15-1823

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
The Honorable Arthur D. Spatt, District Judge, Presiding

EN BANC REPLY BRIEF OF APPELLANT DONAHUE FRANCIS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. **The Complaint Alleges That Defendants Acted "Because of Race" When They Decided Not to Address Known Racial Harassment as They Usually Address Tenant Complaints** 6

A. *Selective Non-Enforcement of Lease Rules When Racial Harassment Is Involved Is a Form of Intentional Discrimination* 9

B. *Deliberate Indifference to Known Racial Harassment Violates the Fair Housing Act and Section 1981* 16

C. *The Complaint's Allegations Permit the Inference of Discriminatory Animus* 21

II. **Consistent with The Complaint's Plausible Allegations, New York Law Empowers and Requires a Landlord to Respond to Serious Tenant-on-Tenant Discriminatory Harassment** 25

III. **Defendants' Remaining Arguments Are Meritless** 32

A. *The Claim Here Is Readily Encompassed by The Fair Housing Act's Plain Language and Precedent* 33

B. *The Defendants' Policy-Driven Arguments Provide No Reason to Narrow the Fair Housing Act's Scope* 41

C. *Defendants' Factual Challenges to The Complaint's Allegations Are Improper on a Motion to Dismiss* 44

IV. **The District Court Erred in Dismissing Mr. Francis's Claims Under New York Law** 53

CONCLUSION 55

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7) 57

CERTIFICATE OF SERVICE 58

TABLE OF AUTHORITIES

Cases **Page(s)**

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009)..... 42

555-565 Assoc., LLC v. Kearsley,
48 Misc. 3d 1211(A), 18 N.Y.S.3d 578 (N.Y. Civ. Ct. 2015) 31

Amnesty America v. Town of West Hartford,
361 F.3d 113 (2d Cir. 2004) 16-17

Armstrong v. Archives L.L.C.,
46 A.D.3d 465 (N.Y. App. Div. 2007)..... 31

Auburn Leasing Corp. v. Burgos,
609 N.Y.S.2d 549 (N.Y. Civ. Ct. 1994) 29

Aurecchione v. N.Y. State Div. of Human Rights,
98 N.Y.2d 21 (2002)..... 54

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 26

Biondo v. Kaledia Health,
935 F.3d 68 (2d Cir. 2019) 27

Bloch v. Frischholz,
587 F.3d 771 (7th Cir. 2009) 38

Bocchini v. Gorn Mgmt. Co.,
69 Md. App. 1 (1986) 31

Boykin v. KeyCorp,
521 F.3d 202 (2d Cir. 2008) ..... *passim*

Brown v. Henderson,
257 F.3d 246 (2d Cir. 2001) 12

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998)..... 38

Byrd v. Lakeshore Hosp.,
30 F.3d 1380 (11th Cir. 1994) 10, 14

Cabrera v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994) 5, 38

Cameron v. Aurora Assocs., L.P.,
19 Misc. 3d 1112(A), 859 N.Y.S.2d 901 (N.Y. Civ. Ct. 2008) 29

Charles v. Orange County,
925 F.3d 73 (2d Cir. 2019) 44

Chertkova v. Conn. Gen. Life Ins. Co.,
92 F.3d 81 (2d Cir. 1996) 12

Chicago v. Matchmaker Real Estate Sales Ctr., Inc.,
982 F.2d 1086 (7th Cir. 1992) 19

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995)..... 40

Coleman v. Donahoe,
667 F.3d 835 (7th Cir. 2012) 12

Ctr. for Indep. of the Disabled, v. Metro. Transp. Auth.,
No. 11412, 2020 WL 2954974 (N.Y. App. Div. June 4, 2020) 54

Davis v. Monroe Cnty. Bd. of Educ.,
526 U.S. 629 (1999)..... 16, 51-52

DiStiso v. Cook,
691 F.3d 226 (2d Cir. 2012) 17, 47, 50, 52

Ewers v. Columbia Heights Realty, LLC,
44 A.D.3d 608 (N.Y. App. Div. 2007) 53

Fitzpatrick v. City of Atlanta,
2 F.3d 1112 (11th Cir. 1993) 12

Fort v. White,
530 F.2d 1113 (2d Cir. 1976) 19

Furnco Const. Corp. v. Waters,
438 U.S. 567 (1978)..... 11-12

Gant v. Wallingford Bd. of Educ.,
195 F.3d 134 (2d Cir. 1999) 16, 17, 20, 52

Hack v. President and Fellows of Yale Coll.,
237 F.3d 81 (2d Cir. 2000) 40

Hollandale Apartments & Health Club, LLC v. Bonesteel,
173 A.D.3d 55 (N.Y. App. Div. 2019) 54-55

Jbari v. District of Columbia,
304 F. Supp. 3d 201 (D.D.C. 2018)..... 14

Kazanoff v. United States,
945 F.2d 32 (2d Cir. 1991) 28

LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester,
40 F.3d 587 (2d Cir. 1994) 9

L.C. v. Lefrak Org., Inc.,
987 F. Supp. 2d 391 (S.D.N.Y. 2013) 14

Lindsay v. Yates,
578 F.3d 407 (6th Cir. 2009) 15

Littlejohn v. City of New York,
795 F.3d 297 (2d Cir. 2015) 15, 23

Marr v. Rife,
503 F.2d 735 (6th Cir. 1974) 19

McNair v. District of Columbia,
213 F. Supp. 3d 81 (D.D.C. 2016)..... 14

Menaker v. Hofstra Univ.,
935 F.3d 20 (2d Cir. 2019) 24

Meyer v. N.Y. Office of Mental Health,
No. 12-CV-6202 PKC, 2014 WL 1767818 (E.D.N.Y. May 2, 2014) 23

Mhany Mgmt., Inc. v. Cty. of Nassau,
819 F.3d 581 (2d Cir. 2016) 21

Miller v. Apartments & Homes of N.J., Inc.,
646 F.2d 101 (3d Cir. 1981) 19

Miller v. State,
62 N.Y.2d 506 (1984) 28

Murrell v. Sch. Dist. No. 1, Denver, Colo.,
186 F.3d 1238 (10th Cir. 1999) 32

Neitzke v. Williams,
490 U.S. 319 (1989) 26

Norton v. Sam's Club,
145 F.3d 114 (2d Cir. 1998) 55

O & G Industries, Inc. v. Nat'l R.R. Passenger Corp.,
537 F.3d 153 (2d Cir. 2008) 42

Oncale v. Sundowner Offshore Serv.,
523 U.S. 75 (1998) 40

Ortiz v. N.Y.C. Hous. Auth.,
198 F.3d 234 (2d Cir. 1999) 28

Papelino v. Albany Coll. of Pharm. of Union Univ.,
633 F.3d 81 (2d Cir. 2011) 51

Pa. Dep't of Corrs. v. Yeskey,
524 U.S. 206 (1998) 39-40

Phillip v. Univ. of Rochester,
316 F.3d 291 (2d Cir. 2003) 2, 23, 24, 37

Phillips v. Albanese,
302 A.D.2d 467 (2d Dep't 2003) 29

Poyck v. Bryant,
820 N.Y.S.2d 774 (N.Y. Civ. Ct. 2006) 28-29

Regensburg v. Rzonca,
14 Misc. 3d 1221(A), 836 N.Y.S.2d 489 (Dist. Ct. 2007) 29-30

Richardson v. N.Y. State Dep't of Corr. Serv.,
180 F.3d 426 (2d Cir. 1999) 46, 47-48

Sanchez v. Thompson,
252 F.R.D. 136 (E.D.N.Y. 2008)..... 22

S. Cal. Hous. Rights Ctr. v. Krug,
564 F. Supp. 2d 1138 (C.D. Cal. 2007)..... 18

Schwapp v. Town of Avon,
118 F.3d 106 (2d Cir. 1997) 45

Shapiro v. Cadman Towers, Inc.,
51 F.3d 328 (2d Cir. 1995) 40

Sherman v. Concourse Realty Corp.,
47 A.D.2d 134 (2d Dep't 1975)..... 28

State Div. of Human Rights v. Stoute,
36 A.D.3d 257 (N.Y. App. Div. 2006)..... 53, 54

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002)..... 23

Szwast v. Carlton Apartments,
102 F. Supp. 2d 777 (E.D. Mich. 2000) 19

Torres v. Pisano,
116 F.3d 625 (2d Cir. 1997) 45

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972)..... 39, 54-55

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..... 37

Vance v. Spencer Cnty. Pub. Sch. Dist.,
231 F.3d 253 (6th Cir.2000) 50

Vega v. Hempstead Union Free Sch. Dist.,
801 F.3d 72 (2d Cir. 2015) 2, 7, 22-23, 24, 26

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
29 U.S. 252 (1977) 2, 7, 21

