15-1823-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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, No. 14-cv-3555, before the Honorable Arthur D. Spatt

BRIEF OF COURT-APPOINTED AMICUS CURIAE DEBO ADEGBILE IN SUPPORT OF PLAINTIFF-APPELLANT DONAHUE FRANCIS

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INTEREST OF AMICUS CURIAE[1]

By order dated April 3, 2020, this Court invited Debo P. Adegbile, of the law firm Wilmer Cutler Pickering Hale and Dorr LLP, to brief and argue this case as amicus curiae in support of the view that the Fair Housing Act prohibits landlords from selectively intervening against tenants who violate their leases or the law based on race, and otherwise in support of Plaintiff-Appellant Donahue Francis.

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[1] Amicus curiae hereby certifies that no party or person other than amicus and counsel authored this brief or contributed money intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

Beginning in February 2012, at the "quiet residential complex" Kings Park Manor, Raymond Endres initiated the first in a sustained series of "violent threats and racial epithets" directed at Plaintiff-Appellant Donahue Francis, his next-door neighbor and fellow tenant. A.16-17 ¶ 2, 4. Francis, an African-American man, endured these escalating tirades for the next eight months, over the course of which Endres "subjected Francis to egregious racial harassment" referring to him on multiple occasions as a "fucking nig**r," a "fucking asshole," and "fucking lazy, god-damn fucking nig**r." A.19-20 ¶¶ 16-20. Endres also directed a homicidal threat at Francis, once stating "I oughta kill you, you fucking nig**r." A.21 ¶ 30. The menacing, impulsive, and racist nature of Endres's behavior made Francis feel "uncomfortable walking in the common areas at Kings Park Manor" and "afraid, anxious, and unwelcome in his own home." A.16-17 ¶ 4, A.20 ¶ 24.

Endres's behavior was so extreme that Francis was forced to call the police four times. A.20 ¶ 21, 21 ¶ 31, 22 ¶ 36, 24 ¶ 42. Francis's well-placed fear for his physical safety also caused him to notify Defendant-Appellee Kings Park Manor, Inc. ("KPM"), the owner of his residential complex, and Defendant-Appellee Corrine Downing, the complex's manager (collectively, the "KPM Defendants"), at least four times about their tenant's conduct at their property. Through these repeated reports, Francis detailed Endres's "pervasive and severe conduct" and

reasonably sought KPM Defendants' response and assistance in addressing Endres's egregious conduct. A.17 ¶ 6. The police investigated, reported Endres's threatening conduct to KPM, A.21 ¶ 25, and eventually arrested Endres, who was charged and convicted of aggravated harassment, a class A misdemeanor. A.17 ¶¶ 5-6; A.23 ¶ 37.

Yet despite all this (i.e., multiple reports of a severe and pervasive pattern of neighbor-on-neighbor threats of violence both from their tenant and law enforcement), KPM Defendants chose not to explore *any* readily available measures to address Endres's conduct. As the Complaint further alleges, it was not just an oversight but a conscious choice to leave Francis without the benefit of his landlord's protection: Upon receiving Francis's complaints, KPM instructed Downing "not to get involved." A.24 ¶ 47. A directive to do nothing. Yet KPM Defendants "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or the law." A.28 ¶ 63.

The primary question presented on appeal is whether KPM Defendants can be held responsible for this intentional conduct under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"). Because KPM Defendants intentionally discriminated against Francis in a manner that interfered with the terms, conditions, and privileges of his lease agreement, KPM Defendants violated the FHA.

The FHA unequivocally reaches racial discrimination after the tenant has taken possession of his home. Consistent with the FHA's broad and remedial purposes, there is circuit consensus that the FHA's dictates do not cease to operate when an individual has acquired housing. At a minimum, the FHA prohibits post-acquisition discrimination that affects a term or condition of the lease agreement. The FHA reflects a "broad legislative plan to eliminate all traces of discrimination within the housing field." *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972) (recognizing the FHA's "broad and inclusive" language and noting that it should be given "a generous construction"). Section 3604(b) of the FHA 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 therewith." 46 U.S.C. § 3604(b). And § 3617 makes it "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" rights granted or protected by the FHA. *Id.* § 3617. These provisions unambiguously prohibit post-acquisition intentional discrimination with respect to the terms, conditions, or privileges that flow from the rental agreement. This reading aligns with the statutory purpose of the FHA, which is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

When the landlord intentionally discriminates against a tenant in a manner that interferes with a key lease term, the landlord can be held liable under the FHA. That holds true where the allegation is that the landlord declined to intervene to protect a tenant from the race-based harassment of another tenant—as the only other circuit to have considered that question has held, *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 864 (7th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1249 (2019). The key question, as it is in all intentional discrimination cases, is whether the landlord acted with discriminatory intent. Under the FHA, as under other civil rights statutes, discriminatory intent can be shown in a variety of ways. These include: (1) the defendant's selective enforcement of a generally applicable policy, (2) its procedural or substantive departure from a generally applicable policy within a larger context of racial antagonism, or (3) its deliberate indifference to known racial harassment. All of these frameworks assess whether an allegation supports an inference of discriminatory intent, and all are consistent with the FHA. Because Francis sufficiently alleged intentional discrimination with respect to the terms, conditions, or privileges of his rental agreement, he has stated a claim for relief under the FHA.

For similar reasons, Francis has also stated a claim under 42 U.S.C. § 1981 and § 1982. This Court has explicitly recognized that § 1981 plaintiffs may prove discriminatory intent through evidence of a defendant's deliberate indifference to

discrimination by third parties within their control. *See Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140-141 (2d Cir. 1999). And § 1982 has consistently been construed in parallel with § 1981. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-440 (1973). The Complaint sufficiently alleges deliberate indifference to Francis's complaints of race-based harassment.

For these reasons, and the reasons stated in Appellant's opening brief, the decision of the district court granting the motion to dismiss should be reversed.

ARGUMENT

I. POST-ACQUISITION DISCRIMINATION WITH RESPECT TO, OR THAT INTERFERES WITH, THE TERMS, CONDITIONS, OR PRIVILEGES OF THE RENTAL AGREEMENT IS ACTIONABLE UNDER THE FHA

The core application of the FHA is to prevent discrimination in access to housing, but "the protections afforded by the [FHA] do not evaporate once a person takes possession of her house, condominium, or apartment." *Wetzel*, 901 F.3d at 867. As the Department of Justice acknowledges, the FHA unambiguously prohibits intentional discrimination against a tenant after he obtains housing, when that discrimination affects the terms, conditions, or privileges of the rental agreement. *See* Brief of the United States as Amicus Curiae In Support of Neither Party 14, ECF No. 305 ("U.S. Br.").

All statutory interpretation begins with the text. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). When the text of the statute is unambiguous, "judges must stop" and enforce the statute according to its terms. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). That said, in recognition of the fact that the "language of the [Fair Housing] Act is broad and inclusive," *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), courts have long given its statutory terms a "generous construction," *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *see also Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000); *abrogated on other groundsby Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992, 994 (2002). But no matter how it is read, the text of the FHA's core anti-discrimination provision, § 3604(b), unambiguously applies to post-acquisition conduct that interferes with terms, conditions, and privileges that flow from the rental agreement.

Section 3604(b) of the FHA 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 therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). The phrases "terms, conditions, or privileges of … rental" and "provision of services and facilities in connection with" the "rental" plainly encompass post-acquisition discrimination claims. These phrases "do[] not contain any language limiting …

[their] application to discriminatory conduct that occurs prior to or at the moment of the sale or rental." *Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 632 (11th Cir. 2019). Because "few 'services or facilities' are provided prior to the point of a sale or rental[] [and] far more attach to a resident's occupancy," these phrases are naturally read to apply to conduct that occurs post-acquisition. *Wetzel*, 901 F.3d at 867; *see also The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) ("The inclusion of the word 'privileges' implicates continuing rights.").

The statutory definition of "rent" further confirms this interpretation. The FHA defines "to rent" as "to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602. Since the exchange of consideration for occupancy rights is rooted in the lease agreement, "rental" under the FHA is most naturally read to cover post-acquisition discrimination in the terms, conditions, and privileges of the rental agreement. Unlike the *sale* of a dwelling, which is complete when the buyer furnishes consideration and the seller gives title to the home, a rental agreement results in a continuing relationship between the landlord and the tenant for the duration of the tenant's occupancy. For example, the tenant has a continuing obligation to pay rent, and the landlord has a series of associated obligations, including, for example, the obligation to make repairs. This suggests that the plain

meaning of "rental" in § 3604(b) "contemplates an ongoing relationship" that continues even after the tenant occupies the residence. *See Richards v. Bono*, No. 04-CV-484, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005).

