Dist. LEXIS 130838, at *7 (N.D. Ga. Sep. 12, 2013)).

207. *Id.* at *21 (quoting Tagliaferri v. Winter Park Hous. Auth., 486 Fed. Appx. 771, 774 (11th Cir. 2012)).

208. Godwin v. Senior Garden Apartments, No. 2:17-cv-02178-MMD-CWH, 2018 U.S. Dist. LEXIS 38738, at *4 (D. Nev. Mar. 9, 2018).

209. *Id.* at *5.

210. Greater New Orleans Fair Hous. Action Ctr. v. Kelly, 364 F. Supp. 3d 635, 651 (E.D. La. 2019).

211. *Id.* at 652.

212. *Id.*

213. *Id.* at 652–53.

In *Mohamed v. McLaurin*, the District Court for the District of Vermont analyzed a hostile environment FHA claim without invoking the Rule.[214] The court stated that "[i]solated or sporadic sexually inappropriate acts are not sufficiently pervasive and severe to constitute sexual harassment under the FHA."[215] While the court ultimately rejected the claim based on issues with the plaintiff's credibility,[216] the court ended its analysis of this issue in a very problematic way. It indicated that even if the plaintiff had met the severe or pervasive standard, she "cannot further establish that she left the apartment within a reasonable period of time after her housing conditions became intolerable."[217] This is both an incorrect and a dangerous interpretation of FHA sexual harassment law because constructive eviction is not required under a hostile environment claim and far surpasses what is required to show interference with use or enjoyment of the property. This approach hearkens back to Title VII cases like *Wyly v. W.F.K.R., Inc.*, where a waitress's supervisor repeatedly spoke crudely to her, placed his hand down her pants against her protests, and grabbed her throat saying he wanted to have sex with her, yet the court ruled that the victim did not have a subjective belief about the hostility of the environment.[218] The court based this finding on the fact that the waitress "testified her job 'was a really enjoyable shift,' and outside of [the supervisor], her coworkers 'were good to [her]'" and that she "continued to work at Sugar's for roughly four months after [the supervisor] touched her."[219] This approach, essentially demanding constructive discharge for a hostile environment claim, was misguided in the employment context as victims should not be punished for trying to retain their jobs when

214. Mohamed v. McLaurin, 390 F. Supp. 3d 520, 548–52 (D. Vt. 2019). The court did state that "[a] federal regulation, promulgated under the FHA, recognizes that § 3617 prohibits '[t]hreatening, intimidating or interfering with persons in *their enjoyment of a dwelling* because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.'" 24 C.F.R. § 100.400(c)(2) (emphasis supplied). In light of the broad remedial purposes of the FHA, the court predicts that the Second Circuit would likewise recognize a post-acquisition hostile housing environment claim under either § 3604 or § 3617." *Mohamed*, 390 F. Supp. 3d at 547.

215. *Id.* at 549 (quoting Rich v. Lubin, No. 02 Civ. 6786 (TPG), 2004 U.S. Dist. LEXIS 9091, at *12 (S.D.N.Y. May 20, 2004); citing Shellhammer v. Lewallen, No. 84-3573, 1985 U.S. App. LEXIS 14205, at *4 (6th Cir. July 31, 1985) ("[Plaintiff] points to two sexual requests during the three or four months of her tenancy. This does not amount to the pervasive and persistent conduct which is a predicate to finding that the sexual harassment created a burdensome situation.")). Note that "pervasive *and* severe" is not the correct standard.

216. *Id.* at 552.

217. *Id.*

218. Wyly v. W.F.K.R., Inc., 1 F. Supp. 3d 510, 512 (W.D. Tex. 2014).

219. *Id.* at 515 (second alteration in original).

subjected to harassment. It is even more out of place in the housing context, where the alternative is often homelessness.[220] In fact, the *Mohamed* plaintiff was especially vulnerable as a Somali refugee with eight children, limited English abilities, and a low-income job.[221] This approach certainly has no support in HUD's Rule, and it is concerning that even after the Rule's issuance courts are pushing the standard for recovery to such heights.

In *Noah v. Assor*, the District Court for the Southern District of Florida quoted the Rule and held that the plaintiff presented sufficient facts for an actionable claim under either quid pro quo or hostile environment standards.[222] For the quid pro quo claim, the defendant followed through on threats to not renew the plaintiff's lease or return her security deposit if she did not have a sexual relationship with him.[223] For the hostile environment claim, the court considered repeated instances of stalking, physical trespasses, sexual propositions, lewd comments, and expressions of jealousy.[224] The court also considered the landlord-tenant relationship in "find[ing] these stalking allegations particularly important."[225] The court further stated that the plaintiff not alleging physical touch or harm "or [threat of] touch or harm . . . does not bar her Fair Housing Act claim, because the statutory structure, regulations promulgated by [HUD], and interpretive case law are in accord that unlawful interference under the

220. Howell, *supra* note 86, at 17 ("So long as courts treat housing harassment like workplace harassment, landlords can sexually harass indigent and near-indigent women without real fear of court intervention. A female tenant will remain caught between two evils. She must either accept sexual harassment, sexually transmitted diseases, and possible pregnancy or face living on the mean streets of America.").