Walsh v. N.Y.C. Hous. Auth.,
828 F.3d 70 (2d Cir. 2016) 12

Whidbee v. Garzarelli Food Specialties, Inc.,
223 F.3d 62 (2d Cir. 2000) 45

Wills v. Brown Univ.,
184 F.3d 20 (1st Cir. 1999) 50

Wetzel v. Glen St. Andrew Living Cmty., LLC,
901 F.3d 856 (7th Cir. 2018) ..... *passim*

Zahorik v. Cornell Univ.,
729 F.2d 85 (2d Cir. 1984) 51

Zarda v. Altitude Express, Inc.,
883 F.3d 100 (2d Cir. 2018) 40

Zeno v. Pine Plains Cent. Sch. Dist.,
702 F.3d 655 (2d Cir. 2012) ..... *passim*

Statutes, Rules & Other Authorities **Page(s)**

N.Y. Exec. Law § 300 53-54

N.Y. Real Prop. Law § 235-b 28

42 U.S.C. 1981(a) 11

42 U.S.C. § 3604(b) ..... *passim*

42 U.S.C. § 3617 ..... 20, 39

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' response narrows the scope of questions before this Court. Defendants concede that severe and pervasive discriminatory harassment of tenants can change the "terms and conditions" of rental housing, and thus violate 42 U.S.C. § 3604(b). And they concede it is immaterial that the harassment here occurred after Mr. Francis acquired rental housing. Declining to adopt those arguments raised by the panel dissent, the Defendants primarily argue, instead, that the complaint fails to plead they acted "because of race" when they ignored Mr. Francis's complaints of racial harassment or that they had the power and obligation to act otherwise. These arguments fail.

1. Mr. Francis pleads that Defendants deliberately refused to address known racial harassment, in contravention of their normal policies and in violation of their own lease terms and New York landlord-tenant law. Such specific factual details support a plausible allegation that Defendants' actions and inactions were "because of race" under multiple well-established doctrines, including selective prosecution, deliberate indifference, and the doctrine of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 49 U.S. 252 (1977), and its progeny. Under any of these doctrines, a plausible inference of intentional discrimination exists where, as here, a landlord deviates from its usual (and required) practices and deliberately and selectively turns a blind eye to the racial harassment suffered by an African-American tenant.

These allegations provide the Defendants more than "fair notice" of the actions that are alleged to be discriminatory, *Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)), and set out the circumstances making discrimination plausible. No more is required. This Court has made clear that a civil-rights plaintiff need only plead allegations that "give plausible support to a minimal inference of discriminatory motivation," *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (internal quotations and citation omitted), and there is "no

heightened pleading requirement for civil rights complaints." *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008).

Defendants' arguments to the contrary are premised on pleading requirements that do not exist. There is no requirement to allege the word "animus," or other such magic words, so long as the complaint's allegations plausibly imply that the challenged actions or inactions were "because of race." The refusal to act on reports of racial harassment is just as much "because of race" as the refusal to act on reports lodged by African-American tenants; in any event, because the harassment Defendants ignored *was* suffered by an African-American tenant, the distinction is immaterial here. And where, as here, it is alleged that Defendants failed to address tenant misconduct as they normally would (and as their lease and New York law require), there is no requirement that the complaint plead a specific person who *was* given the benefit of their lease terms.

2. Defendants argue that they failed to act, not because of race, but because there was nothing they could do. The complaint says otherwise, and that allegation is plausible. Endres's conduct violated his lease, giving Defendants the right to act against him as necessary to fulfill their lease obligations to Mr. Francis.

Contrary to Defendants' assertions, New York law confirms rather than casts doubt upon the complaint's allegations that they were both empowered and obligated to address this harassment. Under New York law, a landlord must

respond reasonably to tenant misconduct that threatens another's habitable environment and peaceful enjoyment of the premises. There is no exception for discriminatory harassment, any more than for smoking or excessive noise. New York law allows a landlord to evict tenants who endanger other tenants and holds landlords liable for foreseeable harm caused by failure to address such danger. And while Defendants argue they were justified in not acting once police had been notified, New York law does not recognize any such exception to a landlord's obligation to provide a safe, habitable environment. Nor should it. While law enforcement officers sometimes can play an important role in addressing harassing behavior, they cannot always protect the most vulnerable tenants (as they could not here). Not every tenant feels comfortable calling the police (and, for many communities, there is good reason to feel uncomfortable doing so). And harassing acts, while interfering with the right to quiet enjoyment (and thus remediable by a landlord) may not constitute a crime (leaving little that police can do).

Given that state-law background, it is at least plausible that, as the complaint alleges, Defendants could have and should have taken action to stop Endres's campaign of harassment against Mr. Francis.

3. Defendants' remaining arguments are meritless. While conceding that the Act's plain, broad language extends to a *landlord's* harassment of a tenant, they argue that the Act does not explicitly reference *tenant-on-tenant harassment*. This

selective call for a clear-statement rule is internally inconsistent—the Act does not explicitly reference a landlord's harassment of a tenant, either—and is directly contrary to the expansive interpretation this Court has always said is necessary to effectuate the Act's "broad legislative plan to eliminate all traces of discrimination within the housing field." *Cabrera v. Jakabovitz*, 24 F.3d 372, 390 (2d Cir. 1994). There is no call for unprecedented demand for legislative specificity here, because discriminatory harassment by neighbors frustrates the Act's core purpose: ensuring that people can live where they want, free of discrimination. It is well within the Act's historical purposes, as it is within its text, to hold a landlord liable for intentionally and selectively refusing to enforce its lease terms—and thereby allowing known discriminatory harassment to occur—"because of race."

Defendants also argue that this Court should construe the Fair Housing Act narrowly based on unsupported policy suppositions regarding the supposed bad effects of requiring landlords to act against known discriminatory harassment. But many *amici curiae* argue that public policy counsels otherwise. In any event, these are arguments better directed to Congress rather than reasons not to give the Act its most natural reading.

Finally, Defendants take issue with the complaint's allegations in a variety of ways and ask this Court to draw conclusions and inferences against the plaintiff. They ask this Court to find, for example, that the harassment Mr. Francis endured

was not sufficiently severe; that they were not on notice that they needed to do anything more about it; and that they acted reasonably in relying on the police to address it. Those are fact questions for a jury based on a full record, however, and not questions of law for this Court to decide at this early stage. Mr. Francis has pleaded sufficient factual detail to make it plausible that he can satisfy each of those elements, which is all that is required.

4. Under current New York state appellate precedent, Defendants' alleged conduct violates the New York Human Rights Law. Should this Court decide it does not violate federal law, it should certify to the New York Court of Appeals the question of whether to narrow state law accordingly. Defendants offer no reason to do otherwise. They similarly offer no rebuttal to, and thus concede, Mr. Francis's argument that the panel erred in affirming dismissal of his negligent infliction of emotional distress claim based on a misunderstanding of New York law.

ARGUMENT

I. The Complaint Alleges That Defendants Acted "Because of Race" When They Decided Not to Address Known Racial Harassment as They Usually Address Tenant Complaints

Defendants' primary argument is that Mr. Francis failed to plead that their refusal to address his complaints of racial harassment constituted intentional discrimination. This argument is meritless.

Mr. Francis pleaded that Defendants deliberately refused to address known racial harassment, in contravention of their normal policies and in violation of their own lease terms and New York landlord-tenant law. Such allegations plausibly allege that Defendants acted "because of race," 42 U.S.C. § 3604(b), in accordance with at least three strands of well-established caselaw. *See* Adegbile Br. at 16-18. These are not independent arguments or claims. They greatly overlap in relevant evidence and substantive argument, even if sometimes using different labels, and so this Court need not determine which theory "best" describes Mr. Francis's claim at this early stage of the case.

The question is simply whether Mr. Francis alleges facts making it plausible that Defendants intentionally decided not to address the harassment he endured at least in part "because of race." *See Vega*, 801 F.3d at 85 (in employment discrimination case, plaintiff need only allege facts making it plausible that race "was a motivating factor in the employment decision"). The doctrines described below—selective enforcement, deliberate indifference, *Arlington Heights*, *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973) and its progeny—are just ways to approach that same ultimate question in certain factual circumstances that regularly recur. And they all lead to the same conclusion here: The complaint sufficiently alleges that Defendants acted (and failed to act) "because of race."

Defendants' bare assertions to the contrary do not seriously grapple with any of this caselaw. They are premised, instead, on assumptions about what allegations are required to plead discriminatory intent that are not reflected in this Court's precedent. For example, Defendants' position appears to be that the complaint must specifically use the word "animus." But this Court has squarely held there is no such requirement. *See Boykin*, 521 F.3d at 215 ("Boykin is correct that she did not need to allege discriminatory animus for her disparate treatment claim to be sufficiently pleaded."). What matters is whether Mr. Francis pleads *facts* that would support such conclusory statements—and he does.