The meaning of "sale or rental of a dwelling" in § 3604(b) is also informed by "the specific context in which that language is used[] and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *accord Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018). Here, other provisions of the statute further confirm that "terms, conditions, and privileges of … rental" apply to discrimination that occurs after the dwelling is occupied. Dwelling is defined in the statute as "any building, structure, or portion thereof which is *occupied as*, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602 (emphasis added). The use of the disjunctive phrase "occupied as … *or* intended for occupancy as" suggests that Congress intended for the statute to apply to claims by plaintiffs who have already occupied a building, as well as those who intend to occupy a building. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *see also United States v. Woods*, 571 U.S. 31, 45 (2013) (noting that use of the word "or" in a statute is "almost always disjunctive"). Thus, the statutory context further confirms that there is some post-acquisition scope to the application of the FHA.

Section 3617 of the FHA makes it even more clear that the statute must be read to cover post-acquisition conduct. That provision makes it unlawful "[t]o 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" the substantive provisions of the FHA, including § 3604. 42 U.S.C. § 3617. Since 1989, the Department of Housing and Urban Development has interpreted that provision to prohibit "[t]hreatening, intimidating or interfering with persons in their *enjoyment of a dwelling*" because of their membership in a protected class. 24 C.F.R. § 100.400(c)(2) (emphasis added). In recognition of "Congress' express broad purpose in enacting the FHA," and the broad language of § 3617, district courts in this Circuit and elsewhere have deferred to HUD's interpretation and concluded that § 3617 should be read to prohibit post-acquisition discriminatory conduct. *See, e.g.*, *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 242 (E.D.N.Y. 1998) (noting that "the Second Circuit does indeed recognize that a claim under § 3617 could entail circumstances not embraced under §§ 3603-3606," and deferring to the HUD interpretation of § 3617 as "a plausible construction of the statute and [] compatible with Congress' expressed broad purpose in enacting the FHA"); *see also Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 61 (2d Cir. 2004)

(deferring to a different HUD interpretation based on expertise and careful consideration the agency had given to the issue).[2]

Reading the FHA to cover post-acquisition conduct also makes sense. To hold otherwise would mean that the FHA could prohibit landlords from entering into discriminatory lease agreements with tenants but could do nothing to ensure that tenants are actually provided the benefit of that bargain. *See Housing Rights Center v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129 (C.D. Cal. 2003) (noting that denying tenants garage access on the basis of national origin "effectively denied the full benefit of the bargain entered into at the moment of first sale or rental"); *see also Abramski v. United States*, 573 U.S. 169, 179 (2014) (statutory occurs "not in a vacuum, but with reference to the statutory context, "structure, history, and purpose").

Indeed, since not long after the FHA was enacted, courts operated under the assumption that the FHA governed post-acquisition conduct.[3] And all circuit

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[2] In *Ohana*, the district court grappled with *Frazier v. Rominger*, 27 F.3d 828 (2d Cir. 1994), which noted that "[s]ection 3617 prohibits the interference with the exercise of Fair Housing rights only as enumerated" in the other substantive provisions of the Act. *Id.* at 834. As the court in *Ohana* and several other district courts have pointed out, however, *Frazier* did not concern a claim based on post-acquisition conduct, and in fact, cited another case approvingly that assigned liability on the basis of post-acquisition liability. *See Ohana*, 996 F. Supp. at 242.

[3] *See* Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants*, 43 Harv. C.R.-C.L. L. Rev. 1, 1 (2008) (noting that "the federal courts operated

courts to have considered the issue have held that the FHA prohibits at the very least post-acquisition discrimination in services that are directly connected to the sale or rental of a dwelling. *See LaGrange*, 940 F.3d at 634 ("[B]ecause there is no temporally limiting language, the plain language of § 3604(b) may, under certain circumstances, encompass the claim of a current owner or renter for discriminatory conduct related to the provision of services, as long as those services have a connection to the sale or rental of the dwelling."); *Curto v. A Country Place Condo. Ass'n, Inc.*, 921 F.3d 405, 410-411 (3d Cir. 2019) (recognizing sex-based post-acquisition discrimination claim by tenants against a condo association's imposition of unequal pool access for male and female condo owners); *Wetzel*, 901 F.3d at 867 (post-acquisition discrimination claims are cognizable when discrimination "affect[s] the provision of services and facilities connected to … [the plaintiff's] rental" and "diminishe[s] the privileges of … [her] rental"); *Modesto*, 583 F.3d at 713 (FHA "encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling"); *Cox v. City of Dallas*, 430 F.3d 734, 746 & n.37 (5th Cir. 2005) (post-acquisition claims are cognizable under § 3604(b) when the "'services'

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under [the] assumption for nearly thirty-five years" that the FHA "prohibits discriminatory treatment or harassment of individuals once they move into such housing").

subject to the alleged discrimination" are "'in connection' with the 'sale or rental of a dwelling,'" such as when a denial of services is "aimed at evicting or constructively evicting a tenant"); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (§ 3604(b) extends "to housing and housing-related services"); *see also* U.S. Br. 21-22 (acknowledging that case law uniformly supports post-acquisition application of § 3604(b)). As these cases make clear, § 3604 applies to services and facilities guaranteed by the lease agreement, *Wetzel*, 901 F.3d at 867; *Curto*, 921 F.3d at 410, as well as municipal services that are "inextricably intertwined with" and "essential to the habitability of" a dwelling, *LaGrange*, 940 F.3d at 634, including "garbage collection," *Jersey Heights*, 174 F.3d at 193, and basic utility services, *LaGrange*, 940 F.3d at 634. Accordingly, this Court should hold, as many of its sister circuits have, that the FHA covers post-acquisition discrimination that interferes with the terms, conditions, services, and facilities that are guaranteed by the lease agreement.

In dissent from the panel opinion, Judge Livingston appears to take issue with reading the FHA to create post-acquisition liability. But even Judge Livingston agrees that "[§] 3604(b)'s prohibition on discrimination in the 'terms, conditions, or privileges of … rental' is … most reasonably read to refer to discrimination in the terms, conditions, and privileges of the *rental arrangement*—a construction that … ties potential liability to discrimination regarding the

commitments made and benefits afforded in connection with the rental itself." A.170 (emphasis added). In fact, that is precisely how most courts have delineated the scope of post-acquisition conduct, and what Francis alleges in this case.

The key provision at issue in this case is § 3604, which makes it unlawful to "discriminate against any person in the terms, conditions, or privileges … rental," 46 U.S.C. § 3604(b), and "rental" is in turn described as an exchange of consideration for the right to occupancy. 42 U.S.C. § 3602 (defining rent[al] as "to grant for a consideration the right to occupy premises not owned by the occupant"). Since it is the rental agreement or lease agreement that sets forth the terms of this exchange, under the plain language of § 3604(b), discrimination that interferes with an actual term of the lease agreement—whether express or implied—plainly constitutes discrimination in the terms, conditions, and privileges of the rental agreement.

Several circuit courts have recognized post-acquisition claims under the FHA when the discrimination alleged interfered with the terms, conditions, and privileges that flowed from the rental agreement. In *Wetzel v. Glen St. Andrew Living Community*, for example, the Seventh Circuit held that a landlord's failure to intervene in co-tenants' harassment of the plaintiff based on her sexual orientation was actionable because (1) the harassment prevented the plaintiff from accessing services and facilities that were guaranteed under the terms of the rental

agreement, and (2) the harassment "diminished the privileges of Wetzel's rental" by interfering with her ability to use the "totality of the rented premises" and with the covenant of quiet enjoyment. 901 F.3d at 867.

Similarly, in *Bloch v. Frischholz*, the en banc Seventh Circuit held that a claim of intentional discrimination is actionable in the post-acquisition context when the discrimination is with respect to a rule or policy that "flows from the terms of the sale." 587 F.3d 771, 780 (7th Cir. 2009) (en banc). The *Bloch* plaintiffs alleged that a condo association rule prohibiting "objects of any sort … outside Unit entrance doors" was discriminatorily applied to prohibit the display of mezuzot outside the doors of Jewish condo owners. *Id*. at 771. The court reasoned that "because the Blochs purchased dwellings subject to the condition that the Condo Association can enact rules that restrict the buyer's rights in the future, § 3604(b) prohibits the Association from discriminating … through its enforcement of the rules, even facially neutral rules." *Id.* at 780.

