15-1823

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DONAHUE FRANCIS,
Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., and CORRINE DOWNING,
Defendants-Appellees,

and

RAYMOND ENDRES,
Defendant.

_____

On Appeal from the United States District Court
For the Eastern District of New York
The Honorable Arthur D. Spatt, District Judge, Presiding

EN BANC OPENING BRIEF OF APPELLANT DONAHUE FRANCIS

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INTRODUCTION AND ISSUES PRESENTED

This case involves a housing provider that has the authority and duty to address tenant misconduct that diminishes habitability and enjoyment of the premises for other tenants, and generally does so. Yet when informed of serious and sustained racial harassment, it made the deliberate choice to deviate from its normal practices and do nothing, breaching its obligation to its tenant and allowing him to be subjected to months of frightening, discriminatory abuse. As the panel majority correctly found, a housing provider that refuses to address racial discrimination as it does other tenant misconduct that it has the authority and duty to address intentionally discriminates in violation of the Fair Housing Act and other laws.

Plaintiff Donahue Francis was subjected to eight months of severe racial harassment right at his front door by his next-door neighbor, Raymond Endres. Among other things, Mr. Endres repeatedly used the word "nigger," said "I oughta kill you," and engaged in bizarre and threatening behavior such as photographing Mr. Francis's apartment. This harassment was so severe that Mr. Francis had to call 9-1-1 on four separate occasions. Ultimately, Mr. Endres was charged with a state-law hate crime and pled guilty to criminal harassment.

Mr. Francis (and the police) repeatedly informed Defendants—the owner and property manager of the apartment complex—of Mr. Endres's conduct. Each

time, Defendants did nothing. That was not for lack of authority and duty to act. Mr. Endres's lease prohibited him from engaging in such conduct; Mr. Francis's lease and New York state law obligated Defendants to ensure him a habitable environment, including addressing harassment from fellow tenants; and Defendants (like all reputable housing providers) usually attempt to comply with their legal and lease obligations when put on actual notice of a violation, and indeed have taken action against tenants who commit far less serious misconduct. Yet Defendants deviated from their usual practices and breached their obligations to Mr. Francis rather than address racial discrimination that was terrorizing their tenant.

Defendants had options available to them. Once informed of the harassment, they could have, for example, issued a warning to Mr. Endres; perhaps that would have been enough. Or they could have offered to move Mr. Francis to a different apartment where Mr. Endres would not confront him on a regular basis. Or they could have required Mr. Endres to move. Or, finally, they could have evicted Mr. Endres—generally a drastic step but one that this conduct warranted. Instead, they affirmatively chose to do nothing. When property manager Ms. Downing reached out to KPM management to discuss Mr. Francis's complaints, management told her not to get involved. Put simply, rather than remedy serious racial discrimination, Defendants deliberately chose not to employ any of the tools a

housing provider routinely uses to carry out its duty to maintain a habitable environment.

There is no basis for reading the Fair Housing Act not to reach this intentional abdication of responsibility with respect to racial misconduct. Under Title VII of the Civil Rights Act, an employer discriminates in the "terms, conditions, or privileges" of employment when it fails to address a discriminatory and hostile work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986). Under Title IX of the Education Amendments Act and other laws, a school discriminates when it intentionally ignores severe and discriminatory harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639-42 (1999). Employers and schools are not thereby held responsible for the discrimination of others, but rather for their own refusal to respond to discriminatory conduct as they would other conduct that is within their authority and responsibility to address. Such refusal, the Supreme Court has confirmed twice, is a type of discrimination that our civil rights laws ban.

The Fair Housing Act provides that a housing provider may not "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race" or other protected class. *See* 42 U.S.C. § 3604(b). That is the same operative language that the Supreme Court construed in *Meritor* under

Title VII. Hostile and racist degradation at one's own doorstep is just as threatening as in the school or workplace; it similarly precludes true equality in each setting. Where, as here, tenant misconduct violates the "terms, conditions, or privileges" of rental, it constitutes intentional discrimination for a housing provider to selectively refuse to honor those contractual terms when serious racial harassment is involved. This Court need not find that the Fair Housing Act creates any duty to protect tenants from misconduct, only that where landlords *already have assumed* such a duty and generally carry it out, they cannot decide to turn a blind eye—and thus refuse to honor an essential lease term—when the misconduct is discriminatory. *See Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 867 (7th Cir. 2018).

The panel dissent nonetheless would have found that Mr. Francis had no claim for two primary reasons, both mistaken.

First, the dissent would have held that the Fair Housing Act reaches very limited discriminatory conduct that occurs after a tenant acquires rental housing. In the dissent's view, discriminatory harassment that does not make housing entirely uninhabitable does not change the "terms, conditions, or privileges of sale or rental of a dwelling." This reading of the statute cannot be squared with the Supreme Court's construction of identical language in Title VII. Nor is it consistent with the consensus of the circuit courts of appeals, all of which now hold that the Fair

Housing Act bars considerable discriminatory conduct that occurs post-acquisition, including conduct that creates a hostile housing environment.

Second, the dissent contends Mr. Francis fails to plead the defendants had the requisite discriminatory intent to be held responsible for denying Mr. Francis equal enjoyment of the terms and conditions of rental housing. But Mr. Francis pleads that defendants deliberately ignored harassing conduct that put them in breach of their obligations, pursuant to their lease and New York law, when their normal practice is to address tenant misconduct. This constitutes intentional discrimination under the Fair Housing Act, as under other civil rights laws. As the majority aptly put it:

> a landlord who fines tenants for creating fire hazards or for littering on the premises, or who responds to complaints of certain forms of tenant-on-tenant harassment, but then watches silently as white tenants burn a cross or dump trash in front of the home of recently arrived black tenants, may be said to intentionally interfere with the tenant's rights under the FHA on the basis of race.

A.219.

The dissent resists this conclusion with a series of policy-driven objections, but even if they could provide grounds for declining to enforce the statute as written (and they do not), finding intentional discrimination on these egregious facts does not implicate any of the dissent's concerns.

The issues that are presented by the facts of this case are:

1. Whether Mr. Francis plausibly alleges that the severe and sustained racial harassment he suffered changed the "terms, conditions, or privileges" of rental housing, 42 U.S.C. § 3604(b).

2. Whether the defendants committed intentional discrimination cognizable under the Fair Housing Act and other laws by deliberately choosing not to address the racial harassment they knew Mr. Francis was suffering, though they had the power to do so, their inaction violated lease obligations and New York law, and they routinely address tenant misconduct that is far less severe.

3. Whether Mr. Francis properly pleaded claims under New York Executive Law and the tort of negligent infliction of emotional distress and, if this Court has any doubt, whether those questions should be certified to the New York Court of Appeals.

STATEMENT OF JURISDICTION

Mr. Francis brought his claims under the Fair Housing Act, 42 U.S.C. §§ 3604(b) and 3617; the Civil Rights Act of 1866, 42 U.S.C. §§ 1981(a) and 1982; and related state statutory and common law. The district court had subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. It had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

The district court granted partial final judgment in favor of defendants Kings Park Manor, Inc. and Corinne Downing. Appendix ("A.") 125.[1] Mr. Francis filed a timely notice of appeal. A. 126-27. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The panel issued a decision, A. 128-201, withdrew that decision, A. 202, and issued a second decision. A. 203-261. This Court granted defendants' petition to rehear this appeal en banc. A. 262.

STATEMENT OF THE CASE

I. Factual Background

In May 2010, plaintiff-appellant Donahue Francis moved into an apartment in Kings Park Manor, an apartment complex located in Kings Park, New York. A. 16 ¶ 2, 18 ¶ 10. Kings Park Manor is owned by defendant-appellee Kings Park Manor, Inc. ("KPM"); defendant-appellee Corinne Downing is its property manager. A. 18 ¶¶ 11, 12.

Over an eight-month period in 2012, Mr. Francis, who is African-American, was subjected to racial harassment by his next-door neighbor and fellow KPM tenant, Raymond Endres. A. 16-17 ¶¶ 1-4. The harassment included repeated use of racial slurs and threats to Mr. Francis's safety. A. 16-17 ¶ 4. In a two-week span

[1] The judgment entered by the clerk of court erroneously states that the district court granted defendants' motion to dismiss as unopposed.

in February and March, for example, Mr. Endres approached Mr. Francis near the front door of his apartment on three separate occasions and called him a "fucking nigger," a "fucking asshole," and a "fucking lazy, god-damn fucking nigger.". A. 19-20 ¶¶ 16-20. In May, Mr. Endres directly threatened Mr. Francis, saying "I oughta kill you, you fucking nigger." A. 21 ¶ 30. Mr. Endres engaged in other bizarre and threatening behavior towards Mr. Francis, such as standing at Mr. Francis's front door and taking pictures of the inside of Mr. Francis's apartment. A. 24 ¶ 42.