As an initial matter, Defendants argue that Mr. Francis did not plead the intentional discrimination claim described in his briefing, but instead pleaded something else that they label a "hostile housing environment" claim. Def. Br. at 17-18, 20-21. This distinction between an "intentional discrimination claim" and a "hostile housing environment claim" does not exist. Rather, it is and always has been one element of Mr. Francis's claims that Endres's harassment created a hostile housing environment, that is, that it materially changed the terms and conditions of rental housing. And contrary to Defendants' argument, Mr. Francis pleaded, and has always argued, that Defendants' conduct constituted some form

of intentional discrimination.[1] *See, e.g.*, Opening Br. of Plaintiff-Appellant, Doc. 37, at 2, 12-13, 39-44 (arguing that Defendants were deliberately indifferent to racial discrimination).

A. Selective Non-Enforcement of Lease Rules When Racial Harassment Is Involved Is a Form of Intentional Discrimination.

As Plaintiff explained in his opening brief, he pleads that Defendants selectively failed to meet their lease obligations when an African-American tenant complained of racial harassment. It is intentional discrimination for a landlord that has the duty and ability to respond to tenant misconduct, and that generally does respond to tenant complaints, to deliberately turn a blind eye to racial harassment complaints. *See* Pl. Br. at 37-43; Adegbile Br. at 18-24. This conclusion flows directly from this Court's precedents squarely holding that an entity may not selectively enforce its rules or offer its protections based on race or other protected classification. *See, e.g., LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994).

[1] To be sure, consistent with HUD's then-position and analogous Title VII caselaw, Mr. Francis at times has *also* argued that his Fair Housing Act claim (unlike his Section 1981/1982 claims) does not require a showing of intentional discrimination. But those arguments were not essential to his winning on these facts, as demonstrated by Mr. Francis's argument to the panel that he satisfied deliberate indifference requirements. *See* Doc. 37 at 43 & n.19 (arguing that Mr. Francis's allegations satisfied either standard).

Defendants largely concede this legal framework, while quibbling with details that do not matter. They do not dispute that they may not selectively ignore complaints based on the complaining tenant's race, but they argue it is perfectly lawful under the Fair Housing Act and Sections 1981 and 1982 to treat racial harassment claims differently from other tenant complaints. As they put it: "A dispute itself cannot serve as a comparator, a person or class of persons must." Def. Br. at 23. Thus, they argue, a landlord can only discriminate by reference to "*whose* complaints went unaddressed, as opposed to the nature of the complaints themselves." *Id.*

This distinction fails on its own terms. Mr. Francis, an African-American tenant, made the deliberately ignored racial harassment complaints at issue. There is no allegation any white tenant has ever complained of similar racial harassment. Given the close connection between Mr. Francis's race and the nature of his complaints, it is immaterial whether the comparison is framed in terms of who made the complaint (an African-American tenant) or its nature (racial harassment); either way, the answer is the same. An employer commits pregnancy discrimination by treating pregnancy leave requests differently from other leave requests, *see Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1382-83 (11th Cir. 1994), regardless of whether it otherwise discriminates against pregnant women. So, too, a housing provider racially discriminates by failing to address black tenants'

complaints of race discrimination as it would other complaints of tenant misconduct. "Here, the counterfactual of 'what would have happened if [Mr. Francis] had been white' yields a clear answer: He would not have been subject to the extreme racial harassment he experienced and that went unaddressed by KPM." LDF Br. at 13 (*quoting Comcast Corp. v. Nat'l Assoc. of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020)).

The ultimate question is not whether Defendants universally treat tenants differently based on race (though that certainly can be relevant evidence); it is whether they denied Mr. Francis, an African-American tenant, full benefit of the terms and conditions of rental housing "because of race." 42 U.S.C. § 3604(b); *see also* 42 U.S.C. § 1981(a) (providing in relevant part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"). Comparing the Defendants' treatment of Mr. Francis's complaints of racial harassment with their treatment of other tenant complaints is simply a means to demonstrate that causal relationship given the facts of this case and the precise discrimination alleged. Comparator doctrine, like other caselaw regarding pleading and evidentiary requirements in civil rights cases, is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"; courts should not impose on it "rigid, mechanized, or ritualistic" requirements that do not appear in the statute. *Furnco*

Const. Corp. v. Waters, 438 U.S. 567, 577 (1978); *accord Walsh v. N.Y.C. Hous. Auth.*, 828 F.3d 70, 75-76 (2d Cir. 2016); *see Coleman v. Donahoe*, 667 F.3d 835, 846-47 (7th Cir. 2012) (relevant comparator analysis is "flexible" and depends on the case); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993) ("[T]he elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances.") (brackets in original) (citation and quotation marks omitted); *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996) ("there is no unbending or rigid rule about what circumstances allow an inference of discrimination when there is an adverse employment decision").

By intentionally failing to address his racial harassment complaints—which by their nature are bound up in his race—as they would complaints about a different subject, Defendants deprived Mr. Francis of equal enjoyment of his rental terms "because of race." Just as "a woman might be abused in ways that cannot be explained without reference to her sex," *Brown v. Henderson*, 257 F.3d 246, 254 (2d Cir. 2001), Mr. Francis suffered injury that cannot be explained without reference to his race. And that establishes exactly what Defendants contend is missing from the complaint: "that race played any factor in KPM's decision not to intervene." Def. Br. at 33. Just as a landlord violates the Fair Housing Act by selectively enforcing lease terms more stringently *against* tenants of a certain race,

LatinoJustice Br. at 19, so too it discriminates by intentionally failing to *protect* an African-American tenant complaining of racial harassment as it generally protects its tenants.

Defendants also argue that Mr. Francis was required to plead, not just that Defendants generally comply with their duties to tenants reporting misconduct under their leases and New York law, but a specific instance in which they did so. Def. Br. at 8. This argument misunderstands the claim.

The discrimination alleged is not that Defendants treated Mr. Francis worse than a specific other tenant, but that Defendants refused to follow their usual policies and practices (and honor their lease obligations) with respect to the racial harassment he suffered. Thus, the relevant comparator is not a specific other tenant or incident, but Defendants' standard practices, which Defendants' own lease commitments represent as well as any specific case. Defendants assert in a conclusory manner that Mr. Francis failed to plead that they departed from their usual practices or to name the practices in question, Def. Br. at 22, but they are mistaken. The complaint alleges the contours of those policies, including the specific lease provisions that both empowered and obligated Defendants to act. *See, e.g.*, A. 58 ¶¶ 8, 12 (guaranteeing Mr. Francis the right to live in a property in "good and habitable condition" and the right to "peaceably and quietly" enjoy the premises), ¶ 6 (prohibiting tenants from engaging in objectionable conduct or

behavior interfering with rights and comforts of other residents). Thus, when Mr. Francis *also* alleges that Defendants ordinarily respond to tenant complaints in accordance with these normal (and legally mandated) policies, A. 28 ¶ 63, that simply confirms an inference already available from his other allegations.

A fact-finder may conclude that "the only logical inference to be drawn" is that the stated policy "customarily was followed"; if the defendant wishes to argue the opposite, it has the burden "to prove this unusual scenario." *Byrd*, 30 F.3d at 1383; *see, e.g., Boykin*, 521 F.3d at 214-15 (race discrimination claim adequately pleaded where plaintiff alleged her loan application was rejected in part because bank deviated from its usual eligibility requirements in her case and she was not given benefit of usual follow-up procedures for rejected applicants; no specific comparator pleaded); *L.C. v. Lefrak Org., Inc.*, 987 F. Supp. 2d 391, 401 (S.D.N.Y. 2013) (disability claim adequately pleaded where plaintiff claimed landlord required her to meet requirements that were not part of normal process); *McNair v. District of Columbia*, 213 F. Supp. 3d 81, 87 (D.D.C. 2016) (race discrimination claim adequately pleaded where plaintiff alleged that she was not given benefit of work-from-home privileges that were generally granted); *Jbari v. District of Columbia*, 304 F. Supp. 3d 201, 209 (D.D.C. 2018) (race discrimination adequately pleaded where plaintiff alleged he was not given benefit of employer's normal leave policies).

Defendants offer no response except to say, in a footnote, that two of these cases are "distinguishable from this case and do not otherwise support Francis's argument." Def. Br. at 24 n.2. They do not explain why Mr. Francis must allege their treatment of a specific other tenant, when the ultimate comparison is how they treat *all* other similarly situated tenants—a fact that is in their possession alone until discovery. *See Boykin*, 521 F.3d at 215 (how defendant bank treated other loan applicants "is information particularly within KeyBank's knowledge and control"). The purpose of alleging specific, similarly situated comparators in other cases is to create "an inference of discrimination" regarding discretionary decisions that are not inherently discriminatory, such as the decision to hire or promote one applicant and not another. *See Littlejohn v. City of New York,* 795 F.3d 297, 312 (2d Cir. 2015). Where a defendant deviates from its normal policy to disfavor an African-American tenant's complaint of racial harassment—and breaks its lease and state-law obligations in the process—such an inference is already present. That makes it unnecessary to point to a specific comparator to make out a prima facie case at summary judgment, *see Lindsay v. Yates*, 578 F.3d 407, 417-18 (6th Cir. 2009) (rejecting similar argument that specific comparator is always required), let alone at the pleading stage.