The Fifth Circuit has also held that a landlord may not impose discriminatory conditions on a tenant's continued occupancy. In *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982), a landlord threatened to evict a white couple after they received African-American guests in their home, unless the couple agreed not to host African-American guests in the future. *Id.* The court reasoned that "when a landlord imposes on white tenants the condition that they

may lease his apartment only if they agree not to receive blacks as guests, the landlord has discriminated against the tenants in the 'terms, conditions and privileges of rental' on the grounds of 'race.'" *Id.*

As these cases demonstrate, post-acquisition discrimination is actionable under the FHA when that discrimination is with respect to, or interferes with, terms, conditions, and privileges that flow from the rental agreement. Here, the Complaint alleges a theory of discrimination that falls comfortably within this framework. At bottom, Francis alleges that by failing to respond to a co-tenant's racial harassment, KPM Defendants failed to ensure quiet enjoyment and habitability—both of which are terms of Francis's lease—while intervening to enforce those lease terms as to other tenants. Francis's lease contains an express provision guaranteeing his quiet enjoyment of the premises or "facilities" within the meaning of the statute: "By paying the rent and observing all the terms and conditions herein, Tenant Shall peaceably and quietly have, hold and enjoy the Premises[.]" A.27 ¶ 57. Francis's lease also includes an implied warranty of habitability, which is implied in every rental agreement in New York.[4] *See* A.119.

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[4] *See Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979) ("[A] lease of residential property [i]s a contract containing an implied warranty of habitability interdependent with the covenant to pay rent."). Under New York law, the warranty of habitability obligates landlords to intervene to protect a tenant from co-tenant aggression or harassment. *See, e.g.*, *Reinert v. 291 Pleasant Ave., L.L.C.*, 938 N.Y.S.2d 229 (App. Term 2011) (holding that a landlord's failure to protect

These guarantees "flow[] from the terms of the [rental]," *Bloch*, 587 F.3d at 780, and the Complaint alleges discriminatory enforcement as to both of them.[5] *See, e.g.*, A.26 ¶ 54.

II. A LANDLORD'S FAILURE TO ADDRESS PERVASIVE TENANT-ON-TENANT RACIAL HARASSMENT OF WHICH HE IS AWARE IS INTENTIONAL DISCRIMINATION THAT VIOLATES THE FHA

When a landlord engages in intentional discrimination against a tenant in a manner that is with respect to, or interferes with, a key lease term, the landlord can be held liable under the FHA. A plaintiff alleging intentional discrimination under the FHA must allege facts tending to show "that the defendant had a discriminatory

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one tenant from the aggression of another tenant is actionable when the landlord has the ability to control the aggressor and the harm was foreseeable); *Regensburg v. Rzonca*, 836 N.Y.S.2d 489 (Dist. Ct. 2007) ("Conditions which various Courts have found violative of the warranty of habitability … [include] taking inadequate action to remedy the situation of menacing co-tenants … and the failure to provide adequate security to the tenant."); *Auburn Leasing Corp. v. Burgos*, 609 N.Y.S.2d 549 (Civ. Ct. 1994) (holding that a landlord breached the warranty of habitability when it had knowledge that cotenants bullied, harassed and threatened tenant with violence, but took inadequate steps to remedy situation).

[5] Despite acknowledging that the scope of post-acquisition liability for a defendant's own intentional discrimination is determined by whether the alleged discriminatory conduct is with respect "to the terms, conditions, and privileges of the *rental arrangement*," the Dissent argues that common law doctrines relevant to a landlord's responsibility for the behavior of third parties, including the warranty of habitability, do not define the FHA's scope because they "sound in contract and property law rather than tort." A.190 n.10. But the principal case on which the Dissent relies, *Meyer v. Holley*, 537 U.S. 280 (2003), is focused on the scope of vicarious liability under the FHA. Here, the Complaint does not seek to hold KPM Defendants vicariously liable for the acts of Endres; rather, it alleges intentional discrimination on the part of KPM Defendants. *See* A.218.

intent or motive." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513 (2015). "Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (internal quotation marks omitted). As this Court has acknowledged, a "victim of discrimination is … seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence." *See Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991).

The Supreme Court and this Court have endorsed various methods of showing intentional discrimination. Three are particularly salient here: *First*, selective enforcement or non-enforcement of a disciplinary rule may demonstrate discriminatory intent. *See Khalil v. Farash Corp.*, 277 F. App'x 81, 83 (2d Cir. 2008). *Second*, a departure from a routine policy or practice, viewed in context, may demonstrate discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). *Third*, deliberate indifference to complaints of race-based harassment may demonstrate discriminatory intent. *See Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643

(1999). Each of these familiar methods of analyzing discriminatory intent apply with equal force to claims of intentional discrimination under the FHA.

A. A Landlord's Selective Enforcement Of Lease Terms May Evince Intentional Discrimination

When adjudicating constitutional and statutory claims of intentional discrimination, this Court has long recognized that discriminatory intent can be inferred from the defendant's selective enforcement of a facially neutral policy or procedure.

In the constitutional context, for example, selective enforcement is cognizable under the Equal Protection Clause, for example, when (1) "the person, compared with others similarly situated, was selectively treated" and (2) "that such selective treatment was based on impermissible considerations such as race … or with the intent to inhibit or punish the exercise of constitutional rights." *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980)). Although this Court has not decided what "similarly situated" requires in the Equal Protection context, courts in this Circuit have required the plaintiff to "identify comparators whom a prudent person would think were roughly equivalent." *See, e.g.*, *Rodrigues v. Inc. Vill. of Mineola*, No. 16-CV-1275, 2017 WL 2616937, at *6 (E.D.N.Y. June 16, 2017).

This test has been widely applied by district courts to adjudicate claims of selective enforcement of a law or policy by municipal officials and police officers. For example, in *Thomas v. Venditto*, the court held that the plaintiffs stated a selective enforcement claim by alleging that although seven other homes in the neighborhood were used as multi-family homes by Caucasian homeowners in contravention of a local law, criminal charges were only levied against the plaintiffs, who were African-American and Puerto Rican. 925 F. Supp. 2d 352, 365 (E.D.N.Y. 2013). In *Riley v. Town of Bethlehem*, the court denied summary judgment on a selective enforcement claim when the plaintiff's evidence indicated that numerous white homeowners openly operated businesses in residential areas without the required use variances, but the town only enforced its zoning ordinance against the plaintiff, an African-American woman. 44 F. Supp. 2d 451, 462 (N.D.N.Y. 1999). Similarly, in the statutory context, under well-established Title VII case law, a plaintiff may prove intentional discrimination by showing that they faced harsher discipline than similarly situated employees. *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000).

Although the Second Circuit has not explicitly held that selective enforcement claims can be brought in the FHA post-acquisition context, it has implicitly recognized discriminatory motive claims based on a landlord's selective enforcement of a lease violation against a protected group under the FHA. For

example, in *Khalil*, this Court recognized in an unpublished case that a claim for disparate treatment was cognizable under §§§ 3604(a) and (b) of the FHA, and that such a claim could be established by showing "discriminat[ion] against tenants [in a protected group] in a 'term, condition, or privilege[]' of rental." 277 F. App'x at 83 (final alteration in original). There, plaintiffs—tenants with children (a protected class under the FHA)—alleged that defendants had discriminated against them by enforcing a generally applicable policy against only them. The Court ultimately found that plaintiffs had not established a *prima facie* case of discrimination, but only because the record evidence showed that the alleged discriminatory conduct had affected both tenants in a protected group and tenants not in a protected group equally. *Id.*

In the post-acquisition context, district courts in this Circuit have similarly analyzed claims of landlord liability under the FHA using a selective enforcement framework where a plaintiff challenges a landlord's failure to act. For example, in *Khodeir v. Sayyed*, the court held that the landlord violated the FHA by failing to act in response to Arab tenants' request for repairs, while responding to non-Arab tenants' requests for the similar services. No. 15 CIV. 8763 (DAB), 2016 WL 5817003, at *6 (S.D.N.Y. Sept. 28, 2016). The court held that the plaintiffs raised a plausible inference of discriminatory motive because they alleged in their complaint that non-Arab tenants were provided plumbing services while plaintiffs

were not and that they were denied those services because of national origin. *Id.* As *Khodeir* demonstrates, an affirmative act is not required to impose FHA liability—a landlord's *inaction* towards a plaintiff's request for services guaranteed by the lease evinces an inference of discriminatory intent when the landlord responds to similar requests by those outside of the plaintiff's protected group. *Id.*