Fearing for his safety, Mr. Francis called 9-1-1 on four separate occasions that year. A. 20 ¶ 21, 21 ¶ 31, 22 ¶ 36, 24 ¶ 42. Initially, Suffolk County police officers were dispatched to Kings Park Manor and warned Mr. Endres to refrain from using racial epithets against Mr. Francis. A. 20 ¶ 21. Police officers spoke to Ms. Downing about Mr. Endres's conduct when they came to the building. A. 21 ¶ 25. The defendants did nothing, and Mr. Endres's conduct continued. Mr. Francis then notified KPM and Ms. Downing regarding the ongoing racial harassment. A. 17 ¶ 6, 21-22 ¶ 32. In particular, Mr. Francis sent, and KPM and Ms. Downing received, three certified letters, in which he explained the substance of Mr. Endres's racial threats, stated that the threats interfered with Mr. Francis's use and enjoyment of the premises, and attached police reports. A. 21-22 ¶¶ 32-33, 23 ¶¶ 38-40, 24 ¶¶ 43-44.

KPM and Ms. Downing did not respond. A. 17 ¶ 6. They never reached out to either Mr. Francis or Mr. Endres to defuse the conflict. They neither notified Mr. Endres that his behavior violated his lease terms, nor took any other steps to remedy the harassment. A. 22 ¶ 35. In fact, when Ms. Downing contacted KPM for guidance upon receiving the third letter, KPM told her not to get involved. A. 24 ¶ 47. That is to say, Defendants made the affirmative and deliberate decision to do nothing about the racial harassment.

Eventually, Mr. Endres was arrested and charged with aggravated harassment, a class A misdemeanor hate crime. A. 23 ¶ 37. In April 2013, Mr. Endres pled guilty to criminal harassment. A. 25 ¶ 50. A court order that issued only after he had left Kings Park Manor prohibited him from any contact with Mr. Francis. A. 25 ¶ 50.

Mr. Francis's lease with KPM gave him the right to live in a property in "good and habitable condition" and the right to "peaceably and quietly" enjoy the premises. A. 58 ¶¶ 8, 12. The hostile housing environment in which he lived did not meet those obligations; Mr. Francis was unable to fully enjoy and use his apartment and the premises outside during Mr. Endres's campaign of harassment. A. 29 ¶ 70. Mr. Francis suffered increased anxiety and loss of sleep. A. 29 ¶ 71.

KPM had ample authority to address Mr. Endres's conduct in some fashion. KPM's standard lease prohibits its tenants from engaging in objectionable conduct

or behavior that interferes with the rights and comforts of other residents. A. 58 ¶ 6. Using that authority, KPM has taken affirmative steps against other tenants at Kings Park Manor who have committed less consequential, non-race-related violations of their leases or of the law. A. 28 ¶ 63. It can terminate—and has terminated—a lease for conduct less egregious than the hate crime at issue here. A. 27-28 ¶ 61.

II. Course of Proceedings Below

Mr. Francis initiated this action in the Eastern District of New York against KPM, Corinne Downing (collectively, "the defendants" or "the KPM defendants"), and the neighboring tenant, Raymond Endres.[2] He alleged that the defendants and Mr. Endres violated the Fair Housing Act, 42 U.S.C. §§ 3604(b) and 3617; the Civil Rights Act of 1866, 42 U.S.C. §§ 1981(a) and 1982; and New York Executive Law §§ 296(5) and 296(6). He also brought common-law claims for breach of contract and negligent infliction of emotional distress. He sought declaratory and injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

The defendants moved to dismiss all claims. The district court (Spatt, J.) granted the motion in part and denied it in part.

[2] Mr. Endres failed to appear, answer, or otherwise participate, and the district court entered default against him. He is not a party to this appeal.

The district court declined to decide whether the Fair Housing Act "prohibits 'post-acquisition' discrimination—that is, discrimination that occurs after a putative plaintiff acquires housing," A. 101, including whether a hostile housing environment—whether created by another tenant or a landlord—violates the Act. A. 101-03. It dismissed Mr. Francis's Fair Housing Act claims for failure to allege either: (1) a "basis for imputing the allegedly harass[ing] conduct to the KPM Defendants as opposed to Endres," or (2) that "the KPM Defendants failed to intervene on account of their own racial animus toward the Plaintiff." A. 111. It distinguished an employer's obligation to address a hostile work environment under Title VII of the Civil Rights Act, reasoning that "an employee is considered an agent of the employer while the tenant is not considered an agent of the landlord." A. 103. The court dismissed Mr. Francis's Section 1981, Section 1982, and N.Y. Executive Law claims for similar reasons, A. 99, 112. As to the negligent infliction of emotional distress claim, the district court found the KPM defendants did not have, and thus could not have breached, any duty to respond to racial harassment. A. 113-14.

The district court found, however, that the KPM defendants had breached the warranty of habitability they owed Mr. Francis under their lease and New York law. A. 119-120. It found that New York law obligates a landlord "to intervene in response to harassing behavior by a co-tenant." A. 119. Mr. Francis voluntarily

dismissed that claim. The district court granted partial final judgment in favor of the KPM defendants pursuant to Federal Rule of Civil Procedure 54(b) so that Mr. Francis could appeal while the motion for default judgment against Mr. Endres remains pending.[3]

III. Proceedings on Appeal

The parties briefed and argued this appeal to a panel of this Court. While the appeal was pending, the U.S. Department of Housing and Urban Development promulgated a final rule—reached after notice and comment—formalizing the department's long-held views regarding how the Fair Housing Act applies to cases such as this one. *Final Rule: Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63054 (Sept. 14, 2016) (HUD Rule). In response to the panel's request, the United States filed a brief asking this Court to adopt HUD's construction of the Act.

The United States explained that, in HUD's view, "a landlord may be liable under the FHA for failing to take prompt action to correct and end a discriminatory housing practice by a tenant where the landlord knew or should have known of the discriminatory conduct and had the power to correct it." Br. Amicus Curiae of

[3] At Mr. Francis's request, the district court postponed determination of Mr. Endres's damages until this Court resolves this appeal, in order to avoid inconsistent or duplicative adjudications regarding the events at issue.

United States at 6. The United States explained that under this standard, "whether a housing provider has the power to take corrective measures in a specific situation—and what corrective measures are appropriate—is dependent on the facts, including the extent of control or any other legal responsibility the person may have with respect to the conduct of such third-party." *Id.* at 10 (quoting 81 Fed. Reg. at 63,071). It explained that the housing provider's ability to address that harassment may depend on lease terms or state or local law. *Id.* at 13.

The panel issued two decisions reversing the district court. The first majority opinion largely adopted the reasoning of HUD's rule in finding that Mr. Francis pleaded a Fair Housing Act claim. A. 130. It held, first, that the Fair Housing Act bars discriminatory conduct inflicted on tenants after the acquisition of rental housing, including the harassment of tenants. A. 141-43.

The majority then held, agreeing with the Seventh Circuit, that a landlord with sufficient control to do so must remedy a hostile housing environment created by discriminatory harassment carried out by one tenant against another. A. 145-46 (citing *Wetzel*, 901 F.3d at 859). It gave HUD's construction some "but by no means definitive weight." A. 146. Mr. Francis alleged that the defendants had enough control to take some remedial action, it reasoned, and any arguments regarding that were disputes of fact or issues of New York state law that were best left for remand. A. 150-52, 157.

The majority also held that Mr. Francis's allegations that KPM was deliberately indifferent to intentional discrimination sufficed to state claims under Section 1981 and 1982. A. 158-59. It held that Mr. Francis stated a New York Human Rights Law claim for the same reasons that he stated federal claims, A. 159-60. Finally, the majority found that the district court erred in dismissing Mr. Francis's claim of negligent infliction of emotional distress for lack of breach of any duty, but affirmed on the alternative ground (not reached by the district court or briefed by the parties) that the defendants' breach of duty "did not directly result in Francis's emotional distress, which Endres directly caused with his continued campaign of racial harassment." A. 161.

Judge Livingston dissented, contending that the harassment Mr. Francis suffered did not affect any of the "privileges of sale or rental" of housing—a term the dissent construed to reach only limited post-acquisition conduct—and so did not violate the Fair Housing Act. A. 166-72. Even if the harassment was cognizable harm, the dissent contended, discriminatory intent rather than negligence (the HUD rule standard) is required for liability. A. 173-75. The dissent did not address Mr. Francis's argument that deliberate indifference constitutes the requisite intentional discrimination.