For similar reasons, Defendants (like the panel dissent) err in suggesting that, under Plaintiff's theory, Defendants' obligation to address a racial harassment

complaint arises only because of idiosyncrasies in how it addresses other tenants' complaints. Def. Br. at 8. As described more fully below, Kings Park Manor was already obligated by the terms of its lease and state law to address tenant complaints in a myriad of situations, including this one; the allegation is not that it declined to take *discretionary* action, but that it selectively chose to forego the provision of *legally mandatory* action that it promises to all tenants as part of the bundle of services entailed by the rental relationship.

B. Deliberate Indifference to Known Racial Harassment Violates the Fair Housing Act and Section 1981.

Defendants also intentionally discriminated by being deliberately indifferent to known racial harassment. Such deliberate indifference to known discriminatory conduct, by an entity that has the authority to intervene and can reasonably be expected to do so, is recognized as a form of intentional discrimination under a variety of civil rights laws—including under the Fair Housing Act and Sections 1981 and 1982. *See Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 863-64 (7th Cir. 2018); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643-44 (1999); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140-141 (2d Cir. 1999); *see also Amnesty America v. Town of West Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) ("where a policymaking official exhibits deliberate indifference to constitutional deprivations caused by subordinates, such that the official's inaction

constitutes a 'deliberate choice,' that acquiescence may 'be properly thought of as a city 'policy or custom' that is actionable under § 1983.'") (*quoting City of Canton v. Harris*, 489 U.S. at 378, 388 (1989)).

This Court has specifically held that deliberate indifference to racial harassment is a species of intentional discrimination that satisfies Section 1981's intent requirement. *See Gant*, 195 F.3d at 140-41; LDF Br. at 16; *see also DiStiso v. Cook*, 691 F.3d 226, 240 (2d Cir. 2012) (since *Gant*, it has been "clearly established" that deliberate indifference constitutes intentional discrimination for qualified immunity purposes). As the NAACP Legal Defense Fund brief comprehensively explains, *Gant* correctly applied Supreme Court precedent. LDF Br. at 17-21. It should directly control the Section 1981 and 1982 claims in this case, and Defendants provide no reason why this straightforward, well-established jurisprudence does not apply as well to the Fair Housing Act claim. Instead, they ignore this Court's deliberate indifference jurisprudence and contend, wrongly, that Section 1981 and 1982 claims always require allegations that a defendant treated a plaintiff differently than specific comparators of another race. Def. Br. at 19-20, 22. They also assert—equally wrongly—that no other Fair Housing Act cases rely on deliberate indifference to discriminatory harassment. Def. Br. at 27. But *Wetzel* did just that, and so what Defendants are asking this Court to do—without acknowledging it—is to split from the Seventh Circuit. *See* 901 F.3d 856, 863-64.

And even if this Court were the first to decide the question, that would not justify giving the Act a crabbed reading that leaves a gap in its coverage compared to other comparably worded civil rights statutes.

Put simply, Defendants get it backwards in portraying the well-worn deliberate indifference standard as a "new hybrid legal standard." Def. Br. at 28. The norm under our civil rights laws is that deliberate indifference to known intentional discrimination is itself a species of intentional discrimination. What would be unprecedented would be exempting landlords, alone, from the responsibility not to be deliberately indifferent to known civil rights violations in the environment over which they are responsible. To be sure, the extent to which a landlord can control the environment may be different from the extent to which other entities can. But those differences can be accounted for as a matter of fact within the deliberate indifference legal framework, which already governs many other diverse environments.

Nor is deliberate indifference a concept foreign to fair housing jurisprudence. While a housing provider is vicariously liable for compensatory damages for an agent's wrongdoing, deliberate indifference to that agent's wrongdoing has long been recognized as making punitive damages appropriate. That is because, when a principal has knowledge of wrongdoing and deliberately chooses not to exercise its authority to address it, it has committed its *own*

discriminatory act. *See, e.g.*, *Fort v. White*, 530 F.2d 1113, 1117 (2d Cir. 1976) (housing provider liable for punitive damages because of agent's discrimination if it "acted or failed to act to prevent known or wilfully disregarded actions of his employee"); *Marr v. Rife*, 503 F.2d 735, 744-45 (6th Cir. 1974) (instructing district court to determine, on remand, whether punitive damages were warranted: "If the District Judge . . . is persuaded that Rife was, *by action or knowledgeable inaction*, involved in the wrongdoing, he may tie him into the award for punitive damages.") (emphasis added); *Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1100-01 (7th Cir. 1992) (applying same rule and collecting cases); *accord Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101, 111 (3d Cir. 1981).[2] There is no reason why the same rule—deliberate indifference is a species of intentional discrimination—should not apply where a housing providers knows of discriminatory conduct by its tenant and deliberately chooses not to take reasonable action to prevent it.

[2] *See also S. Cal. Hous. Rights Ctr. v. Krug*, 564 F. Supp. 2d 1138, 1153 (C.D. Cal. 2007) (applying "knowledgeable inaction" rule and collecting cases); *Szwast v. Carlton Apartments*, 102 F. Supp. 2d 777, 780 (E.D. Mich. 2000) (jury instruction allowed punitive damages against property owner "when the defendants knew or should have known that the plaintiff was in danger of being harmed and that the defendant could have taken steps either to ensure that the plaintiff was not harmed or that the harm to the plaintiff was corrected but that the defendants failed to take such steps").

Defendants attempt to distinguish *Wetzel* by observing that the complaint in that case alleged that the housing provider, in addition to choosing not to respond to known discriminatory harassment by fellow tenants, also retaliated against the plaintiff for complaining. Def. Br. at 34. But those allegations formed the basis of a *separate* claim for retaliation pursuant to 42 U.S.C. § 3617. *See* 901 F.3d at 867-68. Nothing in *Wetzel* suggests a housing provider must *also* retaliate to be liable for its own deliberate indifference to discriminatory harassment under 42 U.S.C. § 3604(b). For similar reasons, Defendants err in relying on cases finding that conduct such as theirs does not make them liable under 42 U.S.C. § 3617. *See* Def. Br. at 36 (describing *Lawrence v. Courtyards at Deerwood Assoc.*, 382 F. Supp. 2d 1133 (S.D. Fl. 2004)). That is not the claim here.

What is required to allege deliberate indifference is: (1) Defendants had actual knowledge that Mr. Francis was enduring severe and discriminatory harassment; (2) Defendants had sufficient control over the environment to remedy the harassment, but instead acted in a manner that was "clearly unreasonable"; and (3) Mr. Francis suffered harm as a result of the choices Defendants made. *See Gant*, 195 F.3d at 141; *Zeno*, 702 F.3d at 665. Mr. Francis's allegations satisfy these elements at the pleading stage. *See* LDF Br. at 25-27. Defendants' arguments to the contrary either imagine non-existent requirements (such as that they witness the harassment first-hand); ask this Court to find, contrary to New York law and

their own leases, that they lacked the authority to take any action here; or improperly rely on drawing inferences against the plaintiff. *See infra* Section II.

C. The Complaint's Allegations Permit the Inference of Discriminatory Animus.

Defendants argue it is insufficient that they selectively enforced lease terms based on race and were deliberately indifferent to intentional racial discrimination; they argue Mr. Francis must *additionally* allege they acted with racial animus. Def. Br. at 13, 21, 30, 36-37. This argument is wrong for the reasons stated above, *see* LDF Br. at 16 (explaining that statutory text of Section 1981 does not require "animus"). It is also irrelevant. Mr. Francis *has* alleged specific facts supporting a plausible allegation of discriminatory animus.

For example, Mr. Francis pleads that Defendants deviated from their normal practices and contractual obligations by refusing to address his complaints. *See* A. 26-28 ¶¶ 54-63 Defendants intentionally failed to carry out their duties under state law and their own leases, with KPM specifically instructing its property manager not to act under circumstances that ordinarily would prompt action. A. 24 ¶ 47. Such otherwise unexplained deviation from normal practice, whether by a government actor, employer, or housing provider, is a well-established indicator of discriminatory animus. *See Arlington Heights,* 49 U.S. 252; *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016); Adegbile Br. at 24-32, 43.

Moreover, Defendants deviated from their normal practices in a context that was unmistakably racially charged: a white tenant harassing and threatening a black tenant, using the vilest racial epithets. And they did so in a way that obviously disadvantaged the black tenant and worked to the white tenant's advantage (as they well knew). These, too, are standard signifiers of discriminatory intent. Adegbile Br. at 25-27, 44.