Moreover, in the pre-acquisition context, district courts have routinely held that a complaint states an intentional discrimination claim when it alleges selective enforcement of a housing application requirement against the plaintiff but not against individuals outside the plaintiff's protected class. *See L.C. v. LeFrak Org., Inc.*, 987 F. Supp. 2d 391, 401 (S.D.N.Y. 2013); *Fair Hous. Justice Ctr., Inc. v. Silver Beach Gardens Corp.*, No. 10- CV-912, 2010 WL 3341907, at *4 (S.D.N.Y. Aug. 13, 2010). At the pleading stage, this is sufficient and "evidence of similarly situated comparators is not necessary." *Rodriguez v. Town of Ramapo*, 412 F. Supp. 3d 412, 436 (S.D.N.Y. 2019). Rather, the district court must simply determine whether, "based on a plaintiff's allegations in the complaint, it is plausible that a jury could ultimately determine that the comparators are similarly situated." *Id.* For example, in *LeFrak Organization*, the court held that the complaint stated a plausible claim of intentional discrimination under § 3604(f) when a real estate agent applied a more "burdensome and delayed" application process for disabled prospective tenants than non-disabled prospective tenants

without inquiring into whether non-disabled tenants were otherwise similarly situated to the plaintiff. 987 F. Supp. 2d at 401. Similarly, in *Fair Housing Justice Center*, the court held that the complaint stated a plausible claim of intentional discrimination under § 3604(a) when the defendant selectively enforced a reference requirement on prospective African-American buyers, while allowing white tenants to evade the policy, without an inquiry into whether the white comparators were otherwise similarly situated. 2010 WL 3341907, at *4. As these cases demonstrate, in the FHA context, a plaintiff may state a selective enforcement claim by alleging that the defendant selectively enforced a housing-related requirement based on race.

As discussed above, the analytical framework for reviewing claims of selective enforcement typically proceeds by comparing the defendant's treatment of the plaintiff to similarly situated individuals outside the plaintiff's protected group. However, the selective enforcement framework need not fit into that conceptual straitjacket—rather, it must be tailored based on the nature of the intentional discrimination alleged. For example, when confronted with race-based associational discrimination claims, courts have compared the defendant's treatment of a white plaintiff in an interracial relationship with individuals not in an interracial relationship (rather than non-white individuals) to assess whether there was disparate treatment on the basis of race. In *Deffenbaugh-Williams v.*

Wal-Mart Stores, Inc., 156 F.3d 581, 590 (5th Cir. 1998), for example, the Fifth Circuit found that there was sufficient evidence for a jury to conclude that the plaintiff's termination was based on race when the employer knew the plaintiff was in an interracial relationship with an African-American man, terminated the plaintiff for "shopping on the clock," and did not discipline "other employees" for engaging in the same violation, *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *cf. Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2d Cir. 2018) (en banc) (noting that the employer's equal punishment of white employees and non-white employees based on their interracial associations does not suggest there was "no discrimination 'because of … race'"), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019). These cases suggest that comparing the defendant's treatment of the plaintiff to individuals outside of the plaintiff's protected group is not the only type of comparison that is probative of intentional discrimination. Instead, comparator evidence must be adapted based on the nature of the discrimination alleged.

At bottom, comparator evidence is probative of discriminatory intent because it raises an inference regarding the role race played in the defendant's decision-making process. As the Seventh Circuit has reasoned, comparator analysis helps to "eliminate confounding variables … which helps isolate the

critical independent variable: complaints about discrimination." *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 504-505 (7th Cir. 2014) (*quoting Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008)); *cf. Zarda*, 883 F.3d at 117 (noting that in comparator analysis, the protected trait is the independent variable and employee treatment is the dependent variable). And here, comparing a landlord's response to race-based complaints and similarly situated race-neutral complaints is probative of intentional discrimination because this analysis isolates the role race played in the landlord's actions. For example, if a landlord issued a notice of a lease violation in response to a tenant's complaint that a co-tenant directed derogatory comments at him, but sat idly by as a tenant shouted racial slurs at a co-tenant, or, as in this case threatened violence or murder, it is reasonable to infer that the landlord's inaction to the second complaint was based on its racial character. In other words, it is reasonable to infer that the landlord's disparate treatment of racial complaints and race-neutral complaints was *based on race*.

B. A Procedural or Substantive Deviation From A Generally Applicable Policy May Evince Intentional Discrimination When It Occurs Within A Larger Context Of Racial Antagonism

A plaintiff need not rely solely on showing that the defendant enforced a policy more favorably to those outside of the plaintiff's protected group to show intentional discrimination under the FHA. Because claims of discrimination are

nuanced and varied, the Supreme Court has recognized that there is no singular type of evidence available in every case. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court explained that a variety of factors may be probative of intent to discriminate, including: (1) the discriminatory effect of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departure from the normal procedural sequence; (5) departure from the normal substantive standards; and (6) the legislative or administrative history of the decision. 429 U.S. at 266-268. Here, several of these factors are particularly relevant to the selective intervention theory: when the defendant's failure to intervene constitutes a procedural or substantive departure from a standard policy of enforcement, and the historical background and the sequence of events leading up to the non-intervention reveal a larger context of racial antagonism, an inference of intentional discrimination may arise.

The Second Circuit has relied on the *Arlington Heights* factors to analyze claims of intentional discrimination by government officials under the Fair Housing Act. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016). In *Mhany*, this Court affirmed the district court's finding that a county's re-zoning decision was motivated by intentional discrimination when the zoning decision had a "considerable impact … on minorities in that community" and the

decision that resulted in the adverse impact appeared to be made in response to "public opposition to the prospect of affordable housing." *Id.* The Court acknowledged that although "no one ever said anything overtly race-based," the background of the decision and the sequence of events leading up to it showed that the city's "abrupt shift in zoning in the face of vocal citizen opposition to changing the character of Garden City represented acquiescence to race-based animus." *Id.* at 611. Because the *Arlington Heights* factors established that "officials knowingly acquiesced to race-based citizen opposition," it was not error for the district court to conclude that the plaintiffs made out an intentional discrimination claim. *Id.* at 612.

Other circuit courts have also found that the *Arlington Heights* factors apply with equal force to claims of intentional discrimination under the Fair Housing Act. For example, in *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, the Ninth Circuit analyzed the *Arlington Heights* factors to conclude that the plaintiffs plausibly alleged an FHA claim of intentional discrimination. 818 F.3d 493, 504 (9th Cir. 2016). The court reasoned that the city's denial of their zoning application to build affordable housing was motivated by discriminatory intent when the decision constituted a procedural and substantive departure from the city's routine policies. *Id.* The court observed, in particular, that (1) the city's decision ran contrary to the unanimous recommendation of its zoning commission;

(2) the proposed zoning was consistent with general zoning requirements; (3) "this zoning request was the only request the City Council denied of the 76 considered over the three years preceding the decision"; and (4) the decision came down within a context of racially-charged opposition. *Id.* at 507. These irregularities, among other considerations, led the court to conclude that the complaint plausibly alleged discriminatory intent.

In *Macone v. Town of Wakefield*, the First Circuit observed that in an FHA intentional discrimination claim that "procedural abnormalities can provide a basis for finding discriminatory intent" when they are relevant "within a larger scope" of racial discrimination. 277 F.3d 1, 6 (1st Cir. 2002). Unlike in *Mhany*, where there was evidence that the challenged decision was taken in response to vocal citizen opposition to affordable, racially-inclusive housing, the *Macone* court failed to find discriminatory intent because the procedural irregularities did not coincide with a backdrop of racial antagonism or hostility. *See Macone*, 277 F.3d at 6; *Mhany*, 819 F.3d at 611; *see also Hallmark Developers, Inc. v. Fulton Cty., Ga.*, 466 F.3d 1276, 1283-1284 (11th Cir. 2006) (using *Arlington Heights* factors to analyze FHA intentional discrimination claim). These cases demonstrate that when the defendant's decision constitutes a procedural and substantive departure from its regular procedures, and those irregularities coincide with a backdrop of racial antagonism, an inference of intentional discrimination may arise.

District courts in this Circuit have also routinely used the *Arlington Heights* factors to ascribe a discriminatory motive in the FHA context. For example, in *Sunrise Development, Inc. v. Town of Huntington*, the court held that the plaintiffs demonstrated likelihood of success on a disability-based intentional discrimination claim under the FHA by alleging that a town's denial of their application to build a senior home used primarily by seniors with disabilities was motivated by discriminatory intent. 62 F. Supp. 2d 762, 775 (E.D.N.Y. 1999). The court observed that the defendants deviated from their normal procedural sequence because just as the application for the senior home was pending, the town sped up the effective date of a new local law that precluded the plaintiff's application from being considered, without any emergency or other circumstance that required its acceleration. *Id.* at 768. The court also reasoned that the town's enactment of the local law gave "little or no consideration to 'normal substantive criteria,'" with the hearing transcript "devoid of substantive reason" for it. *Id.* at 776. From these observations, the court concluded that the defendants demonstrated a likelihood of success on the merits of their intentional discrimination claim under the FHA. *See also Rivera v. Incorporated Vill. of Farmingdale*, 784 F. Supp. 2d 133, 152 (E.D.N.Y. 2011) (finding issues of fact as to discriminatory intent when town officials did not enforce their regular due diligence procedures while issuing

permits to a new housing development that would have a negative impact on Hispanic tenants).