The dissent acknowledged that the majority's holding was consistent both with HUD's promulgated rule and with Title VII jurisprudence. But, it contended,

landlords typically know less about the relevant environment, and have less ability to remedy harassment in it, than do employers. A. 183-89.

The panel withdrew its opinion and issued one that reached the same result with somewhat different reasoning with respect to the Fair Housing Act claim. The majority once again found that Section 3604(b) and Section 3617 bar discriminatory harassment that creates a hostile housing environment, regardless of whether the discrimination post-dates the acquisition of rental housing. A. 212-18. The majority assumed without deciding that such claims require intentional discrimination. It found Mr. Francis pleaded such discrimination by alleging that KPM, which has authority to remedy a hostile housing environment caused by another tenant and has addressed other tenants' non-race-related lease violations, intentionally chose not to address racial harassment of which it was actually aware. A. 218-21.

The majority reasoned that "a landlord who fines tenants for creating fire hazards or for littering on the premises, or who responds to complaints of certain forms of tenant-on-tenant harassment, but then watches silently as white tenants burn a cross or dump trash in front of the home of recently arrived black tenants, may be said to intentionally interfere with the tenant's rights under the FHA on the basis of race." A. 219. It again noted that it was not opining on defendants'

contention that "they were powerless to address Endres's conduct," merely holding that "Francis is entitled to discovery" to prove the truth of his allegations. A. 222.

Judge Livingston again dissented. The dissent contended, incorrectly, that Mr. Francis did not argue that KPM's actions satisfied any intentional discrimination standard, A. 231 & n.3, without addressing Mr. Francis's argument that deliberate indifference constitutes intentional discrimination. The dissent faulted Mr. Francis for failing to plead details regarding a specific comparator tenant who received better treatment in the manner that "we have required in the employment context to assert a plausible claim of purposeful discrimination." A. 233-234 (citing *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 257 (2d Cir. 2014) and *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003)).

The dissent asserted that Section 3604(b) reaches only post-acquisition discrimination that rises to the level of "a constructive eviction" making continued occupancy impossible. A. 240-45. It contended that landlords have little ability or obligation to prevent one tenant from abusing another, and so the majority opinion considerably expanded landlords' duties from what New York law provides. A. 246-47. Landlords do not have the requisite control over their tenants to remedy such tenant misconduct, the dissent contended. A. 252-55. Ultimately, it charged the majority with construing the Fair Housing Act in a way that "alter[ed] rather

than respect[ed]" landlords' common-law duties to tenants, A. 246. This Court granted defendants' petition for en banc review.

SUMMARY OF ARGUMENT

The panel majority correctly found that, on the egregious facts alleged here, Mr. Francis states a claim. All this Court must find is that it constitutes intentional discrimination that violates the Fair Housing Act and the other laws at issue here for a landlord with the authority and responsibility to address conditions that diminish habitability—and who generally does so with respect to tenant misconduct—to deliberately choose not to intervene with respect to serious racial harassment. Contrary to the dissent's suggestion, such a finding would be fully consistent with landlords' pre-existing state-law obligations to tenants rather than fundamentally changing them. It means only that landlords cannot selectively abdicate their duties when racial discrimination is involved.

1. The severe and sustained racial harassment that Mr. Francis suffered affected the "terms, conditions, and privileges" of his rental housing, such that subjecting him to it violated the Fair Housing Act. Section 3604(b) applies to discrimination that occurs after a tenant acquires rental housing and causes the tenant not to receive the full benefit of the housing bargain. The severe and sustained harassment that Mr. Francis suffered deprived him, because of his race,

of a fundamental part of the housing bargain to which he was entitled—the right not to live in a hostile environment.

The Fair Housing Act contains the precise statutory language that the Supreme Court has found confers upon an employer the right not to work in a discriminatory environment. Just as Title VII bars discrimination "in the terms, conditions, or privileges" of employment, so the Fair Housing Act bars discrimination "in the terms, conditions, or privileges" of, among other things, renting a dwelling. That language in Title VII "is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Meritor*, 477 U.S. at 66. The same language in the Fair Housing Act must be read to have the same effect. That HUD—the agency charged with administering the Act—has construed Section 3604(b) to bar post-acquisition discriminatory conduct for decades, including in multiple promulgated regulations, only confirms this conclusion.

Accordingly, every appellate court to consider the question now agrees that Section 3604(b) bars discriminatory harassment in housing. And no appellate court in the past decade has found *any* post-acquisition discriminatory conduct excluded from Section 3604(b)'s coverage. *See Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 632 (11th Cir. 2019); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir.

2009). The Seventh Circuit once announced a more restrictive reading of Section 3604(b), *see Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004), but that decision was so poorly reasoned and unworkable that the Seventh Circuit itself has abandoned it, *see Wetzel*, 901 F.3d at 867. While the circuits have described somewhat differently the extent to which the Fair Housing Act bars post-acquisition discrimination, there is no dispute that conduct that causes a discriminatory and hostile housing environment is covered.

2. A landlord intentionally discriminates when it makes the deliberate choice, after being put on clear notice that its tenant is suffering from a discriminatory and hostile housing environment, not to respond with the same urgency, employing the same tools, as it would to other conditions or conduct that degrade the housing environment. Here, Mr. Endres clearly violated his lease, and Defendants could have and should have acted to stop his discriminatory behavior, just as they regularly do with respect to other lease violations. As the district court found, the Defendants' failure to act breached the warrant of habitability they owed Mr. Francis. Thus, this case does not present any question whether the Fair Housing Act obligates a landlord to do anything not already required; it presents only the question whether a landlord intentionally discriminates by making the deliberate choice to violate its own state-law and lease obligations rather than remedy racial harassment that violates the Fair Housing Act.

The appellate courts to consider this question, as well as HUD, have agreed that a landlord has some responsibility to act in such a situation. *See Wetzel*, 901 F.3d at 859; *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (per curiam). No court of appeals has held otherwise. And it is already well-established in other contexts that an entity with the authority and responsibility to ensure a safe environment violates civil rights laws by turning a blind eye to discriminatory harassment that is within its power and duty to address. Title VII requires an employer to address known workplace harassment that creates a discriminatory and hostile workplace, even where the harasser is not the employer's agent or employee. Similarly, Title IX requires a school to respond to known harassment in the educational environment, even where the harasser is not the school's agent or employee. The Fair Housing Act's operative language is identical to that of Title VII and comparable to that of Title IX; it should be construed to impose a comparable duty on landlords, at least to the extent that (as here) a landlord has the authority and independent obligation to address the harassment.

There is no reason why Mr. Francis must plead a specific tenant comparator with respect to whom the defendants *did* follow the law and their lease obligations. The claim here is not that defendants made completely discretionary decisions in a discriminatory manner, but rather that they intentionally departed from their own policies and obligations rather than address known racial harassment.

The dissent offers many objections, most of which sound in housing policy and factual supposition regarding the control landlords have over the housing environment rather than statutory construction. None warrants construing the Fair Housing Act to exempt housing providers from even-handedly exercising the control they *do* have over the housing environment, just as employers and schools must do with respect to the environments they oversee. On these facts and in this procedural posture (a motion to dismiss, where all allegations must be taken as true), this Court need not decide the extent to which housing providers can address harassing behavior. That is a question of fact for individual cases—properly decided after discovery—rather than the basis for giving housing providers a categorical exemption as a matter of law from using the tools they *do* have to address discriminatory conduct that they *can* control.

3. Regardless of how it rules on the federal-law questions above, this Court should reverse the dismissal of Mr. Francis's claims under Section 296 of the New York Executive Law and for negligent infliction of emotional distress or should certify those questions to the New York Court of Appeals. New York appellate courts have found Executive Law claims properly pleaded in cases such as this one, and the New York Court of Appeals likely would agree. The panel incorrectly affirmed dismissal of the negligent infliction of emotional distress claim on a ground not reached by the district court or briefed by the parties; this Court should

remand that issue for consideration by the district court in the first instance or should certify it along with the Executive Law claim.

ARGUMENT

I. Standard of Review

The Court reviews *de novo* the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007). The court must accept all well-stated facts as true and draw all inferences in the plaintiff's favor. *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014), *quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. The Fair Housing Act Requires a Landlord to Use the Same Tools to Address a Known Discriminatory and Hostile Housing Environment Created by Another Tenant That It Would Use to Address Other Conditions Diminishing a Tenant's Enjoyment of Housing

A. The Fair Housing Act Bars Discrimination Occurring After the Acquisition of Housing That Creates or Unreasonably Permits a Hostile Housing Environment.