This Court upheld a bench trial finding of discriminatory intent based on similar indicia in *Mhany*. There, the trial court found a town's zoning decision was influenced by discriminatory considerations, relying heavily on (1) the action's discriminatory impact based on race; (2) the process by which the town made its decision, which included abrupt and unexplained deviation from its normal procedures; and (3) the racially charged atmosphere in which the decision was made, including the use of "code words for racial animus" by residents. 819 F.3d at 606-609. To be sure, the evidence was more extensive there, befitting the procedural posture of a case that had gone through discovery and trial. But Mr. Francis has pleaded comparable indicia of discriminatory intent, such that he is entitled to develop a comparable record.

Mr. Francis's burden at this early stage of the case is not to plead facts that would make out a prima facie case of discrimination, but only to plead allegations that "give plausible support to a minimal inference of discriminatory motivation."

Vega, 801 F.3d at 84 (internal quotations and citation omitted); *see Swierkiewicz*, 534 U.S. at 510 ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."); *Boykin*, 521 F.3d at 215 ("There is no heightened pleading requirement for civil rights complaints alleging racial animus"); *Phillip,* 316 F.3d at 298-99; *see, e.g., Meyer v. N.Y. Office of Mental Health*, No. 12-CV-6202 PKC, 2014 WL 1767818, at *5 (E.D.N.Y. May 2, 2014) (it was sufficient that Plaintiff alleged "that she was not hired because of her religion and gender, and that, on information and belief, younger, non-Jewish males were hired instead"); *Sanchez v. Thompson*, 252 F.R.D. 136, 141 (E.D.N.Y. 2008) (Bianco, J.) (Fair Housing Act claim stated where "the complaint alleges that plaintiffs were from Puerto Rico, they were asked about their national origin, there was an abrupt change in defendants' intention to sell them the house, and they were treated differently because of their national origin. That is sufficient to satisfy the liberal pleading standards under Rule 8(a) and *Swierkiewicz*.").

In the employment discrimination context, this Court has found that supporting such a "minimal inference" requires no more than pleading that an employee was replaced by someone of a different race. *Littlejohn*, 795 F.3d at 313. Similarly, in the lending discrimination context, this Court found it sufficient that a plaintiff alleged she was African-American, had her loan denied, and "was treated differently from similarly situated loan applicants ... because of her race, sex, and

the location of the property in a predominantly African-American neighborhood." *Boykin*, 521 F.3d at 215 (ellipses in original). And in a case involving alleged discrimination by university police, this Court found it sufficient that "Plaintiffs allege that they are African-Americans, describe defendants' actions in detail, and allege that defendants selected them for maltreatment 'solely because of their color.'" *Phillip*, 316 F.3d at 298. It observed that, pursuant to *Swierkiewicz*, all that is required is that a complaint give a discrimination defendant "fair notice" of the actions alleged to be discriminatory. *Id.* (quoting *Swierkiewicz*, 534 U.S. at 514); *see Vega*, 801 F.3d at 84 (*Swierkiewicz* continues to supply controlling standard after *Twombly* and *Iqbal*).

Mr. Francis satisfies this standard. He pleads with great specificity the alleged events that he contends were motivated by discriminatory animus. And those events support the required "minimal inference" of discriminatory intent: Not only did a landlord deliberately choose not to investigate or intervene when an African-American tenant complained of serious harassment by a white tenant, but it deviated from its normal procedures and violated its state-law and contractual obligations in the process. This Court has said that "clear procedural irregularities in a university's response to allegations of sexual misconduct" make a sex discrimination claim plausible. *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019). The same should be true here with respect to Mr. Francis's race

discrimination allegations. Some courts have found that a landlord's failure to respond appropriately to domestic violence complaints creates the inference of sex discrimination. ACLU Br. at 26. Likewise, here, a landlord's failure to respond to a race discrimination complaint creates the obvious inference "that the landlord implicitly condones such behavior," NY Br. at 22.

II. Consistent with The Complaint's Plausible Allegations, New York Law Empowers and Requires a Landlord to Respond to Serious Tenant-on-Tenant Discriminatory Harassment

Defendants heavily rely on the contention that housing providers inherently lack the ability to control their own housing environments, regardless of whether their leases suggest they can and will exercise such control. *See, e.g.*, Def. Br. at 25 (relying on claimed "stark differences between the FHA and Title IX environments" to distinguish *Davis*). Based on that premise, Defendants argue that housing providers—unlike entities such as employers and schools—are categorically exempt from any obligation to take reasonable steps, consistent with their normal practices, to ensure a non-discriminatory environment. This claim flies in the face of the complaint's allegation that Defendants *did* have the authority and duty to address Endres's actions. And it is based on a mistaken view of New York law.

As a preliminary matter, even if Defendants' assertions regarding housing providers' control had merit—and they do not—they could not justify artificially

narrowing the plain text of the Fair Housing Act as a matter of statutory construction. A housing provider must provide even-handed access to *all* the "terms, conditions, or privileges of [] rental of a dwelling, or in the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). The allegation here is that Defendants intentionally chose not to provide Mr. Francis the benefit of certain terms and privileges of rental (such as the full habitability and quiet enjoyment of his residence) that they guarantee in their leases and provide other tenants as a matter of course. Defendants' contentions to the contrary should be adjudicated as the factual questions they really are.

To prevail, Mr. Francis must establish—and he has pleaded—that Defendants had the ability to address the harm he suffered, such that their actions and inactions caused him harm. He is entitled to the opportunity to prove those allegations, rather than having the *Defendants'* version of the truth credited at the motion to dismiss stage. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Vega*, 801 F.3d at 86. Defendants can try to establish as a matter of fact that housing providers categorically lack the authority to address tenant-on-tenant harassment, but such an argument is misplaced on a motion to dismiss.

To the extent Defendants are contending that allegations regarding their duty and authority to respond to Mr. Francis's complaints are inherently implausible, they are mistaken. *See* NYC Br. at 7-8; AARP Br. at 29-35. Defendants' own leases both obligated them to protect Mr. Francis from such harassment and empowered them to act against Endres, up to and including evicting him. It is, at the very least, plausible that Defendants could reasonably have acted in accordance with their own leases; as one *amicus curiae* aptly puts it, they have offered no support for the far-fetched claim "that a landlord categorically lacks the control necessary to remedy conduct prohibited by the plain terms of its own standard lease." NFHA Br. at 24; *see Biondo v. Kaledia Health*, 935 F.3d 68, 75 (2d Cir. 2019) (it was jury question whether hospital officials told of need for ASL interpreter had authority to order one; jury was entitled to discount denials they had such authority in light of written hospital policy saying they did).

Those lease terms simply confirm duties already provided by law. A landlord has federal-law duties to tenants facing sexual harassment and domestic violence; to comply with those requirements, they must address complaints of tenant-on-tenant harassment. *See* ACLU Br. at 26. Meanwhile, New York law already requires a landlord to take reasonable steps to prevent foreseeable harm to tenants, including criminal activity by third parties, once on notice of a specific

risk.[3] *See* AARP Br. at 26-28; LatinoJustice Br. at 27; NFHA Br. at 17-23; *see, e.g., Ortiz v. N.Y.C. Hous. Auth.*, 198 F.3d 234 (2d Cir. 1999) (table decision) (landlord liable for rape of tenant; it was required to take precautionary measures once informed of foreseeable danger); *Miller v. State*, 62 N.Y.2d 506, 513-14 (1984) (duty to lock dormitory doors once informed of likelihood of criminal intrusions); *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134, 139 (2d Dep't 1975) (landlord liable for injury caused by intruder when it was aware that buzzer security system was broken and failed to fix it); *compare Kazanoff v. United States*, 945 F.2d 32, 38-39 (2d Cir. 1991) (landlord not liable for murder of tenant where it had no prior notice of heightened risk).

Similarly, as the District Court found, a landlord fails to provide the habitable environment it warrants to tenants when it fails to respond reasonably to another tenant's harmful behavior, including where such misconduct causes exposure to second-hand smoke, excessive noise and odors, and water overflow. *See* NY Br. at 13-14; N.Y. Real Prop. Law § 235-b(1) (landlord impliedly warrants that "occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety"); *see,*

[3] While the briefing in this case has largely discussed New York law, since that defines the Defendants' state-law obligations here, there is no reason to think other states impose substantially different obligations on landlords. *See* LDF Br. at 23-24 (citing caselaw from other states as well as Restatement authority); AARP Br. at 24-25 (almost all states have some version of warrant of habitability law).

e.g., *Poyck v. Bryant*, 13 Misc. 3d 699, 705 (N.Y. Civ. Ct. 2006) (rejecting landlord argument that he lacked sufficient control over neighbor's smoking to be held responsible where landlord "failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition"). That is as true when the tenant misconduct consists of actual or threatened violence as it is for excessive noise complaints. *See Auburn Leasing Corp v. Burgos*, 160 Misc. 2d 374, 376-77 (N.Y. Civ. Ct. 1994) (landlord liable when steps it took "[were] too little and too late to protect the tenant who became the target of her drug dealing cotenant.").