Although the *Arlington Heights* factors originated to ferret out discrimination by government actors, the factors are equally applicable to assessing whether a private actor's decision was motivated by a discriminatory purpose. Courts have noted that "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it." *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1082 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)). In this regard, a landlord is no different from a government actor. Recognizing that defendants will rarely disclose their discriminatory motivations, the *Arlington Heights* court characterized the inquiry into invidious purpose as a "sensitive" one that requires marshalling "such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. In service of that "sensitive inquiry," the Supreme Court laid out the *Arlington Heights* factors as tools to ferret out discriminatory purpose. Courts "must be mindful not to cripple a plaintiff's ability to prove discrimination indirectly and circumstantially," *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir. 1998), because a victim of intentional discrimination "is usually constrained to rely on the cumulative weight of circumstantial evidence," *see Rosen*, 928 F.2d at 533. Since a landlord will, likewise, rarely disclose his discriminatory motivations,

Arlington Height's context-sensitive inquiry should be applied to FHA cases involving private actors.

Indeed, the Fourth and Seventh Circuits have already applied the *Arlington Heights* factors to claims of intentional discrimination against private actors. *See Betsey v. Turtle Creek Assocs*., 736 F.2d 983, 987 (4th Cir. 1984) (implicitly assuming that *Arlington Heights* applies in case against private defendant); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990). And district courts in this circuit have recognized and applied *Arlington Heights* factors to assess intentional discrimination claims against landlords too. *See Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp*., 388 F. Supp. 3d 145, 178 (E.D.N.Y. 2019) (applying *Arlington Heights* factors to ascertain whether the tenant's claim of disparate treatment by a landlord survived summary judgment); *Bronson v. Crestwood Lake Section 1 Holding Corp*., 724 F. Supp. 148, 157 (S.D.N.Y. 1989) (citing *Arlington Heights* and noting that "the specific sequence of events leading up to the challenged decision" may be probative of a landlord's discriminatory intent); *Dreher v. Rana Mgmt., Inc*., 493 F. Supp. 930 (E.D.N.Y. 1980) (applying *Arlington Heights* in an FHA case against a private landlord)

Additionally, although not specifically referencing *Arlington Heights*, courts have nevertheless used *Arlington Heights* factors to ferret out discriminatory intent on the part of private actors under other civil rights statutes. For example, in Title

VII jurisprudence, courts and the EEOC have already recognized that procedural departures from the defendant's standard practices—an *Arlington Heights* factor—are relevant to assessing whether a private employer's actions were the result of a discriminatory motive. *See, e.g.*, *Kouvchinov v. Parametric Tech. Corp.*, 537 F.3d 62, 68 (1st Cir. 2008) ("Pretext can be demonstrated through a showing that an employer has deviated inexplicably from one of its standard business practices."); U.S. Equal Opportunity Commission, Compliance Manual § 15-V Evaluating Employment Decisions (April 19, 2006), *available at* https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination (listing an "employer's deviation from an applicable personnel policy, or past practice" as evidence "of a discriminatory motive"). Therefore, although the *Arlington Heights* factors originated in a context where they were used to determine whether governmental actors were motivated by discriminatory intent, there is no reason why these factors are not equally applicable—and, indeed, already applied—to gauge whether a private decisionmaker acted with a discriminatory motive.

As shown by the cases above, under the *Arlington Heights* analysis, a plaintiff can allege discriminatory intent by showing that the defendant's conduct constituted a deviation from a generally applicable policy and that the background or sequence of events leading up to the decision took place within a larger context

of racial antagonism. This analysis does not require the plaintiff to point to specific instances of the defendant following the policy to favor individuals outside the plaintiff's protected group. Nor must it. Recognizing that a deviation from a generally applicable policy alone can support an inference of discriminatory intent at the pleading stage is important, as plaintiffs likely may not have access to evidence of how a policy has been enforced without discovery.

C. Deliberate Indifference To Complaints Of Race-Based Harassment May Evince Intentional Discrimination

Courts have also considered whether a defendant acts with the requisite intent by using the deliberate indifference framework. The deliberate indifference inquiry rests on whether a defendant's actions or lack thereof were "clearly unreasonable in light of known circumstances," thereby demonstrating that the defendant intended the conduct to occur. *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999). Under this framework, "the ultimate inquiry, of course, is one of discriminatory purpose on the part of the defendant himself." *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999). It is not a theory of imputed conduct or a way to avoid the discriminatory intent inquiry. Instead, liability based on deliberate indifference requires "a deliberate choice among alternatives, rather than negligence or bureaucratic inaction." *Reynolds v. Giuliani*, 506 F.3d 183, 193 (2d Cir. 2007).

The deliberate indifference theory of liability has been applied by the Supreme Court and this Court to both statutory and constitutional claims, arising in several different contexts, including civil rights statutes comparable to the FHA. For example, constitutional claims based on an inmate's conditions of confinement, or a failure to train or supervise government employees are considered under a deliberate indifference framework. *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997) (considering whether "municipal action was taken with 'deliberate indifference' as to its known or obvious consequences" in violation of a plaintiff's constitutional rights); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (considering whether "official knows of and disregards an excessive risk to inmate health or safety," and thus acts with deliberate indifference). A deliberate indifference framework is also used to analyze claims arising under Title VI, Title IX, the Americans with Disabilities Act, and the Rehabilitation Act. *DT v. Somers Cent. Sch. Dist.*, 348 F. App'x 697, 699 (2d Cir. 2009) ("In this circuit, cases arising under both Title VI and Title IX allow claims brought based on deliberate indifference."); *Garcia v. S.U.N.Y. Health Services Center of Brooklyn*, 280 F.3d 98, 115 (2d Cir. 2001) ("[P]rior to today, we have held that a plaintiff may recover money damages under either Title II of the ADA or § 504 of the Rehabilitation Act upon a showing of a statutory

violation resulting from 'deliberate indifference' to the rights secured the disabled by the acts.").

Recognizing the widespread use of deliberate indifference in civil rights contexts, the Seventh Circuit recently held that a landlord could be held liable for tenant-on-tenant harassment under the FHA based on a theory of deliberate indifference. *Wetzel*, 901 F.3d at 864. In *Wetzel*, the Seventh Circuit chose to analyze a tenant's claim for a "hostile housing environment" under the Title VII test for a hostile work environment. In doing so, the court noted 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 … the tenant is largely independent of the landlord." *Id.* at 863. Nevertheless, the court concluded that a landlord could be liable based on one tenant's harassment of another if the landlord "had actual knowledge of the severe harassment [the plaintiff] was enduring and [was] deliberately indifferent to it." *Id.* at 864. In adopting this standard, the court noted that deliberate indifference was used to assess comparable claims under Title IX, and that much of the reasoning behind adopting such a standard in the Title IX context, "applied readily to the housing

situation." *Id.* There is no sound reason for this Court to depart from the Seventh Circuit.

Moreover, the Seventh Circuit's analogy to Title IX is an apt one. Under Title IX, a plaintiff can state a claim for damages based on an educational institution's deliberate indifference to student-on-student harassment. In *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), the Supreme Court first held that a school district could be held liable for violating Title IX under a theory of deliberate indifference based on "a teacher's sexual harassment of a student." *Id*. at 285. Rather than holding the school district liable based on agency principles, however, the Court noted that a school district could only be liable for damages based on "an official decision by the recipient not to remedy the violation," finding "a rough parallel in the standard of deliberate indifference." *Id.* at 290.