The severe harassment Mr. Francis endured violated his rights under the Fair Housing Act. There is no basis for the dissent's suggestion that the Act, while robustly protecting against discrimination in the rental of housing, has little

application once a tenant acquires that housing, precluding only discrimination that amounts to a constructive eviction. If this were true, the Act would not bar most sexual harassment, racial harassment, and other misconduct against tenants based on protected class even if committed by the landlord himself. But the Act's plain language does not support, let alone compel, such a parsimonious reading of its coverage. The circuits to consider this question all agree that the Fair Housing Act bars discriminatory harassment. While the extent to which the Act reaches post-acquisition discriminatory conduct has been formulated in different ways, there exists no disagreement that is relevant here.

1. *The Plain Language of Section 3604(b) and Section 3617 Bars Discriminatory Harassment of Tenants.*

The operative language of the Fair Housing Act contains the same language that, the Supreme Court has held, makes harassment of *current* employees (not just discrimination against *prospective* employees) based on a protected class a Title VII violation. And the Act goes further, with additional language that leaves no doubt that it bars discriminatory conduct that creates a hostile housing environment such as Mr. Endres inflicted on Mr. Francis.

The Fair Housing Act and Title VII both make it "unlawful" to "discriminate against" an individual "in the terms, conditions, or privileges" of

housing/employment "because of" the individual's race or other protected class.[4] *See* 42 U.S.C. § 3604(b) (FHA); 42 U.S.C. § 2000e-2(a)(1) (Title VII). This language, the Supreme Court held with respect to Title VII, "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64 (*quoting City of L.A., Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Quoting from a seminal Fifth Circuit decision, the Court stated: "[T]he phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 66 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

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[4] The full statutory language of 42 U.S.C. § 3604(b) reads:

> [I]t shall be **unlawful**—
>
> (b) To **discriminate against** any person **in the terms, conditions, or privileges** of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, **because of race, color, religion, sex, familial status, or national origin** (emphasis added).

And 42 U.S.C. § 2000e-2(a)(1) states:

> It shall be an **unlawful** employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against** any individual with respect to his compensation, **terms, conditions, or privileges** of employment, **because of such individual's race, color, religion, sex, or national origin** (emphasis added).

There is no relevant textual difference between that language and the operative provision of 42 U.S.C. § 3604(b), which similarly guarantees non-discriminatory access to all "terms, conditions, or privileges" of, *inter alia*, rental housing. After *Meritor*, the plain meaning of such statutory language is to bar conduct that creates or maintains a discriminatory environment, in housing as in the workplace. "The statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental." *LaGrange*, 940 F.3d at 632. To the contrary, Section 3604(b) contains essentially the same language that Congress later used to *overturn* a decision construing Section 1981 to not reach racial discrimination occurring after an employment or other contractual relationship begins. *See* 42 U.S.C. § 1981(b); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 450 (2008) (describing how Congress added "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" to ensure that Section 1981 barred discrimination occurring after contract formation).

And the text of the Fair Housing Act goes on to provide *more* explicit protection against discriminatory harassment or other conduct occurring after the acquisition of housing. Section 3604(b) bans not only discrimination in the "terms, conditions, or privileges" of rental housing itself, but also discrimination in "the provision of services or facilities in connection therewith." *See City of Modesto*,

583 F.3d at 713 (statute's "natural reading . . . encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling"); *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522, 525 (N.D. Ill. 1980) (rejecting as "ludicrous" argument that Section 3604(b) bars only discrimination that affects availability of housing, because it "runs counter to the plain and unequivocal language of the statute").[5]

Additionally, the Fair Housing Act makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by" Sections 3603 through 3606. 42 U.S.C. § 3617. HUD's implementing regulations have long provided that such conduct includes "[t]hreatening, intimidating or interfering with persons in their enjoyment of a

[5] That the Act's plain language explicitly encompasses a broad array of post-acquisition discrimination was apparent from the Act's earliest days. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 250-51 (1969) (Harlan, J., dissenting) (dissenting from decision construing Section 1982 to ban post-acquisition discrimination in part because newly enacted Fair Housing Act more explicitly applied: "should a Negro in the future rent a house but be denied access to ancillary recreational facilities on account of race, he could in all likelihood secure relief under the provisions of the Fair Housing Law"). The Act was written thusly to ensure it reached circumstances where it was then doubtful that Section 1981 and 1982 applied; there is no basis for giving it a *narrower* scope than those laws have. *See, e.g.*, *Davis v. City of N.Y.*, 902 F. Supp. 2d 405, 433-35 (S.D.N.Y. 2012) (a "complete evisceration of a contract" is not required under Section 1981; housing authority liable where it interferes with plaintiffs' ability to have visitors, thus impairing their right to full enjoyment of lease terms).

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).

In light of the Fair Housing Act's language that *more* explicitly applies here, it would be strange to read the Act not to cover harassment of the sort that *is* covered by Title VII. Each of the two laws has the same, broad purpose: "to eradicate discriminatory practices within a sector of our Nation's economy." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2521 (2015); *id.* at 2518 (Title VII cases "provide essential background and instruction" in interpreting the FHA); *see also Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (the two statutes "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination"); *aff'd*, 488 U.S. 15 (1988); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) (the two statutes have "parallel . . . antidiscrimination objectives"). And there is no reason why Congress would have wanted the Fair Housing Act's protections to diminish with the acquisition of housing, thus permitting people to "win the battle (to purchase or rent housing)," only to then "lose the war (to live in their new home free from invidious discrimination)." *City of Modesto*, 583 F.3d at 714, quoting *Bloch v. Frischholz*, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting). Congress codified the Act's vast intended sweep,

see 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."). This Court has, accordingly, held that Section 3604 must be "given broad and liberal construction, in keeping with Congress' intent." *Cabrera v. Jakabovitz*, 24 F.3d 372, 388 (2d Cir. 1994). Here, that requires no more than honoring Section 3604(b)'s plain words.

The dissent, while conceding that this Court and the Supreme Court have frequently read similar language in the Fair Housing Act and Title VII *in pari materia*, argues that sometimes interpretations of the two statutes diverge. A. 184, 252. But in the example it relies upon, *Curtis v. Loether*, 415 U.S. 189, 197 (1974), the Supreme Court pointed to a stark textual distinction to justify different constructions. *See id.* ("In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based . . . contrasts sharply with [the Fair Housing Act's] simple authorization of an action for actual and punitive damages."). Here, no such textual distinction exists, and nothing in *Curtis* suggests courts have freewheeling discretion to decide when they think the analogy inappropriate based on extra-textual considerations.

2. Consistent Agency Interpretation and Precedent from Other Circuits Confirm That Section 3604(b) Bars Discriminatory Harassment.

Even if the text left ambiguity—and it does not—agency interpretation and precedent from other circuits confirm that Section 3604(b) bars discriminatory harassment of the sort Mr. Francis experienced.

HUD has, for decades, construed Section 3604(b) to cover a broad array of post-acquisition discriminatory conduct, including severe harassment. It did so most recently in its harassment-specific rule, but the agency did not purport to break new ground there; rather, it reaffirmed its long-held position, with respect to harassment claims and with respect to the Act's applicability to post-acquisition discriminatory conduct more broadly. 81 Fed. Reg. at 63055 (describing how regulation is consistent with 1989 regulations that contemplate Fair Housing Act right not to suffer harassment or other post-acquisition discrimination); *see, e.g.*, 24 C.F.R. § 100.65(b)(2) (barring housing provider from "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race" or other protected class). The Department of Justice, too, has long maintained that the Fair Housing Act bars post-acquisition harassment. *See, e.g.*, Br. for the United States as Amicus Curiae in *Bloch v. Frischholz*, No. 06-3376 (7th Cir.), at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/bloch.pdf. As the

United States told this Court, HUD's consistent position is entitled to deference as, at the very least, a reasonable construction of the Act. United States Br. at 5.

Meanwhile, the circuits are now in agreement on this point, and so this case does not require this Court to take a side in a debate regarding the extent to which the Fair Housing Act bars post-acquisition discrimination. No circuit to consider these questions in the past ten years—since the Seventh Circuit began walking back its poorly reasoned decision in *Halprin*, 388 F.3d at 328-29—has found that Section 3604(b) excludes *any* post-acquisition discriminatory conduct. *See LaGrange*, 940 F.3d at 632; *Wetzel*, 901 F.3d at 867; *City of Modesto*, 583 F.3d at 713. In particular, every appellate court to consider the question now holds that Section 3604(b), along with its disability-discrimination corollary that is identically worded as relevant here, Section 3604(f)(2),[6] reaches the discriminatory harassment of tenants. *Neudecker*, 351 F.3d at 364-65; *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993); *see also Khalil v. Farash Corp*., 277 F. App'x 81, 84 (2d Cir. 2008) (unpublished decision citing with approval to *Neudecker* and *DiCenso v.*

[6] Section 3604(f)(2) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling," on the basis of disability.