This duty necessarily implies that a landlord has some ability to investigate and address reports of particularly noxious behavior, even if it lacks day-to-day dealings with lease-abiding tenants. Caselaw confirms that a landlord can act against a tenant who severely harasses fellow tenants, including evicting him if necessary. *See, e.g.*, *Phillips v. Albanese*, 302 A.D.2d 467, 468 (2d Dep't 2003). And a landlord cannot abdicate this duty in the case of actual or threatened violence by requiring tenants to have the police handle harassment by other tenants. *See Cameron v. Aurora Assocs., L.P.*, 19 Misc. 3d 1112(A), 859 N.Y.S.2d 901 (N.Y. Civ. Ct. 2008) ("the provisions in the lease which require that tenants call the police and submit to mediation do not relieve defendant of liability for failing to take appropriate action where the relationship between roommates becomes volatile"); *Regensburg v. Rzonca*, 14 Misc. 3d 1221(A), 836 N.Y.S.2d

489 (Dist. Ct. 2007) (landlord violated warrant of habitability by instructing tenants to call police rather than address harassing behavior).

It is for good reason that New York law does not recognize the "call the police instead" exception to a landlord's duty to ensure a habitable environment that Defendants imagine. Law enforcement is ill-suited to address harassment that is serious but may not (yet) be criminal, while many communities—often for good reason—distrust law enforcement or otherwise may be hesitant to involve it. *See* NYC Br. at 11-13; LatinoJustice Br. at 27-29; PVA Br. at 18-22. Indeed, as New York City explains, it is better for both the accusing tenant and the accused if landlords "who generally know their buildings well and can take a measured approach to conflict between tenants," are held to their responsibility to address harassment like any other condition that interferes with the quiet enjoyment of residency. NYC Br. at 3.

Defendants nonetheless suggest they have no means to investigate tenant complaints about fellow tenants, determine whether they are well-founded, and act on them. *See* Def. Br. at 50 (arguing that it would have been "practically unachievable" for it to corroborate Mr. Francis's complaints to evict Endres). This claim not only contradicts the complaint's allegation, it flies in the face of common sense and lived experience, since landlords do so all the time. *See* AARP Br. at 29-34 (describing tools landlords have to address tenant misconduct); ACLU Br. at

24-25 (same, and describing preemptive steps landlord can take to prevent tenant misconduct from occurring in the first place); *see, e.g.*, *555-565 Assoc., LLC v. Kearsley*, 48 Misc. 3d 1211(A), 18 N.Y.S.3d 578 (N.Y. Civ. Ct. 2015) (upon receiving tenant complaint that another tenant was smoking and causing second-hand smoke in neighboring apartment, superintendent went to apartment to investigate, interviewed other residents, and issued letters to all residents reminding them of lease obligations). Since Endres's conduct violated his lease terms, it is at least plausible that Defendants could have done something to enforce those terms, whether through eviction or lesser measure. *See Bocchini v. Gorn Mgmt. Co.*, 69 Md. App. 1, 12 (1986) ("The insertion in a lease of a restriction against excessive noise or other offensive conduct is precisely for the purpose of enabling the landlord to control that conduct."); *Armstrong v. Archives L.L.C.*, 46 A.D.3d 465, 466 (N.Y. App. Div. 2007) (in response to noise complaints, landlord "call[ed] the offending tenant" and explored complaining tenant's "relocation options to another apartment in the building").

The point is not that landlords can and must address all reported tenant misconduct, or even that the discussion above definitively shows that Defendants had the ability and duty to address the conduct reported to it here. Defendants' ability to address Endres's misconduct is ultimately a question of fact rather than law that cannot be fully answered on a motion to dismiss. *See* NFHA Br. at 21-23.

It is enough that Mr. Francis's allegations that Defendants were reasonably capable of addressing Mr. Endres's conduct—and that they chose not to do so because of race— are plausible as a matter of New York law. *See, e.g.*, *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248 (10th Cir. 1999) ("At this stage in the proceedings we must accept as true the allegation that Ms. Jones's teachers were invested with the authority to halt Mr. Doe's known sexually assaultive behavior. If they were, their alleged response quite plainly amounts to deliberate indifference.").

III. Defendants' Remaining Arguments Are Meritless

Defendants offer several other arguments, which can be summarized as falling into three categories

First, while not disputing that the Fair Housing Act's broad text bars the discriminatory harassment inflicted on Mr. Francis here—and, indeed, conceding that it bars a landlord from inflicting such harassment directly—Defendants ask this Court to impose a clear-statement rule to limit the Act's protections. They argue that, because the Act does not specifically mention tenant-on-tenant harassment, a landlord cannot be liable for its discriminatory failure to address such harassment, even if the purpose and effect of that failure is exactly the same as if the landlord had committed the harassment itself. This is not how the Supreme Court or this Court have ever construed the Fair Housing Act, nor would it be

sensible to start now. The Act is written in broad terms rather than spelling out all its specific applications.

Second, the Defendants argue that, for policy reasons, this Court should not apply the Fair Housing Act as written here. This is not a basis for restricting the reach of the Act's plain language. Moreover, Defendants are wrong on the policy. Providing an incentive for landlords to address discriminatory harassment—rather than an incentive for them to ignore it—is fully consistent with the Act's policy objectives.

Finally, Defendants ask this Court to ignore the complaint's well-pleaded allegations in favor of their side of the story (not reflected in the complaint), while drawing inferences in their favor. They call into question the severity of the harassment Mr. Francis endured, the adequacy of the notice they received of it, and the reasonableness of any response they could have offered. None of these arguments can be appropriately resolved on a motion to dismiss.

A. The Claim Here Is Readily Encompassed by The Fair Housing Act's Plain Language and Precedent.

As Mr. Francis argued in his opening brief, this claim is readily encompassed by the Fair Housing Act's text: "because of race," a landlord chose not to provide an African-American tenant the same lease guarantees (of a habitable environment and the quiet enjoyment of housing) that it generally provides other tenants, thus discriminating "in the terms, conditions, or privileges"

of rental housing and the "provision of services" associated with it. 42 U.S.C. § 3604(b). That textual conclusion is confirmed by the Act's broad purposes; precedent construing it; and precedent (including from the Supreme Court) construing analogous civil rights statutes. To hold categorically that landlords *never* are liable under the Act for failure to address tenant-on-tenant discrimination, even where (as alleged here) that decision was at least in part "because of race," would dramatically depart from how this Court and the Supreme Court have long construed the Fair Housing Act and analogous civil rights statutes.

Defendants concede virtually all this ground. They do not dispute (nor could they) that nothing in the Fair Housing Act's text, legislative history, or decades of precedent distinguishes it from analogous civil rights statutes under which claims such as these are well-established. Under those laws—including Title VII, Title IX, the Americans with Disabilities Act, and the Civil Rights Act of 1866—an entity with the requisite control over the environment is liable, under some circumstances, for failing to respond reasonably to known, severe discriminatory harassment.[4]

[4] There may be some question as to *which* of those laws is most analogous, *see Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 863-64 (7th Cir. 2018) (electing to apply Title IX standards rather than Title VII standards in Fair Housing Act case), and there may be factual questions as to how these legal principles translate to housing environments. But there is no dispute that *every* analogous civil rights law would, at a minimum, provide a cause of action against an entity that intentionally fails to address known discriminatory harassment in the

Defendants specifically concede, as they must, that severe and pervasive harassment of tenants can change the terms and conditions of rental housing and thus violate 42 U.S.C. § 3604(b). Thus, they concede that "a landlord who actively subjects a tenant to racial harassment may be liable under the FHA." Def. Br. at 14; *accord id.* at 33. That is a critical concession. As the United States explains, Section 3604(b) "does not specify a class of potential defendants; instead, it is drafted only in terms of the prohibited conduct." United States Br. at 2. There is, therefore, no controversy that Mr. Francis was subjected to conduct that violates Section 3604(b), leaving only the question of the circumstances under which a landlord can be liable for its role in allowing such conduct to occur.

Relatedly, Defendants no longer argue that it matters that the harassment here occurred after Mr. Francis acquired rental property. That is because no such

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environment it is charged with controlling in a manner consistent with its usual duties and practices.