Just one year later, the Court held that a school district could also be liable for damages under a theory of deliberate indifference based on student-on-student harassment. *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999). The Court again noted that this theory of liability was based on the "intentional violation of Title IX" by the school district, and not based on any theory that a student acted as an agent of the district. *Id.* However, the Court noted that some limitations to this theory necessarily applied. First, the Court

recognized that liability based on deliberate indifference only made sense "where the funding recipient has some control over the alleged harassment" because "[a] recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." *Id.* at 644. Applying this standard, the Court concluded that a school's disciplinary authority over its students meant that it could be held liable for being deliberately indifferent to student-on-student harassment that occurred at the school. *Id.* at 646. Second, the Court noted that a school need not go so far as to expelling all students accused of harassment in order to avoid liability. *Id.* at 648. Instead, the deliberate indifference theory required only that the defendant's response to alleged harassment not be "clearly unreasonable in light of the known circumstances." *Id.* Based on *Davis*, this Court has held that, to state a claim for student-on-student harassment under Title IX, a plaintiff must allege "(1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge, and (4) deliberate indifference." *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012).

Since *Davis*, this Court has "endorsed the *Davis* framework in cases of third-party harassment" in a range of cases arising "outside the scope of Title IX." *Zeno v. Pine Plains Cent. School Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012) (collecting cases arising under § 1983, § 1981, and the Equal Protection Clause, and applying the deliberate indifference standard to Title VI); *see also Saxe v. State College*

Area School Dist., 240 F.3d 200, 206 n.5 (3d Cir. 2001) (noting that while *Davis* "dealt with sexual harassment under Title IX," the "reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI and other relevant federal anti-discrimination statutes"). And across all of these contexts the logic is the same: that being deliberately indifferent to acts of discrimination can qualify as cognizable intentional discrimination.

There is no reason why housing should be treated differently. As the Supreme Court has recognized, the FHA has many parallels to other federal civil rights law. *See, e.g.*, *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (noting that [t]he cases interpreting Title VII and the ADEA provide essential background and instruction" in the Court's interpretation of the FHA). And every other civil rights statute recognizes a theory of liability based on a failure to address the discriminatory conduct of others. Even Title VII, which uses agency principles to assign liability to employers for the discriminatory conduct of their employees, allows for employers to be held liable for the discriminatory conduct of customers and other non-employees under certain circumstances. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (recognizing a cause of action for "employer liability for harassment by non-employees"). Such liability depends on whether the employer knew or "should have known, about the harassment yet failed to take

appropriate remedial action" and "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Id.* The extent of control an employer can exercise over a customer is far less than that a landlord can exercise over a tenant.[6] The right to remain free from harassment in one's home should at least be considered on equal footing with the right to remain free from harassment at one's place of employment or at school.

Accordingly, this Court should hold that a plaintiff can state a claim under the FHA when a landlord has been deliberately indifferent to tenant-on-tenant harassment.[7]

III. FRANCIS'S COMPLAINT STATES A CLAIM FOR INTENTIONAL DISCRIMINATION UNDER THE FHA

The law in this Circuit is clear that FHA claims are analyzed under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 (1973). *See, e.g.*, *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir.

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[6] "During [the tenancy] period, the landlord retains many rights to control the property." Oliveri, *supra* note 2 at 47. These rights can include "the ability to evict, to enter the unit under certain circumstances, to control who occupies the unit, to dictate whether the tenant can have pets, and to control whether the tenant can have particular items (such as waterbeds) or engage in particular activities (such as smoking) in the unit." *Id.*

[7] While a showing of deliberate indifference should be sufficient to state a claim under the FHA, this Court need not decide whether that level of intent is necessary.

2008); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir. 2002), *superseded by statute on other grounds*; *Mhany Mgmt, Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (applying *McDonnell Douglas* to a plaintiff's claim of discriminatory zoning practices).

"There is no heightened pleading requirement for civil rights complaints alleging racial animus." *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008). At the pleading stage, a plaintiff asserting a claim under the FHA need not even make out a *prima facie* case of discrimination; instead, "a plaintiff can survive a motion to dismiss if the plaintiff can allege facts that support a plausible claim that the plaintiff was [1] 'a member of a protected class,' [2] 'suffered relevant adverse treatment,' [3] 'can sustain a *minimal burden* of showing facts suggesting an inference of discriminatory motivation.'" *Palmer v. Fannie Mae*, 755 F. App'x 43, 45 (2d Cir. 2018) (quoting *Littlejohn v. City of New York,* 795 F.3d 297, 311 (2d Cir. 2015); *see also Boykin*, 521 F.3d at 215 ("[T]his Court has found [intentional discrimination] … claims sufficiently pleaded when the complaint stated simply that plaintiffs are African-Americans, described defendants' actions in detail, and alleged that defendants selected plaintiffs for maltreatment solely because of their color." (internal quotation marks omitted)). In the Title VII context, this Court held that to survive a motion to dismiss, a plaintiff "need not give plausible support to the ultimate question of whether the adverse employment action was attributable

to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation." *Littlejohn*, 795 F.3d at 311.

The Complaint plausibly alleges that KPM Defendants' failure to intervene against Endres's racial harassment of Francis was motivated by a discriminatory purpose, and thus raises the "minimal inference" of discriminatory motive required to survive a motion to dismiss. First, the Complaint alleges that KPM selectively intervened to resolve non-race-related lease violations, while ignoring race-based lease violations. Second, the Complaint alleges that KPM's failure to intervene against Endres's race-based lease violations constitutes a procedural and substantive departure from its policy of routinely enforcing lease violations and that this procedural irregularity occurred against a background of racial antagonism. Finally, the Complaint alleges that KPM was deliberately indifferent to Endres's severe and discriminatory racial harassment of Francis.

A. The Complaint Plausibly Alleges Selective Non-Enforcement Of Its Policies In Response To Francis's Complaints Of Race-Based Harassment

The Complaint adequately alleges a "minimal inference" of intentional discrimination, as is required to survive a motion to dismiss. *Littlejohn*, 795 F.3d at 311. At the motion to dismiss stage, "evidence of similarly situated comparators is not necessary," rather the district court must simply determine whether, "based on a plaintiff's allegations in the complaint, it is

plausible that a jury could ultimately determine that the comparators are similarly situated." *Rodriguez v. Town of Ramapo*, 412 F. Supp. 3d 412, 436 (S.D.N.Y. 2019). By alleging that KPM had a policy of selective enforcement against race-neutral lease violations, the Complaint must survive a motion to dismiss.

And this inquiry varies "from case to case," but the plaintiff must allege that those he maintains were similarly situated "must have been subject to the same . . . standards." *Taylor v. Seamen's Soc'y for Children*, No. 12-CV-3713, 2013 WL 6633166, at *14 (S.D.N.Y. Dec. 17, 2013). Here, Francis alleges that "KPM Defendants have intervened against *other* tenants at Kings Park Manor regarding non-race-related *violations of their leases or of the law*," but ignored Endres's race-based violations of his lease. *See* A.28 ¶ 63 (emphasis added). Accordingly, Francis has sufficiently alleged that he and the other tenants are similarly situated, having been subject to the same lease provisions. *Novick v. Vill. of Wappingers Falls, New York*, 376 F. Supp. 3d 318, 343 (S.D.N.Y. 2019). While KPM Defendants intervened in other instances, based on violations of the co-tenants' lease agreement, they refrained from enforcing this *same policy* in response to Francis's complaint. This is more than sufficient.

Moreover, KPM Defendants' actions were clearly motivated by race. Their failure to intervene in Francis's race-based complaint regarding Endres's lease violation, including by directing KPM's agent "not to get involved." KPM's

selective enforcement of non-race-based lease violations gives rise to a minimal inference that KPM's inaction was motivated by race. *See* A.24 ¶ 47; A.28 ¶ 63; *Sayyed*, 2016 WL 5817003, at *6.

B. The Complaint Plausibly Alleges A Departure From KPM's Policies Of Routinely Enforcing Lease Violations Within A Larger Context Of Racial Antagonism

The Complaint alleges that Endres's racial harassment of Francis put Endres in violation of his lease agreement with KPM and that KPM's inaction towards Endres's harassment put them at risk of violating their lease agreement with Francis. A.27-28 ¶ 61. Against these background facts, the Complaint asserts, as its theory of discrimination, that KPM failed to intervene against Endres's race-based violations of his lease—and indeed, counselled their agent "not to get involved"—while intervening against non–race-based lease violations. A.24 ¶ 47; A.28 ¶ 63.

These allegations amount to a claim that (1) KPM had a policy of intervening against tenants to address lease violations; (2) that it departed from that policy when it failed to intervene against Endres's race-based lease violation; and that (3) the background and sequence of events leading up to the landlord's idiosyncratic non-intervention were punctuated by Francis suffering severe racial harassment.

First, under *Arlington Heights*, the landlord's idiosyncratic inaction towards Endres's lease violation is a procedural departure from a policy of enforcement that raises some circumstantial evidence of race-based discrimination. *See City of Yuma*, 818 F.3d at 504; *United States v. City of Yonkers*, 96 F.3d 600, 613 (2d Cir. 1996) (noting that "liability may be premised not only on action but on a refusal to act").