Cisneros, 96 F.3d 1004 (7th Cir. 1996)); *Davis v. City of N.Y.*, 902 F. Supp. 2d 405, 433-35 (S.D.N.Y. 2012) (following *City of Modesto*).[7]

Halprin does not offer persuasive reasoning to the contrary—as the Seventh Circuit itself has concluded. Without the benefit of briefing from the United States or other amici, *Halprin* failed to grapple with the textual points above. It relied on unexplained assertions that Section 3604(b)'s language differs from that of Title VII (it does not); speculated that Congress left no indicia of intent to address harassment in housing (which does not distinguish Title VII); ignored HUD's contrary interpretation; and refused to honor precedent adjudicating post-acquisition rights of tenants dating to the Fair Housing Act's early days, on the ground that all these courts failed to notice the issue. *See* 388 F.3d at 328-29 (dismissing *DiCenso*, *Neudecker*, *Honce*, and *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), as lacking any "*considered* holding") (emphasis in original).

Halprin's reasoning suggests that harassment cannot constitute discrimination in the terms and conditions of housing, and thus cannot violate

[7] The Ninth Circuit has also recognized an FHA hostile environment claim in an unpublished case. *Hall v. Meadowood Ltd. P'ship*, 7 F. App'x 687, 689 (9th Cir. 2001); *see also Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995) ("[T]he purposes underlying Titles VII and VIII are sufficiently similar so as to support discrimination claims based on sexual harassment regardless of context.").

Section 3604(b), regardless of what role the housing provider or its agents play or what discriminatory intent they may have. Indeed, the defendants in *Halprin* were a homeowners' association and various members alleged to have themselves intentionally harassed a Jewish family based on religion.[8] As one scholar properly put it:

> Under so limited a reading of the statute, it would not violate § 3604(b) for a condominium owner's association to prevent a disabled person from using the laundry facilities or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate § 3604(b) for a landlord to sexually harass a tenant . . . . All of these behaviors would be beyond the law's purview solely because of when they occurred.

Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C. L. Rev. 1, 32-33 (2008); *see City of Modesto*, 583 F.3d at 714.

This untenable holding did not endure scrutiny. The Seventh Circuit first distinguished it, holding that Section 3604(b) covers a broad range of post-acquisition discrimination that rises to the level of changing the terms and conditions of housing. *See Bloch v. Frischholz*, 587 F.3d 771, 780 (7th Cir. 2009)

[8] *Halprin* reinstated claims under Section 3617 because the conduct at issue was "[i]nterference with enjoyment of a dwelling" barred by HUD's regulations. 388 F.3d at 330. However, it suggested in dicta that those regulations might be invalid—though the defendants had waived any such argument—because Section 3617 claims require an underlying right under Sections 3603-3606 to suffer interference and *Halprin's* construction of 3604(b) had eliminated any such right. 388 F.3d at 330.

(en banc). It then squarely held that any harassment interfering with "the covenant of quiet enjoyment" can violate Section 3604(b). *Wetzel*, 901 F.3d at 867. *Halprin* failed to persuade its own circuit; this one should not follow it.

Nor does *Cox v. City of Dallas, Texas*, 430 F.3d 734 (5th Cir. 2005), support a reading of Section 3604(b) so narrow as to exclude the housing-related conduct alleged here. A. 243-45. *Cox* involved a challenge to a municipality's failure to prevent dumping of waste in a predominantly minority neighborhood. The Fifth Circuit found that this policy did not constitute "the provision of services or facilities in connection" with the rental or sale of housing, not because of the timing of the alleged discrimination in relation to a sale or rental transaction, but because the discrimination was insufficiently connected to housing provision at all. *See* 430 F.3d at 745-46; *LaGrange*, 940 F.3d at 633 (discussing *Cox* as one of several cases "involving services provided by local governments [that] have focused on whether said services have a sufficient nexus to housing").

Whatever the merits of *Cox*'s reasoning with respect to Section 3604(b)'s application to municipal services, it has nothing to do with *this* case, which involves a housing provider's own conduct and responsibilities to its own tenants.

* * * * *

The bottom line is that statutory text, agency interpretation, and precedent all agree: Section 3604(b) bars discriminatory harassment of current tenants that

creates a hostile housing environment, regardless of whether it makes housing completely unavailable (and thus independently violates Section 3604(a)).

3. Mr. Francis Was Subjected to Sufficiently Serious Discriminatory Harassment to Violate Section 3604(b).

The harassment that Mr. Francis suffered was based on his race and was severe enough that his allegations plausibly plead the existence of a hostile, discriminatory housing environment. The relevant analysis is well-established under Title VII and, because the Fair Housing Act has identical operative language, has been widely adopted for Fair Housing Act cases as well. *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 946-47 (8th Cir. 2010); *DiCenso*, 96 F.3d at 1008; *see also Cain v. Rambert*, No. 13-cv-5807, 2014 WL 2440596, at *5 (E.D.N.Y. May 30, 2014) (quoting *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 20 (2d Cir. 2014)).

Whether abusive conduct rises to the level of changing the terms, conditions, and privileges of employment or housing requires careful consideration of "the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; [and] whether it is physically threatening or humiliating, or a mere offensive utterance." *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745 (2d Cir. 2003) (internal quotations omitted). This Court has observed that "this analysis is fact-specific" such that it "is best left for trial." *Id.*; *accord Richardson v. N.Y. State Dep't of Corr. Serv.,* 180 F.3d 426, 437 (2d Cir. 1999) (due to fact-sensitive

nature, this question is "especially well-suited for jury determination") (internal quotation marks omitted), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006).

Mr. Francis pleads allegations that easily meet this standard. Over an eight-month period, he was regularly subjected to abusive and threatening conduct by his next-door neighbor. Mr. Endres threatened that he "ought to kill [Mr. Francis]" and repeatedly referred to Mr. Francis as a "fucking nigger," a "fucking asshole," and a "fucking lazy-god-damn fucking nigger." This conduct was so disruptive, and interfered with Mr. Francis's use and enjoyment of his property to such a degree, that Mr. Francis was compelled to call 9-1-1 on four separate occasions in seven months. Ultimately, Mr. Endres was arrested and charged with a misdemeanor hate crime, aggravated harassment. He later pled guilty to criminal harassment and the court issued a protective order prohibiting him from having any further contact with Mr. Endres.

Numerous courts have recognized that the word "nigger" in particular, used repeatedly and without sanction or consequence, is "pure anathema to African-Americans"—far "more than a mere offensive utterance." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (internal quotations omitted). For that reason, this Court has stated that "[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment

than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rivera*, 743 F.3d at 24 (internal quotations omitted).

The use of racial epithets is even more likely to create a hostile environment when "presented in a physically threatening manner." *Rivera*, 743 F.3d at 24 (internal quotations omitted); *see also Hayut*, 352 F.3d at 745 (same in hostile education environment analysis). Where, as here, the plaintiff was subjected to frequent, humiliating racist taunts that were coupled with sustained threats to his physical safety—right at his front door, with no way to avoid them—it is at least plausible that the terms and conditions of his housing were materially changed.

B. The Defendants Bear Responsibility for Tolerating Racial Discrimination, Where They Actually Knew of it, Had the Ability and Duty to Address it, and Do Address Tenant Misbehavior That Does Not Involve Racial Discrimination.

That leaves only the question of whether the Fair Housing Act requires housing providers to address such discriminatory harassment inflicted on their tenants in the same manner that they would any other intolerable impairment of the housing environment they control. It does, as numerous courts have found. *See, e.g., Wetzel*, 901 F.3d at 867; *Neudecker*, 351 F.3d 361;[9] *Fahnbulleh v. GFZ*

[9] The dissent recasts *Neudecker* as a case where the landlord's agents were responsible for the harassment. A. 249 n.13. But the Eighth Circuit described the allegations thusly: "[w]hile Neudecker *does not allege that Boisclair's agents themselves harassed him*, he does allege that tenants—including children of

Realty, LLC, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Williams v. Poretsky Mgmt., Inc*., 955 F. Supp. 490, 496 (D. Md. 1996); *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No. 96–cv–2495, 1997 WL 1877201, at *7 (D.D.C. Dec. 18, 1997).

1. A Housing Provider That Has the Authority and Duty to Address Misconduct, But Refuses to Do So with Respect to Known Discriminatory Conduct, Commits Intentional Discrimination.