Defendants spend considerable time arguing that this Court should not adopt standards for failing to address discriminatory harassment developed under Title VII caselaw and adopted in HUD regulations. Def. Br. at 38-47, 52-54. But because Mr. Francis pleads facts that plausibly allege some form of intentional discrimination, concerns about allowing liability on a lesser showing are irrelevant. *See* United States Br. at 11-12 (observing that Mr. Francis does not rely on the HUD Rule as providing the legal standard applicable in this case, making it irrelevant); NYC Br. at 3-4 (legal theory advanced here "strikes an appropriate balance between protecting tenants from discriminatory harassment and imposing a burden on landlords that does not exceed their practical abilities under the circumstances"); *id.* at 13-15 (policy concerns have been to more expansive liability contemplated by HUD Rule).

argument can be made consistent with the Act's plain language. As Mr. Francis explained in his opening brief, the text of 3604(b) ensures non-discrimination in *all* the terms and conditions of the ongoing rental relationship, with no temporal limitation. *See* Pl. Br. at 23-28. The United States agrees that "Section 3604(b) contains no temporal limitation and its language otherwise refers to continuing rights beyond the point of acquisition." United States Br. at 10. It explains that Section 3604(b)'s protections extend "to ongoing relationships that post-date the sale or rental of a dwelling." *Id.* This understanding of Section 3604(b)'s scope not only is textually compelled, but is critical for the Fair Housing Act to effectively stop sexual harassment as well as racial harassment in housing. *Id.* at 10-11. Accordingly, the United States explains, wherever the outer boundary of conduct covered by 3604(b) may be, this case does not approach it. *Id.* at 19-20. Other *amici* agree. *See* Adegbile Br. at 5-16; NY Br. at 5-10; Lawyers' Committee Br. at 4-7; NFHA Br. at 8-11.

Given the considerable confusion this issue has introduced to this case and others, this Court should clarify that no temporal limit on the scope of Section 3604(b) bars claims such as these.

Finally, Defendants concede it is immaterial to Fair Housing Act analysis whether the state-law duties they owed to Mr. Francis sound in tort, contract, or both. Def. Br. at 29 n.3. They thus decline to endorse the panel dissent's limitation

of the Act's protections to securing those terms and conditions of rental housing that sound in tort, and for good reason. As this Court has found with respect to Section 1981: "Because both contracts and torts are areas of particular state concern, there is no persuasive reason why racially motivated torts that deprive a plaintiff of the equal benefit of laws or proceedings for the security of persons and property should be outside the ambit of federal authority while racially motivated breaches of contract are not." *Phillip*, 316 F.3d at 297-98. The same reasoning applies with respect to Fair Housing Act claims. *See* NFHA Br. at 25-26. And because "we follow the principle of party presentation," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), this Court should not adopt arguments that no party (or any of the many *amici curiae*) endorses.

Defendants thus are left with the half-hearted argument that, even if the Act's plain language readily encompasses this claim, this Court should apply some form of clear-statement rule to narrow the Act's coverage.

As they put it, the Fair Housing Act does not explicitly "reference[] tenant-on-tenant harassment," and therefore a landlord cannot be held liable for failing to address it. Def. Br. at 31. But the same could be said with respect to analogous claims under Section 1981, Title VII, Title IX, and the ADA/Section 504—and, for that matter, for any number of other claims under the Fair Housing Act itself that courts have properly recognized as encompassed by the Act's broadly phrased

textual provisions and weeping purposes even if not specifically enumerated. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (observing that terms "quid pro quo" and "hostile work environment" "do not appear in the statutory text" of Title VII); *Bloch v. Frischholz*, 587 F.3d 771, 777 (7th Cir. 2009) (en banc) ("[C]ourts have construed the phrase 'otherwise make unavailable or deny' in subsection (a) to encompass mortgage 'redlining,' insurance redlining, racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units which directly affect the availability of housing to minorities."). Indeed, Defendants cannot square their argument with their concession that the Fair Housing Act bars landlords from discriminatory harassment of tenants—an action that is no more specified by the Act's text.

Like the other major civil rights laws, the Fair Housing Act is written in broad terms rather than spelling out all its specific applications. Imposing a clear-statement rule on it would be inconsistent with the "broad legislative plan to eliminate all traces of discrimination within the housing field." *Cabrera,* 24 F.3d at 390.

That is particularly true here, because a landlord's refusal to address racial discrimination complaints like other tenant complaints frustrates the Act's core purpose: ensuring that people can live where they want, free of discrimination. As the Congress that wrote the Fair Housing Act well knew, discriminatory

harassment by neighbors can enforce segregation just as surely as a landlord's refusal to rent. It sends the message that tenants of a certain color (or other protected class) are not welcome, as surely as if the landlord announced it as an official policy. *See* AARP Br. at 2-3, 8-10; LatinoJustice Br. at 3-4. Accordingly, Congress specifically barred neighbors and others who are not housing providers from interfering with fair housing rights. *See* 42 U.S.C. § 3617. It is unlikely that Congress—which was well aware of the extent to which neighbor harassment could frustrate integration—intended to permit landlords that have the ability to address such harassment and ordinarily address tenant complaints to selectively turn a blind eye when race or other protected class is involved. *See* LatinoJustice Br. at 5-8, 14. The Fair Housing Act cannot fulfill its sweeping purpose of creating "truly integrated and balanced living patterns," *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (Statement of Sen. Mondale)), if landlords are categorically free to ignore such harassment, even when they know of it and are fully capable of addressing it.

In any event, it is irrelevant whether Congress specifically contemplated landlord liability for failing to address tenant racial harassment so long as the Act's broad statutory language covers it. "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It

demonstrates breadth."[5] *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998). As Justice Scalia wrote for a unanimous Court in finding that Title VII permitted a claim for same-sex sexual harassment, even if Congress was unlikely to have anticipated that application of the law in 1964: "We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. . . . [I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 79-80 (1998). Similarly, as this Court has stated with respect to Title VII: "[B]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018) (en banc). Just so with respect to the Fair Housing Act. Judges

[5] Even if the Act's text were ambiguous as applied here, there is no precedent for importing the rule of lenity—a rule based on the need to protect criminal defendants—to narrow the scope of a civil discrimination claim under the Fair Housing act. *See* New Civil Liberties Alliance Br. at 22-23. The Supreme Court and this Court have repeatedly said the opposite: The Act must be given "generous construction" to ensure that its broad purposes can be achieved. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Hack v. President and Fellows of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995).

do not rewrite the Act by applying it to circumstances encompassed by its broad text but not specifically enumerated; they rewrite the Act by refusing to do.

B. The Defendants' Policy-Driven Arguments Provide No Reason to Narrow the Fair Housing Act's Scope.

Defendants argue that, for policy reasons, this Court should decline to give the Fair Housing Act its customary broad reading as applied to landlord refusal to address discriminatory harassment. These arguments are not properly directed at this Court, and they are mistaken in any event.

First, Defendants argue that public housing authorities would suffer if required to act against tenants who seriously harass other tenants. Def. Br. at 16, 54-58. But Defendants are not a public housing authority. Kings Park Manor is a commercial housing provider offering market-rent housing, and so this case does not present any such concerns.[6] NFHA Br. at 27-28.

Even if the issue were presented, Defendants offer no supporting evidence for their argument. New York City, which has a much greater interest in the health of public housing authorities, says Defendants are mistaken. NYC Br. at 14-15. It observes that, while some public housing authorities expressed concerns that HUD's regulation would impose on them unrealistic duties to monitor tenant

[6] This Court need not decide whether an actual public housing authority could advance this argument as a matter of fact, *i.e.*, as a reason why it would not be reasonable for a public housing authority (as opposed to a private landlord) to take further action under the circumstances of a particular case.

misconduct, none of those concerns are implicated by holding Defendants liable in a situation where they had actual knowledge of discriminatory conduct and deliberately chose to do nothing. This Court lacks the record to adjudicate this argument, and it cannot justify narrowing the Fair Housing Act's scope as a matter of statutory interpretation. It is not this Court's role to impose limits on a statute's coverage that Congress did not see fit to impose. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009); *O & G Industries, Inc. v. Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 161 (2d Cir. 2008).

Second, Defendants argue that private landlords, if potentially liable for failing to act against a harassing tenant, will unjustly evict people accused of harassment. Def. Br. at 55-56. This argument, too, goes unsupported with evidence. It is difficult to square with the reality that landlords already have the obligation to address such harassment. *See* NY Br. at 3-4 & n.3.

Moreover, a landlord's failure to evict could not constitute deliberate indifference or any other form of intentional discrimination unless the decision not to evict was "clearly unreasonable in light of the known circumstances." *Zeno*, 702 F.3d at 666 (quoting *Davis*, 526 U.S. at 648). That standard does not permit second-guessing landlords' choice among reasonable options; it merely provides that landlords cannot wash their hands of the matter entirely when it is obvious that action should be taken. As explained by New York City—itself the owner of

residential buildings—this is a deferential standard that does not risk "landlords [] unreasonably held liable for matters beyond their control." NYC Br. at 3.

To the extent this Court appropriately considers the incentive structure created by its ruling, it would be far more troubling to hold that federal civil rights law has nothing to say about a landlord intentionally looking the other way rather than addressing serious racial harassment. As these facts demonstrate, although state law *already* requires landlords to address conduct as egregious as Endres's here, liability under state law alone may fail to motivate them to do so.