Second, and for similar reasons, it is reasonable to infer that KPM's failure to intervene in Endres's harassment constitutes a "substantive departure" that further strengthens the inference of discriminatory motive. *Arlington Heights*, 429 U.S. at 267. Under the *Arlington Heights* factors, a substantive departure strengthens an inference of discriminatory motive if "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *See id*. The Complaint alleges that Endres's conduct violated the terms of his lease, and KPM's failure to act on Endres's harassment would have put it at risk of violating the terms of Francis's lease. This risk, typically salient to landlords, counselled in favor of at least *some* intervention, but KPM nevertheless repeatedly failed to take any action in response to Francis's complaints and Endres's lease violation. *See* A.26 ¶ 54; *City of Yuma*, 818 F.3d at 507 (holding that the complaint plausibly stated a claim for FHA discrimination by alleging that a city's failure to approve a zoning application when the town's planning

commission counselled in favor of approval and the application was consistent with general zoning requirements). The Complaint thus plausibly alleges that KPM's failure to intervene constitutes a procedural and substantive departure from a routine policy of intervention.

Finally, here, these irregularities give rise to an inference of discrimination because the background and sequence of events leading up to KPM Defendants' inaction were punctuated by a co-tenant's repeated and severe racial harassment of Francis. *See Macone*, 277 F.3d at 6 (noting that procedural irregularities, situated within a larger context of racial hostility, evince an inference of discriminatory intent). The Complaint alleges that Endres's lease violations were based on egregious and repeated conduct: despite death threats, three certified letters from Francis notifying KPM of the racial harassment, and Endres's arrest, KPM took no action at all and counselled their agent against intervention. A.24-25 ¶¶ 47-48. Within this larger context of racial harassment, KPM Defendants' deviation from a policy of enforcement becomes suspect. Like in *Mhany*, where intentional discrimination was based on a showing that town officials *acquiesced* to race-based citizen opposition to a housing decision, here, despite having a policy of routinely enforcing lease violations, KPM directed their agent not to intervene in Endres's racial harassment-based lease violation. *See Mhany Mgmt.*, 819 F.3d at

612. Under the familiar *Arlington Heights* framework, therefore, KPM Defendants' selective intervention plausibly alleges intentional discrimination.

C. The Complaint Plausibly Alleges Deliberate Indifference To Francis's Complaints Of Race-Based Harassment

Finally, Francis sufficiently alleged that (1) KPM Defendants exercised substantial control over the harasser, (2) Francis suffered severe and discriminatory harassment, (3) KPM Defendants' actual knowledge, and (4) deliberate indifference. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012). Accordingly, the Complaint plausibly alleges deliberate indifference.

1. KPM Defendants had substantial control

Francis has sufficiently alleged that KPM Defendants "exercise[d] substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 645.

In order to find that one party had substantial control over another such that liability based on deliberate indifference is appropriate, it is not necessary that the parties had a principal-agent relationship. Instead, one party must have "some control over the alleged harassment" and not "lack[] the authority to take remedial action." *Davis*, 526 U.S. at 644. In all landlord-tenant relationships, a landlord exercises some degree of control over a tenant. But the extent and nature of that control will depend on the specific facts of a given case. Here, Francis has sufficiently alleged that KPM Defendants had control over the harasser in the

context in which the harassment occurred. First, KPM Defendant had control over Endres pursuant to the terms of his lease. The Complaint alleges that, among other things, Endres's lease "prohibited him from engaging in objectionable conduct or behavior that interfered with the rights and comforts of other residents" and provided KPM Defendants the "authority pursuant to this lease agreement with Defendant Endres to counsel, discipline, or evict him due to his continued harassment of Mr. Francis[.]" A.27-28 ¶ 61. That authority in the lease is also accompanied by an obligation under New York law to ensure that tenants "not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety.'" *Solow v. Wellner*, 658 N.E.2d 1005, 1007 (N.Y. 1995). This includes an obligation to take action "to remedy situation of menacing co-tenants." *Regensburg v. Rzonca*, 14 Misc. 3d 1221(A) (N.Y. Dist. Ct. 2007). Thus, while KPM Defendants may not have had control over Endres in all respects, they did have control over him to the extent his actions violated his lease or interfered with the rights of other tenants. And Francis has alleged both of those circumstances in this case.

Second, KPM Defendants had control over the context in which the harassment occurred. Francis has alleged that he was harassed by Endres while in his apartment home, and in the common areas immediately outside his home. These are core areas over which KPM Defendants had control. *Cf. Davis*, 526 U.S.

at 646 (noting that harassment was actionable in part because it happened "during school hours and on school grounds"). In particular, the lease provides that all common areas "shall be under the sole jurisdiction of the Landlord" and that KPM Defendants can deny tenants' use of "[a]ll facilities and common areas … at anytime without any written notice." A.59.

While KPM Defendants may be able to show with the benefit of discovery that they attempted to, but could not control Endres, or took steps to curtail his pattern of misconduct and threats taking the allegations in the Complaint as true, Francis has sufficiently alleged that KPM Defendants had substantial control over Endres because they had "the authority to take remedial action" to address his misconduct. *Davis*, 526 U.S. at 644.

2. Endres's harassment was discriminatory and severe

The Complaint more than sufficiently alleges that Francis faced severe and pervasive race-based harassment. Francis alleged that his next-door neighbor and fellow tenant subjected him to a barrage of racial epithets and threats over the course of several months. A.19-25 ¶¶ 16-48. After experiencing this harassment, Francis complained repeatedly to the Defendants, and to the Suffolk County

Police, who eventually charged Endres with aggravated harassment. A.21-25 ¶¶ 25-48.

There also is no serious doubt that that the alleged harassment was sufficiently severe as to constitute discrimination cognizable under the FHA. In both the Title VI and IX contexts, courts consider whether harassment was "severe, pervasive, and objectively offensive." *Davis*, 526 U.S. at 650-651. This Court has recognized that the "use of the reviled epithet "nig**r," raises a question of severe harassment going beyond simple teasing and name-calling." *DiStiso v. Cook*, 691 F.3d 226, 242-243 (2d Cir. 2012). Threats of violence and menacing behavior can also support allegations that behavior constituted severe harassment. *See Zeno*, 702 F.3d at 667. *Cf. Rivera v. Rochester Genesee Regional Transp. Authority*, 743 F.3d 11, 24 (2d Cir. 2014) (noting that in the Title VII context, "[t]he use of racially offensive language is particularly likely to create a hostile work environment when, as here, it is presented in a 'physically threatening' manner").

In the Complaint, Francis alleged that "Endres threateningly approached him and called him a 'nig**r' several times" as Francis was inside his home with the door open. A.20 ¶ 20. The behavior only escalated over the course of several months, with Endres later stating, "I oughta kill you, you fucking nig**r." A.21 ¶ 30. Because of Endres's repeated use of racial epithets and threats, Francis alleged that he "feared for his personal safety and called 911," A.20 ¶ 21, and "felt

uncomfortable walking in the common areas," and "felt afraid, anxious, and unwelcome in his own home," A.20 ¶ 24. In the Complaint, Francis described in detail many disturbing encounters he had with Endres, occurring over several months. A.19 ¶ 16, A.24 ¶ 42. Endres's repeated use of "racially offensive language" in a "'physically threatening' manner," certainly qualifies as severe enough as to constitute discrimination on the basis of race. *See Rivera*, 743 F.3d at 24. Moreover, this Court should hold that harassment need not be as egregious to be actionable at home under the FHA as is actionable at work or at school. As the Eighth Circuit has recognized, the fact that a plaintiff is subjected to harassment in his home, "a place where [he] is entitled to feel safe and secure and need not flee," makes harassing conduct "even more egregious." *Quigley v. Winter*, 598 F.3d 938, 947 (8th Cir. 2010). Whatever the standard, though, Francis's allegations in the Complaint of a pattern of persistent and severe racial discrimination that the Kings Park defendants did nothing about meet that standard.