The legal principle that governs this case is well-established by now across a variety of environments: Under the Fair Housing Act, as under every analogous civil rights statute, an entity that has the requisite authority and duty to act and refuses to address discriminatory conduct as it would anything else that seriously degrades the environment it oversees commits intentional discrimination. *See Wetzel*, 901 F.3d at 863 ("[W]e look to analogous anti-discrimination statutes for guidance."). That is true under Title IX, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis*, 526 U.S. 629, under Title VII, *Meritor*, 477 U.S. at 64, under Title VI, *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665-66 (2d

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Boisclair's management team—constantly harassed and threatened him based on his disability; that he repeatedly complained to Boisclair management about the harassment to no avail; and that he ultimately moved from his apartment out of concerns for his health stemming from the harassment." *Neudecker*, 351 F.3d at 365 (emphasis added). Based on this understanding that the harassers were not the landlord's agents, *Neudecker* relied on Title VII caselaw involving harassment by people who were not an employer's agents. *Id.* (citing *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-12 (8th Cir. 1997) and *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (workplace can be rendered offensive in equal degree by acts of supervisors, coworkers, and strangers).

Cir. 2012), and under Section 1981 and Section 1982 in other settings, *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140-41 (2d Cir. 1999); *see also Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (prison official may be liable under Eighth Amendment for being deliberately indifferent to "a substantial risk of serious harm"); *Lance v. Lewisville Ind. Sch. Dist.*, 743 F.3d 982, 995-96 (5th Cir. 2014) (deliberate indifference to harassment based on disabilities can violate Section 504 of Rehabilitation Act).

Davis v. Monroe Cnty. Bd. of Educ., which concerned student-on-student harassment, explained why this is so. The classmate's harassing behavior was not imputed to the school; rather, the Board was liable "for its *own* decision to remain idle." *Davis*, 526 U.S. at 641 (emphasis in original). The intentional discrimination was the "official decision by the [school] not to remedy the violation," *id.* at 642, under circumstances where acting could be reasonably expected. Accordingly, under other analogous civil rights schemes, it constitutes intentional discrimination to ignore the known discriminatory harassment of a third party, where the defendant "exercises substantial control over both the harasser and the context in which the known harassment occurs." 526 U.S. at 645.

The Fair Housing Act imposes a comparable duty on housing providers to respond even-handedly to discrimination that degrades the environment they control, to the same degree as they would any other unacceptable conduct or

condition, that Title VII does on employers and Title IX does on schools. Nothing in the text or legislative history of the Fair Housing Act (or 42 U.S.C. §§ 1981(a) and 1982[10]) supports a different construction. That rule may apply differently in the housing context as a matter of fact; the conduct that a school or employer has the duty and ability to address is not the same as for a housing provider. But where (as here) a housing provider *has* the state-law authority and duty to remedy the harassment at issue, it intentionally discriminates by refusing to address known racially discriminatory conduct as it does other tenant misconduct that violates its leases and triggers that authority and duty to act. A housing provider cannot make it a clear lease violation for a tenant to interfere with other tenants' rights and

[10] Defendants have not argued for dismissal of Mr. Francis's Section 1981 and 1982 claims on any basis other than those applicable to the Fair Housing Act claims. Rather, they have contested only that they had the requisite intent. Accordingly, the arguments in the text regarding the Fair Housing Act apply equally to Section 1981 and Section 1982.

A claim under either statute requires that: (1) the plaintiff is a racial minority; (2) the defendant acted with the requisite intent; and (3) discrimination based on race impaired plaintiff's right to engage in one or more activity enumerated in the statutes—here, to make and enforce contracts (Section 1981) and to lease property (Section 1982). *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); *see, e.g.*, *Young v. Suffolk Cnty.*, 705 F. Supp. 2d 183, 207 (E.D.N.Y. 2010). The same standards apply to both provisions, though they cover different protected activities. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973). The defendants below "assum[ed] arguendo" that Mr. Francis properly stated the first and third elements, Mem. in Supp. of Mot. To Dismiss. at 6, and the district court did not find otherwise.

comforts, as this one does, A. 58 ¶ 6, and then claim lack of authority to enforce its own lease when racial harassment is involved.

The dissent argues that no clear duty specific to this situation is spelled out in the Act's text and legislative history, but this fails to distinguish the Act from Title VII or Title IX, both of which (like the Fair Housing Act) are worded broadly rather than describing all of their various applications. There is no basis for applying a clear-statement rule to the Fair Housing Act, nor is there any indication that Congress did *not* want the Act to apply here. *Cf. Hayden v. Pataki*, 449 F.3d 305, 314-16 (2d Cir. 2006) (en banc) (describing circumstances in which broad, facially applicable language might nonetheless not apply).

The dissent observes that the Act extends liability to entities who are not housing providers, but a claim like this one, by definition, applies only to entities with the requisite ability and duty to control the housing environment, not to real estate agents or others without such control. A. 168-69. And the dissent relies on the district court's erroneous statement that "hostile environment" doctrine under Title VII requires an agency relationship between employer and harassing co-employee that is not present in the housing environment. A. 252 citing A. 103. But the dissent does not actually endorse the district court's reasoning, nor could it,

since Title VII does *not* limit an employer's obligation to address discrimination in the workplace to acts committed by agents.[11]

[11] In analogous Title VII jurisprudence, agency is required for the employer to be vicariously liable for a supervisor's act. Because the supervisor is the employer's agent, his liability is imputed directly to the employer; the employee need not show that the employer failed to act against the supervisor when it learned of the discriminatory conduct. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."); *see also Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 182 (2d Cir. 2012).

But no agency is required where, as here, the claim is that the defendant *itself* acted improperly in response to harassment. *See Vance*, 133 S. Ct. at 2441 (explaining rules that apply where harassing employee is not supervisor). The harasser need not even be a fellow employee, if the employer has authority to act and should have done so. As the Seventh Circuit explained, "[t]he employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem." *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005) (Easterbrook, J); *see, e.g.*, *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (employee harassed by players on school's football team; although their conduct could not be imputed to school, defendants were liable if they failed to properly intercede upon learning of the harassment); *see also Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-24 (4th Cir. 2014); *Dunn*, 429 F.3d at 691-92 (hospital potentially liable for sexually hostile work environment created by independent contractor surgeon using facilities); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-12 (8th Cir. 1997) (operator of home for individuals with developmental disabilities potentially liable for sexually hostile working environment created by resident); *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966-69 (9th Cir. 2002); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072-75 (10th Cir. 1998); *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010).

If anything, the Fair Housing Act's text and history provide *more* reason to think it bars landlords from turning a blind eye to known discriminatory harassment that falls within its general authority and duty to act. The Act imposes both civil and criminal sanctions on those whose harassing behavior interferes with accomplishment of the Act's objectives. *See* 42 U.S.C. §§ 3617 (making it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by" Fair Housing Act); 3631 (criminal sanctions for similar conduct).

That the Act explicitly bars the underlying harassment must inform what it means for a landlord to provide non-discriminatory access to "terms, conditions, or privileges of sale or rental of a dwelling," 42 U.S.C. § 3604(b). Where, as here, harassment violates the harassing tenant's lease; violates the landlord's warrant of habitability to the tenant being harassed; *and* violates 42 U.S.C. § 3617, a landlord that enforces lease terms in other cases but not in this one is unequally honoring the terms, conditions, and privileges of rental housing. *Cf. Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (where harassment is discriminatory and sufficiently serious, it "offends Title VII's broad rule of workplace equality").

The dissent errs in highlighting what it describes as a paucity of prior cases involving a landlord's failure to remedy a hostile environment caused by another tenant. A. 236-37. A series of cases beginning in the 1980s established that a tenant

has the Fair Housing Act right not to be harassed by her landlord. *See DiCenso*, 96 F.3d at 1008 (recounting development of doctrine to that point). Meanwhile, the Supreme Court firmly established the obligation of employers and schools to address a discriminatory environment, in 1986 with respect to Title VII and in 1998 with respect to Title IX. As soon as the doctrinal premises for the claims were established under analogous civil rights laws, cases brought under the Fair Housing Act and Section 1981 began finding that a housing provider must address known tenant-on-tenant harassment as it would other obstacles to habitability. *See, e.g., Neudecker*, 351 F.3d 361; *Fahnbulleh*, 795 F. Supp. 2d 360; *Williams*, 955 F. Supp. at 496; *Reeves*, 1997 WL 1877201, at *7. HUD, meanwhile, published its interpretation of the Act as permitting such claims two decades ago, in 2000. Fair Housing Act Regulations Amendments: Standards Governing Sexual Harassment Cases, 65 Fed. Reg. 67, 666 (Nov. 13, 2000). Thus, the claim here is not remotely novel; there is no basis for the dissent's suggestion that the Act's obvious reach has somehow contracted through desuetude.