221. Mohamed v. McLaurin, 390 F. Supp. 3d 520, 527 (D. Vt. 2019).

222. Noah v. Assor, 379 F. Supp. 3d 1284, 1290 (S.D. Fla. 2019). The court also stated that "district courts in the Eleventh Circuit agree that Section 3617 'extends only to discriminatory conduct that is so severe or pervasive that it will have the effect of causing a protected person to abandon the exercise of his or her housing rights.'" *Id.* at 1289–90 (quoting Lawrence v. Courtyards at Deerwood Ass'n, Inc., 318 F. Supp. 2d, 1133, 1144 (S.D. Fla. 2004)). While § 100.600(a) does not state that it applies to § 3617, this abandonment of housing rights goes well beyond the harm required by § 100.600.

223. *Id.* at 1290–91.

224. *Id.* at 1291–93.

225. *Id.* at 1292–93 (citing Salisbury v. Hickman, 974 F. Supp. 2d 1282, 1293 (E.D. Cal. 2013) (denying summary judgment to defendants and noting that "sexual harassment by someone in a position of authority is more likely to be emotionally and psychologically threatening," such as where the defendant "on-site manager . . . is first in-line to respond to any issue that might interfere with [plaintiff's] use and enjoyment of her residence"); Beliveau v. Caras, 873 F. Supp. 1393, 1398 (C.D. Cal 1995) (denying motion to dismiss hostile environment sexual harassment claim under Fair Housing Act and emphasizing harassment came from resident manager, "whose very role was to provide [a] safe environment")).

Fair Housing Act does not require force, or threat of force."[226] This analysis provides a useful example of how courts should apply HUD's Rule.

In *Cudjoe v. Watermark Villas at Quail North, LLC*, the District Court for the Western District of Oklahoma cited the Rule to identify both quid pro quo and hostile environment claims as causes of action under the FHA and to define hostile environment harassment in denying a motion to dismiss.[227] The court did not analyze the Rule further.

In *Birdo v. Duluky*, the District Court for the District of Minnesota determined that the plaintiff "failed to plausibly allege a sexual-harassment claim under the FHA" for discrimination he believed was due to his unwillingness to participate in homosexual behavior, but the court did not consider the Rule.[228] The court stated that the plaintiff's complaint did "not allege that anyone explicitly conditioned any housing benefits to Birdo on any sort of sexual favors."[229] The court's requirement of *explicitly* conditioning housing benefits on sexual acts contradicts the Rule, as well as the Eighth Circuit's precedent, which is controlling and to which the court cited.[230] In considering whether the alleged behavior created a hostile environment, the court stated that it had "little difficulty concluding that this conduct is not 'sufficiently severe or pervasive.'"[231] In a footnote, the court stated that this conclusion was

> particularly clear when considering Eighth Circuit cases concerning Title VII sexual-harassment claims, which rely on a similar sufficiently-severe-or-pervasive standard. *See, e.g.*, . . . *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 687 (8th Cir. 2012) (affirming summary-judgment grant for defendants in Title VII sexual-harassment claim where relevant conduct included "complaints about [Defendants' employees'] poor personal hygiene, boasting about past sexual exploits, sporadic remarks of sexual vulgarity, and highly offensive but isolated instances of propositioning for sex").[232]

226. *Id.* at 1293 (footnotes omitted).

227. Cudjoe v. Watermark Villas at Quail N., LLC, No. CIV-17-1068-D, 2019 U.S. Dist. LEXIS 41538, at *7–9 (W.D. Okla. Mar. 14, 2019).

228. Birdo v. Duluky, No. 20-CV-1108 (SRN/HB), 2020 U.S. Dist. LEXIS 170242, at *10 (D. Minn. Aug. 27, 2020).

229. *Id.* at *9–10.

230. *Id.* (citing United States v. Hurt, 676 F.3d 649, 654 (8th Cir. 2012) ("Quid pro quo sexual harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors.") (quoting Quigley v. Winter, 598 F.3d 938, 946–47 (8th Cir. 2010))).

231. *Id.* at *10.

232. *Id.* at note 3.

This exclusive reliance on Title VII case law in applying the severe or pervasive standard is concerning because it sets a high bar and leaves little room for distinguishing the contexts or harms of harassment under the two statutes.