3. KPM Defendants had actual knowledge of the harassment

Francis has adequately alleged that KPM Defendants had actual notice of Endres's harassment. The Complaint states that "[o]ver a period of eight months, Mr. Francis notified Defendants Kings Park Manor, Inc. and Corrine Downing … at least four times about Defendant Endres's pervasive and severe conduct." A.17 ¶ 6. The Complaint attaches three letters Francis sent to KPM Defendants, which

all described Endres's conduct, noting that "Endres's remarks and conduct were unwelcome, based on race, and unreasonably interfered with the use and enjoyment" of Francis's home. A.22 ¶ 34, A.23 ¶ 40, A.24 ¶ 45. The Complaint noted that at least one of these letters notified KPM Defendants "of Mr. Endres's arrest for aggravated harassment and his continued use of racial and ethnic slurs," providing KPM Defendants notice of the severity and continuing nature of Endres's harassment. A.23 ¶ 38. The Complaint also specifically alleges that Defendant-Appellee Downing discussed Endres's harassment with KPM. A.24 ¶ 47. The police also reported Endres's threating conduct to KPM. A.21 ¶ 25.

4. KPM Defendants were deliberately indifferent to Endres's harassment

Finally, KPM Defendants made the deliberate choice not to address Endres's harassment. Francis has alleged a number of different facts which support an inference that KPM Defendants made "a deliberate choice among alternatives" in deciding not to address Endres's harassment, as opposed to mere "negligence or bureaucratic inaction." *Reynolds*, 506 F.3d at 193. Most notably, Francis has alleged that when Defendant-Appellee Downing discussed Endres's harassment with the owners of Kings Park, Inc., she "was told by the owners not to get involved." A.24 ¶ 47. Francis has also alleged that KPM Defendants did choose to "intervene[] against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law." A.28 ¶ 63. While comparator

evidence is not necessary to state a claim for relief under a deliberate indifference theory, evidence that a landlord was active in addressing non-race-related lease violations while at the same time instructing an employee not to address a race-related complaint, supports a strong inference that KPM Defendants' choice to ignore complaints of racial harassment was intentional, and therefore cognizable under the FHA.

It is worth noting that in order to adequately address Francis's complaints of racial discrimination so as to avoid liability under the FHA, KPM Defendants likely would not have had to evict Endres. In the Title IX context, fund recipients are not required to expel all students guilty of harassment in order to avoid liability. *See Davis*, 525 U.S. at 648. Indeed, the Supreme Court has held that liability is only appropriate "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the circumstances." *Id.* Here, according to the allegations in the Complaint, KPM Defendants not only failed to evict Endres, they failed to conduct any sort of investigation of Endres's conduct, to warn Endres about the possible consequences of his conduct, or even to acknowledge the very serious complaints made by Francis. A.21 ¶ 26, A.22 ¶ 35, A.23 ¶ 41, A.24 ¶ 46.

In considering how landlords could fulfill their obligations, other courts have found that they need only take "minimally burdensome measures [that are]

reasonable under the circumstances." *Barber v. Chang*, 151 Cal. App. 4th 1456, 1467–68 (Ct. App. 2007) (internal quotation marks omitted). These measures may include, for example, responding to a tenant's complaint of harassment; investigating the incident; warning the harassing tenant of his lease obligations; putting that tenant on notice of his lease violations and potential consequences; requesting that tenant cease and desist; inviting either tenant to relocate; and ultimately, if none of those measures worked, considering eviction. KPM Defendants had a number of resources at their disposal to address Francis's complaint without resorting to eviction. And while a range of possible responses could well have been deemed acceptable on the part of KPM Defendants, a complete failure to act—and in this case, a directive to another party not to act—in the face of clear and severe racial harassment and threats is not one of them. Because KPM did not explore *any* readily available means to address Endres's conduct, and instead commanded that its employee do nothing to respond, it ignored the foreseeable, race-motivated risks to its lawful African-American tenant, Francis. This Court should conclude that they were deliberately indifferent.

IV. FRANCIS HAS ADEQUATELY PLED A CLAIM UNDER 42 U.S.C. § 1981

Section 1981 provides, in relevant part, as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens[.]" 42

U.S.C. § 1981(a).[8] The statute defines "make and enforce contracts" broadly, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). A claim under 1981 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 make and enforce contracts. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). The only element at issue on appeal is the second—discriminatory intent; KPM did not challenge in its motion to dismiss that the complaint plausibly alleges the first and third elements.[9]

This Court has held that, under § 1981, plaintiffs may prove intent through evidence of a defendant's deliberate indifference to discrimination by third parties within their control. *See Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140-141 (2d Cir. 1999); *Hill v. City of New York*, 136 F. Supp. 3d 304, 340 (E.D.N.Y. 2015) ("[C]ourts permit § 1981 liability based on a defendant's

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[8] 42 U.S.C. § 1982 mirrors the language of 42 U.S.C. § 1981, but the former protects against discrimination with respect to the leasing of property. The two statutes have been similarly construed, *see Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-440 (1973), and therefore these arguments apply with equal force to Plaintiff's § 1982 claim.

[9] In their motion to dismiss, KPM Defendants "assum[ed] arguendo" that Mr. Francis properly stated the first and third elements. *See* Mem. in Supp. of Mot. To Dismiss 6.

deliberate indifference to discrimination by other parties within their control."). To succeed on a § 1981 deliberate indifference claim, a plaintiff must prove: (1) that the plaintiff "was in fact harassed … based on his race," (2) "that such race-based harassment was 'actually known' to the defendant" and (3) that the defendant's "response to such harassment was so 'clearly unreasonable in light of the known circumstances' as to give rise to a reasonable inference that the defendant himself intended for the harassment to occur." *DiStiso*, 691 F.3d at 240-241 (applying *Gant* to a § 1983 claim).

Francis's complaint alleges each element with the requisite specificity. First, Francis alleges that he was harassed based on his race by Endres—through racial slurs and epithets. *See* A.16-17 ¶ 4.

Second, Endres's sustained and severe harassment was actually known to KPM and Downing. In *Gant*, this Court found that there was no evidence that the defendant knew the harassment was "racial in nature." 195 F.3d at 143. By contrast, the complaint alleges that Francis sent and KPM Defendants received *three* certified letters detailing Endres's racially-motivated harassment. A.21-22 ¶¶ 32-33, 23 ¶¶ 38-40, 24 ¶¶ 43-44. Further, KPM knew of Endres's arrest for aggravated harassment. A.22-23 ¶¶ 36-41.

Finally, the complaint plausibly alleges that the response to the reported harassment was "clearly unreasonable in light of the known circumstances" as to

give rise to a reasonable inference that KPM Defendants "intended for the harassment to occur." *Gant*, 195 F.3d at 141. KPM Defendants knew that Endres had, among other threats, called Francis a "nig**r" on multiple occasions, a word this court has made clear rises to the level of "severe harassment." *See DiStiso v*, 691 F.3d at 242-243 ("Defendants do not—and cannot—dispute that such conduct, particularly use of the reviled epithet "nig**r," raises a question of severe harassment."). Despite Francis's pleas for assistance as well as police involvement, KPM Defendants refused to even investigate Francis's complaints of severe harassment, nor did they inform Endres that he violated his lease terms. A.22 ¶ 35. The inference that KPM Defendants "intended" the harassment to occur is best evidenced by KPM instructing Ms. Downing, the property manager, *not to intervene* when she asked for guidance regarding how to approach the situation. A.24 ¶ 47. In these circumstances, KPM Defendants' express instruction not to address Francis's complaints of racial harassment was clearly unreasonable.

This Court has explained that "[i]t is not necessary to prove that the defendant fully appreciated the harmful consequences of that discrimination, because deliberate indifference is not the same as action (or inaction) taken 'maliciously or sadistically for the very purpose of causing harm.'" *Gant*, 195 F.3d at 141 (internal citations omitted). Francis alleges that KPM Defendants

knew that their lack of investigation, intervention, and termination of Mr. Endres's lease would lead to the continued and sustained harassment of Francis—thereby intending for the harassment to occur. KPM Defendants have therefore violated Francis's right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" through their deliberate indifference to Endres's severe and pervasive harassment. 42 U.S.C. § 1981(b).

While *Gant* arose in a school, rather than a housing, context, there is nothing in the text of § 1981 or in the case law to suggest that a different standard should apply to a housing claim under the statute. And this Court has made clear that the deliberate indifference framework applies outside of the school context for third-party harassment. *See Zeno*, 702 F.3d at 665 ("Although the harassment in *Davis*, and the "deliberate indifference" standard outlined by the Supreme Court, arose under Title IX, we have endorsed the *Davis* framework in cases of third-party harassment outside the scope of Title IX.").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the District Court's opinion be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the order of this Court dated April 24, 2020, because it contains 13,342 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief of amicus curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 7th day of May, 2020.

/s/ Debo P. Adegbile
DEBO P. ADEGBILE

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2020, I caused the foregoing to be served on all counsel of record via the Court's CM/ECF system.

/s/ Debo P. Adegbile
DEBO P. ADEGBILE

May 7, 2020