2. The Dissent's Policy-Driven Arguments for Construing the Act Differently Than Other Analogous Laws with Comparable Language Are Meritless.

The dissent's other arguments rely on unsupported empirical suppositions and policy considerations. Even if this were grounds for ignoring the statutory text—and it is not—the dissent considerably overstates the extent to which finding

the defendants liable on these facts changes a landlord's obligations, if it does at all.

The dissent contends the housing environment is fundamentally different from the employment environment, in order to explain why the same language that appears in Title VII should operate differently. A. 253 ("employer's ability to monitor, respond and enforce—all crucial aspects of our Title VII jurisprudence—differs substantially from the ability of a landlord to do the same"); A. 254 (landlords "ordinarily lack the tools to investigate and remediate tenant misconduct when it is reported"). Whatever the truth of these assertions more broadly—and the record here does not permit this Court to decide one way or the other—these objections have little application to this case.

The Defendants had actual knowledge of the discriminatory harassment here, and so it is irrelevant to what extent landlords can be expected to "monitor" the premises. Nor would it impose a novel or untoward burden on landlords to respond, or displace New York common-law principles. A. 245-46. To the contrary, as the district court correctly found, KPM *already has* a duty pursuant to the warrant of implied habitability—which state law incorporates into all leases—to respond appropriately to abusive behavior of *any* sort.[12] A 116-19. Indeed, the

[12] New York courts routinely require landlord action in response to harmful and intrusive conduct of co-tenants and other neighbors, *see Elkman v. Southgate Owners Corp.*, 649 N.Y.S.2d 138, 139 (N.Y. App. Div. 1996) (neighboring

New York Court of Appeals has specifically found that, even in jurisdictions like New York City that are protective of tenants, sustained harassment of other tenants is a ground for eviction, and so Defendants would have been on safe ground acting against Endres. *See Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 124-25 (2003).

Mr. Francis's own lease is consistent with this bargain between landlord and tenant. Each tenant agrees not to "allow any nuisance or use which might interfere with the enjoyment of other tenants, neighbors," or others. A. 58. The landlord, in turn, promises that the tenant "shall peaceably and quietly have, hold and enjoy the Premises," and that the landlord "will maintain the Premises and common areas in a habitable condition." A. 58. It is thus clear that defendants permitted Mr. Endres to engage in conduct that violated his own lease terms, and their permitting that conduct violated their obligations under Mr. Francis's lease as well as New York law. The claim here does not depend on finding a *new* duty for a landlord; it

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business's noxious fish odor); *Nostrand Gardens Co-Op v. Howard*, 634 N.Y.S.2d 505, 505-06 (N.Y. App. Div. 1995) (neighboring co-tenants' excessive noise); *Poyck v. Bryant*, 820 N.Y.S.2d 774 (N.Y. Civ. Ct. 2006) (neighboring co-tenants' second-hand smoke), and in response to persistent or otherwise foreseeable criminal conduct of third parties, *see Luisa R. v. City of New York*, 686 N.Y.S.2d 49, 52-53 (N.Y. App. Div. 1999) (intimidation and threats by unauthorized squatters and frequent visitors); *Highview Assocs. v. Koferl*, 477 N.Y.S.2d 585, 585-87 (N.Y. Dist. Ct. 1984) (nearby burglaries and a "peeping tom" incident). Consequently, the landlord's duty to maintain habitable premises may also require that he or she promptly address tenant-on-tenant intimidation and harassment, *Auburn Leasing Corp. v. Burgos*, 609 N.Y.S.2d 549, 551 (N.Y. Civ. Ct. 1994).

requires only a finding that a landlord must carry out its *existing* duties in a non-discriminatory way.

The dissent dismisses all this on the grounds that, because a Fair Housing Act claim has been equated with a tort action, the Act cannot ensure non-discriminatory enforcement of housing-related rights unless those rights sound in tort rather than contract. A. 246& n.11. In fact, New York courts have held that a breach of the implied warranty of habitability can function as negligence per se in a tort action. *E.g. Kaplan v. Coulston*, 381 N.Y.S.2d 634, 638-39 (N.Y. Civ. Ct. 1976); *see also Gottesman v. Graham Apartments, Inc.*, 47 Misc. 3d 1213(A), 2015 WL 1839746, at *32 (N.Y. Civ. Ct. 2015) (surveying case law). But this Court need not concern itself with those intricacies of New York law,[13] because the Fair Housing Act's protections are not limited to ensuring non-discrimination in rights enforceable under state tort law.

The Fair Housing Act ensures non-discrimination in many of the contractual rights attendant to the housing relationship, including (as here) in the "terms, conditions, or privileges" of rental housing. State-law doctrine regarding enforcement of such contractual terms, conditions, and privileges will, of course,

[13] Should this Court decide that Fair Housing Act coverage turns on this question, it should certify to the New York Court of Appeals for authoritative decision on whether New York tort law, as well as contract law, bars the defendants' conduct here.

be contract law. Similarly, Section 1981 and Section 1982 explicitly ensure non-discrimination in contractual rights. *See* 42 U.S.C. § 1981 (ensuring equality in ability "to make and enforce contracts"); 42 U.S.C. § 1982 (ensuring equality in right "to inherit, purchase, lease, sell, hold, and convey real and personal property"). Accordingly, these laws are used regularly to ensure that contractual terms are enforced even-handedly in all aspects of the housing market. *See, e.g.*, *Wetzel*, 901 F.3d at 867 (landlord responsible under Fair Housing Act for failure to meet contractual obligation of rental agreement on equal basis); *Lindsay v. Yates*, 578 F.3d 407 (6th Cir. 2009) (suit for terminating sales contract because of race); *Crumble v. Blumthal*, 549 F.2d 462, 464-66 (7th Cir. 1977) (suit against seller who refused to perform contract to sell house because of race). And it is commonplace for the Fair Housing Act to effectively provide a right of action for the *discriminatory* breach of contract that exceeds the recovery available under state contract law for a *garden-variety* breach. *See, e.g.*, *Anderson Group, LLC v. City of Saratoga Springs*, 805 F.3d 34, 55 (2d Cir. 2015). By contrast, no precedent supports reading the Fair Housing Act as failing to provide a cause of action for discriminatory enforcement of housing rights secured by contract, nor could such reading be squared with their plain language and broad purposes.

The dissent contends that, because landlords lack the same control over their tenants that employers have over their employees, Fair Housing Act liability for

failing to exercise such control would have untoward consequences. A. 186-89. But whatever the truth of this assertion more broadly, it is irrelevant here. Mr. Francis pleads that Defendants had the *ability* to address Mr. Endres's conduct—for example by terminating Mr. Endres's lease—that they had the independent *duty* to do so under their contract with Mr. Francis and under state law, and that they *have acted* with respect to less egregious misconduct. *See* A. 27 ¶ 58, 27-28 ¶¶ 61, 63. This Court is not being asked to find that the Fair Housing Act imposes a duty to act in an unusual way. Quite the opposite: the conduct claimed to be discriminatory is that the defendants, when apprised of serious racial harassment, refused to follow their own usual practices and rely on their normal toolbox for handling tenant misconduct.

The point is not that Defendants' discriminatory intent can be inferred by comparing their differential treatment of this situation and any other particular one, and so the dissent errs in contending that Mr. Francis must plead a specific instance of the defendants addressing a different lease violation, *i.e.*, the sort of comparator that suggests race factored into the decision to hire one person over another. Rather, the point is that defendants made a race-based exception to their usual practices by ignoring Mr. Endres's conduct, violating their own lease terms and New York law in the process. One can presume they ordinarily follow their own policies and the law, making it unnecessary to plead a specific example of them

doing so. *See Bradley v. Carydale Enters.*, 730 F. Supp. 709, 716-18 (E.D. Va. 1989) (tenant had Section 1982 right to have complaints of racial harassment treated like other tenant complaints, as part of "the 'bundle of rights' for which an individual pays when he or she leases a piece of property"); *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1321 (11th Cir. 2000) (employee alleging pregnancy discrimination "need not identify specific non-pregnant individuals treated differently from her, if the employer violated its own policy in terminating her"). And because defendants' actions *facially* discriminated—by carving out an exception for their usual policies with respect to discriminatory harassment—it is irrelevant whether they *also* had discriminatory subjective intent. *See Curto v. A Country Place Condo. Ass'n*, 921 F.3d 405, 410 (3d Cir. 2019).