In *Torres v. Puntney*, the District Court for the District of Nevada refuted the defendant's assertion that the plaintiff failed to state a claim, stating that "it is beyond question that sexual harassment is a form of discrimination."[233] The court cited the Rule in recognizing both quid pro quo and hostile environment sexual harassment and concluding that "allegations that [the defendant] demanded a sexual favor and a sexual consent form are sufficient to state a plausible claim for relief under either theory."[234]

In *United States v. Webb*, the District Court for the Eastern District of Missouri denied the defendants' motion to dismiss an FHA sexual harassment suit alleging:

> (1) [the owner-landlord] demands to know personal information about [the tenant] such as whether she had a boyfriend, how she engaged in sex with her girlfriend, whether she and her girlfriend would engage in a threesome, and whether they would engage in a threesome with [the owner-landlord]; (2) sexual comments about [the tenant's] body; (3) offers of housing benefits like free or reduced rent in exchange for sex; (4) a request or attempt to touch [the tenant's] breasts; and (5) [The owner-landlord's] watching [the tenant] and her guests from outside her home for no legitimate business reason.[235]

In denying this motion, the court responded to the defendants' argument that the allegations "plead nothing more than the ordinary tribulations of apartment living, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."[236] The court stated that "[i]t is true that Title VII does not prescribe a general civility code nor does it prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex" but decided that the plaintiff's complaint alleged "more than 'ordinary tribulations of apartment living.'"[237] The court's decision rightly recognized that the

233. Torres v. Puntney, No. 2:19-cv-00594-APG-EJY, 2020 U.S. Dist. LEXIS 88470, at *6 (D. Nev. May 20, 2020); *see also* Torres v. Rothstein, No. 2:19-CV-00594-APG-EJY, 2020 U.S. Dist. LEXIS 53218 (D. Nev. Mar. 24, 2020).

234. *Torres*, 2020 U.S. Dist. LEXIS 88470, at *6.

235. *United States v. Webb*, No. 4:16cv1400 SNLJ, 2017 U.S. Dist. LEXIS 21940, at *1–2 (E.D. Mo. Feb. 16, 2017).

236. *Id.* at *5.

237. *Id.* at *5–7 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 777–78

alleged harassment may be severe and pervasive, but its extension of Title VII's "general civility code" precedent to the housing context is problematic given the differences discussed in Part IV. If courts are willing to accept "ordinary tribulations of [rental] living" as outside the purview of the FHA and these "ordinary tribulations" include sexual harassment by a landlord, the FHA will not be able to adequately protect victims against sexual harassment.

From these cases it is clear that HUD's Rule has seen limited application by courts so far. This is problematic because some courts continue to evaluate sexual harassment without considering the uniqueness of sexual harassment in the housing setting, applying ill-fitting standards that bar some victims from recovery.

Courts' relative indifference to the Rule runs counter to the principles of agency law espoused in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[238] As the Sixth Circuit noted before the Rule was issued, "we defer to Department of Housing and Urban Development regulations to the extent they are 'a permissible construction of the statute.'"[239] The Rule is "a permissible construction of the statute" based on the text of the FHA and the holdings and reasoning of the Housing Context Cases recognizing that significant differences between harassment under the Title VII and the FHA warrant standards tailored to the FHA. Therefore, courts should give the Rule deference. Instead, some courts continue to look to precedent developed before its passage and apply standards imported from Title VII case law without considering the housing setting.

VIII. Conclusion

While the Title VII framework may have been a good starting point for courts to evaluate sexual harassment claims under the FHA, Title VII standards are not a perfect fit for harassment in the housing context.

(1998) (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998))) (internal quotation marks omitted).

238. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–44 (1984).

239. Campbell v. Robb, 162 Fed. Appx. 460, 466 (6th Cir. 2006) (quoting *Chevron*, 467 U.S. at 842–44); *see also* Bailey, *supra* note 61, at 234 ("Throughout FHA jurisprudence, the federal courts have relied on 'four guiding principles' for interpreting the FHA, two of which are that the FHA should be construed broadly and that Title VII gives essential guidance in construing the statute. The remaining two principles are that the statute should be interpreted with reference to the congressional goal of racial integration in housing and that interpretations and regulations promulgated by the Department of Housing and Urban Development (HUD) are entitled to significant weight and deference.")

Although HUD's Rule does not go far enough in delineating where the lines between Title VII and FHA standards should be drawn, it does provide some tailoring to harassment in the housing context. It certainly provides room for courts to consider the uniqueness of the housing setting in their application of the framework borrowed from Title VII. But courts are not displaying sufficient deference to the Rule, and some courts continue to perpetuate dangerous ideas about what violates the FHA. Moving forward, courts should apply HUD's Rule broadly. Even if they do not, courts should integrate reasoning such as that in the Housing Context Cases, acknowledging and considering the harms and features unique to harassment in the housing context. This approach will allow the FHA to offer appropriate redress to tenants who are sexually harassed in the place intended to be a sanctuary.