Neither in the employment context nor in the education context must a plaintiff who suffers discriminatory harassment plead the existence of a similarly situated person who was *not* deprived of equal terms and conditions by the entity charged with maintaining a non-discriminatory environment. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (no comparator evidence needed to establish employer liability for tolerating harassment); *Petrosino v. Bell Atl.*, 385 F.3d 210, 225 (2d Cir. 2004) (same); *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002) (same); *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018) (same). For example, *Johnson* held that plaintiffs' "claims of race

discrimination in pay discrepancy, failure to promote, termination, and discriminatory work assignments claims" failed for failure to point to a specific comparator, but then ruled that plaintiffs' hostile work environment claim survived summary judgment without such a comparator.

Contrary to the dissent's suggestion, New York state caselaw does not demonstrate that a landlord *cannot* have effective control over known and sustained tenant misconduct as a matter of law. A. 190-91. Rather, those cases hold that the "mere power to evict," by itself, does not provide a "reasonable opportunity or effective means to control a third person." *Siino v. Reices*, 216 A.D.2d 552, 553 (N.Y. App. Div. 1995). That is, a plaintiff cannot point to the power to evict alone, but must actually prove—as a matter of fact—that the landlord could have and should have acted. *See id.* at 553 ("[T]he proffered evidence failed to raise an issue of fact with respect to Rypins' ability to control the conduct of the Reices."). Under *Siino*, this is a fact-specific question that cannot be resolved categorically as a matter of law, as the dissent would have this Court do.

All this Court must find to rule for Mr. Francis at the pleading stage is that it is plausible that this landlord ordinarily enforces its own lease terms and has the authority to do so. And this Court need not second-guess a landlord's choice among reasonable options, because here the landlord intentionally chose to do

nothing. The dissent contends Mr. Francis must say now what steps the defendants should have taken. But that depends both on information that remains in defendants' control (*e.g.*, their usual practices when faced with tenant misconduct) and on decisions within a landlords' discretion. Courts regularly recognize that defendants have multiple options when faced with discriminatory harassment and that, while any of those options might satisfy their obligations, doing none of them will not. *See, e.g.*, *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074-75 (10th Cir. 1998) (employer liability for failing to address harassment by customer when manager of harassed waitress "clearly had both the means and the authority to . . . direct[] a male waiter to serve [the harassers] . . . or ask[] them to leave the restaurant"); *Beckford v. Dep't of Corr.*, 605 F.3d 951, 959-60 (11th Cir. 2010) (describing variety of policy actions the defendants could have taken to protect employees from harassment by prisoners).

Once informed of the harassment, KPM could have, for example, issued a warning to Mr. Endres; perhaps that would have been enough. *See Wetzel*, 901 F.3d at 865. Or it could have offered to move Mr. Francis to a different apartment where Mr. Endres would not confront him on a regular basis. Or it could have required Mr. Endres to move. Or, finally, it could have evicted Mr. Endres—generally a drastic step but one that this conduct warranted. Instead, the KPM defendants affirmatively chose to do nothing. When property manager Ms.

Downing reached out to KPM management to discuss Mr. Francis's complaints, KPM told her not to get involved. It constitutes intentional discrimination to take such a "see no evil, hear no evil" approach to a discriminatory housing environment. *Freeman v. Dal-Tile Corp.,* 750 F.3d 413, 422-23 (4th Cir. 2014).

The dissent is skeptical that Mr. Francis can demonstrate that any of these steps would have worked. But even if that skepticism had basis—and Mr. Francis submits it does not—he is entitled to the opportunity to prove his allegations.

III. The District Court Erred in Dismissing Mr. Francis's Claims Under New York Law

For largely the reasons stated above, Mr. Francis also properly stated claims against the KPM defendants for violating New York Executive Law § 296. That law is generally construed to provide all the protections that the Fair Housing Act does. *See, e.g.*, *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 153 (2d Cir. 2014); *Elmowitz v. Exec. Towers at Lido, LLC*, 571 F. Supp. 2d 370, 376 (E.D.N.Y. 2008). The district court found that Mr. Francis's claim under New York Executive Law § 296 "fails as a matter of law for the same reason the FHA claims do." A. 112. The premise that the Fair Housing Act claims fail was erroneous, and so this Court should reinstate the Executive Law claim.[14]

[14] Mr. Francis pleaded his claim in the alternative under both § 296(5) (direct liability) and § 296(6) (aiding and abetting). This Court need not decide under which theory New York courts would recognize the claim.

Should this Court affirm the dismissal of the federal Fair Housing Act claims, it should certify to the New York Court of Appeals the question of whether, under these circumstances, the New York Executive Law provides greater protection than does the Fair Housing Act. New York intermediate appellate courts have held that (1) hostile housing environment claims may be brought under § 296 and (2) a landlord may be liable for the discriminatory harassment of one tenant by another if the landlord "knew or should have known about the harassment and failed to remedy the situation promptly." *State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 265 (N.Y. App. Div. 2006); *see also Curley v. Bon Aire Props., Inc.*, 2 N.Y.S.3d 571, 574 (N.Y. App. Div. 2015); *Ewers v. Columbia Heights Realty, LLC*, 44 A.D.3d 608, 610 (N.Y. App. Div. 2007). The New York Court of Appeals likely would hold similarly and should be permitted to issue an authoritative opinion regarding this question of New York law. *See Margerum v. City of Buffalo*, 24 N.Y.3d 721, 737-741 (2015) (Rivera, J., concurring in part and dissenting in part) (discussing circumstances under which federal precedent has narrowed reach of federal civil rights law sufficiently that it is no longer appropriate for New York civil rights law to be construed identically consistent with intent of New York legislature).

This Court also should reinstate Mr. Francis's claim for negligent infliction of emotional distress. This state-law tort requires the plaintiff to suffer "an

emotional injury from defendant's breach of a duty which unreasonably endangered her own physical safety." *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996) (*citing Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 504 (1983)). The district court held that Mr. Francis had failed to prove the existence of a duty that defendants owed him. *See* A. 113-114. The panel majority correctly rejected this reasoning, because "the KPM Defendants may have had a duty arising from the FHA itself." A. 225. Moreover, the KPM defendants had a duty to respond to Mr. Endres's conduct to satisfy the "implied warranty of habitability" that New York includes in every lease by statute[15]—a duty the district court found they failed to meet, *see* A. at 119.

The panel nonetheless upheld dismissal of the emotional-distress claim on the alternative ground (not argued by the defendants) that the emotional distress Mr. Francis suffered was a "consequential" rather than "direct" result of the breach. A. 225-26 (*citing Kennedy*, 58 N.Y.2d at 506). That was so, the panel reasoned, because Mr. Endres "directly caused" the injury, and the defendants did not. A. 226.

[15] *See* N.Y. Real Prop. Law § 235-b; *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1294 (N.Y. 1979) (Section 235-b imposes a "nondelegable and nonwaivable duty" on landlords to maintain habitable residences).

This misunderstands *Kennedy*'s "directness" limitation. In *Kennedy*, negligent repairs caused a machine to malfunction in a dental office, killing a patient. Plaintiff—the dentist—claimed he suffered emotional harm from that death. *Kennedy* held he could not bring such a claim, because the patient was the one directly harmed, and emotional distress "is compensable only when a direct, rather than a consequential, result of the breach." 58 N.Y.2d at 506. That is, the problem was not that someone else directly caused the injury, but that the injury was directly inflicted upon someone else. So long as the plaintiff is the one directly injured, it is immaterial that (as a result of the defendant's breach of duty) a third party more directly inflicted the harm. *See, e.g.*, *Winje v. Cavalry Veterans of Syracuse*, 124 A.D.2d 1027, 1028 (N.Y. App. Div. 1986) (driver who struck person lying in the street intoxicated as a result of bar's violation of dram shop law, and suffered emotional distress as a result, could sue bar).

The reasoning on which the panel relied has not been litigated by the parties, and there is no need for this Court sitting en banc to consider this question of state law, particularly when defendants failed to raise it themselves. If this Court reverses on the federal claims, it can remand for that question to be litigated more fully in the district court in the first instance; if it does not reverse the federal claims, it should certify the question to the New York Court of Appeals along with the New York Executive Law issue.

CONCLUSION

This Court should reverse the judgment of the district court and remand the case for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Rule 32(a)(7)(B)(iii), this brief contains 13,616 words. This certificate was prepared in reliance upon the word-count function of the word processing system (Microsoft Word 2007) used to prepare this brief. This brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using font size 14 Times New Roman.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONAHUE FRANCIS, Plaintiff-Appellant, v. KINGS PARK MANOR, INC., ET AL., Defendants-Appellees.	)	**CERTIFICATE OF SERVICE** Docket Number: 15-1823

I, Sasha-Samberg-Champion, hereby certify under penalty of perjury that on March 16, 2020, the foregoing Reply Brief of Plaintiff-Appellant was electronically filed using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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