Discriminatory harassment in housing is an enormous problem across multiple protected classes. *See* ACLU Br. at 6-9 (describing sexual harassment in housing); AARP Br. at 13-21 (describing harassment of people with disabilities, the elderly, and LGBT people); LatinoJustice Br. at 21 (describing white nationalist violence in Suffolk County directed against Latino immigrants); PVA Br. at 12-18 (recounting incidents of harassment of people with disabilities). Disturbingly, it appears to be on the rise in recent years. NFHA Br. at 14-16 (collecting statistics and describing particular incidents). It chronically goes unreported, *see* ACLU Br. at 9-11, a problem that will only worsen if this Court holds that landlords have no federal-law duty to respond to those reports that are made. And it has a devastating effect on vulnerable tenants, who are made to suffer discriminatory conduct at their own doorstep, with nowhere to go.

If potential Fair Housing Act liability spurs landlords to act lawfully under circumstances such as this one, rather than put their heads in the sand when told of serious racial harassment, that is exactly the incentive structure the Act *should* create. *See* NYC Br. at 7. And, given how plainly the Fair Housing Act (as well as Section 1981 and 1982) reaches this matter textually, arguments that the Act's facially broad coverage should be narrowed because of such policy concerns are properly directed at Congress.

C. Defendants' Factual Challenges to The Complaint's Allegations Are Improper on a Motion to Dismiss.

In a variety of ways, Defendants challenge the complaint's allegations. They take issue with the facts Mr. Francis pleads with respect to the severity of the harassment he endured, the reasonableness of their response, and the degree to which their actions and inactions caused harm. Whatever the ultimate merits of these contentions, they cannot be adjudicated on a motion to dismiss, when the complaint's allegations must be accepted as true and all available inferences granted to the plaintiff. *See, e.g.*, *Charles v. Orange County*, 925 F.3d 73, 89 (2d Cir. 2019) ("Defendants have raised significant factual issues" about whether they were deliberately indifferent to medical needs but such issues could only be adjudicated on remand after discovery).

Specifically, the Defendants contend:

The harassment Mr. Francis endured was not sufficiently severe and pervasive to compromise his enjoyment of the terms and conditions of his lease. Def. Br. at 2, 15, 46-48. Defendants argue this must be so because Mr. Francis renewed his lease shortly after the harassment began, Def. Br. at 2, 15, and because he was not entirely denied use of the premises, *id.* at 48. But constructive eviction is not required to deny equal enjoyment of rental housing's terms. As this Court has found in employment, there is no requirement that harassment "render[ed] the plaintiffs' jobs 'unendurable' or 'intolerable.' The bar is not set so high." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000); *see* ACLU Br. at 22. Rather, the test is whether "the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse." *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997). So, too, in housing: the question is whether the conditions of Mr. Francis's rental were "altered for the worse," not whether a reasonable person would find them completely "unendurable."

Defendants may mean to suggest that the harassment must not have been so severe if Mr. Francis did not vacate. Perhaps they are free to so argue to a jury, but the complaint does not require that inference. It is at least plausible that, when renewing his lease, Mr. Francis hoped the harassment would end soon (or that the Defendants would address it). Leaving one's home abruptly, without another home

lined up to replace it, is not a step anyone takes lightly, and particularly not those with few resources. *See* AARP Br. at 22-23. Defendants similarly err in asking this Court to draw an inference against Mr. Francis from the fact that he renewed his lease in February 2013—*after* Endres's lease was not renewed. Def. Br. at 3. There is no obvious reason why Mr. Francis *would* leave with Endres gone—and, in any event, this whole line of argumentation is improper on a motion to dismiss.

Defendants also assert that Mr. Francis was not subjected to enough incidents of abusive conduct to make his housing environment hostile. Def. Br. at 48-49. But this Court has made clear there is no "threshold magic number of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 439 (2d Cir.1999) (internal quotation marks omitted). Moreover, "the appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable." *Id.* (internal quotation marks omitted). For similar reasons, Defendants err in trying to distinguish *Wetzel* on the grounds that the abuse alleged in that case was worse than that alleged here. Def. Br. at 33-34. Whether that is true is irrelevant, because *Wetzel* does not purport to set the lower bound for what harassment is sufficiently severe and pervasive.

It would be particularly improper—and unprecedented—to find that Mr. Francis failed to plead harassment of the requisite severity where he alleges that he was repeatedly subjected to threats that were accompanied by the use of the word "nigger." This Court has specifically held that the "use of the reviled epithet 'nigger'" generally "raises a question of severe harassment." *DiStiso*, 691 F.3d at 242-43. It has observed multiple times that "perhaps 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." *Id.* (quoting *Richardson*, 180 F.3d at 439 (internal quotations and brackets omitted). Likewise, "in the school context, a teacher's indifference to children's use of this particular epithet to belittle a child may well be found" to create an unequal educational environment. *Id.*

At the very least, at this early stage of the case, such allegations make it plausible that Mr. Francis was subjected to severe and pervasive harassment. Defendants point to no case dismissing a complaint with such allegations on these grounds, nor is Mr. Francis aware of any.[7]

[7] This Court has sometimes stated that, for "racist comments" to create a hostile work environment, "there must be more than a few isolated incidents ... there must be a steady barrage of opprobrious racial comments." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (internal quotations omitted). But it has also stated that this question is particularly fact-specific and "especially well-suited for jury determination," such that "summary judgment may be granted only when reasonable minds could not differ on the issue." *Richardson v. N.Y. State Dep't of*

It was Mr. Francis's fault that Endres harassed him. Def. Br. at 1, 5. Even if true, this would be irrelevant to Defendants' liability. A tenant need not be faultless to be entitled to even-handed enforcement of lease protections. But in any event, the complaint need not be read in this manner. Neither the complaint, nor any of the supporting documents, states that Mr. Francis provoked Endres.

Defendants were never on notice they needed to do anything because Mr. Francis did not begin writing to them until two months after the harassment started and did not ask them to take any specific action. Def. Br. at 2, 3-4, 48. But Defendants knew of Endres's harassing conduct, and that the police had been called as a result, before Mr. Francis began writing to them. A. 21 ¶ 25. It is their *knowledge* of the conduct that matters, not the formalities of a written letter or the request for specific action in response. And it is, at the very least, a permissible inference that the very point of Mr. Francis writing to the Defendants was that he wanted some action taken. While the Defendants are free to argue to a jury that Mr. Francis "specifically chose the remedy of police action," those words do not appear in his letters or the complaint. There is no basis for drawing that inference against

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Corr. Serv., 180 F.3d 426, 437 (2d Cir. 1999) (internal quotation marks and citation omitted). Here, at the motion to dismiss stage, the question is not whether the complaint contains sufficient evidence to survive summary judgment, but whether it contains enough detail to make it plausible that Mr. Francis can ultimately establish the existence of a hostile housing environment. The complaint here surely does.

the plaintiff on a motion to dismiss. *See Zeno*, 702 F.3d at 671 ("despite the District's present argument that it did not know its responses were inadequate or ineffective, a jury reasonably could have found that the District ignored the many signals that greater, more directed action was needed").

It was reasonable for Defendants to assume the police would take care of the issue. Def. Br. at 5, 15, 26, 49. As explained above, while police involvement may sometimes be appropriate in cases of discriminatory harassment, New York law does not provide that it is categorically reasonable or acceptable for landlords to assume that police involvement (or the possibility of it) ends their responsibilities.

The facts of this case, far from supporting Defendants' position, illustrate how problematic it is for a landlord to rely on the police to ensure its even-handed compliance with lease and state-law obligations. Mr. Francis sought assistance from the police in March 2012, A. 20 ¶ 21, and May 2012, A. 21 ¶ 31, but there was little the police could do, possessing only the blunt power to arrest and detain. In August 2012, the police arrested and charged Endres, A. 22-23 ¶¶ 36-37, but once freed he continued to harass Mr. Francis, A. 24 ¶ 42. It is hard to square the argument that Defendants reasonably relied on the police to assist Mr. Francis with the reality that they did little that caused the harassment to stop.

Ultimately, this argument, too, cannot be adjudicated on a motion to dismiss. Indeed, Defendants' argument depends on "facts" that are not in the complaint,

such as that they genuinely and reasonably believed a police investigation would resolve the problem. Def. Br. at 15, 27.

Based on the complaint's actual allegations, there is no basis for ruling as a matter of law that Defendants' "response"—that is, the decision to do nothing at all—was reasonable. "Responses that are not reasonably calculated to end harassment are inadequate." *Zeno*, 702 F.3d at 669. And where an entity "has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, [it] has failed to act reasonably in light of the known circumstances." *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000). That is precisely what Mr. Francis has alleged here: Defendants decided to do nothing, and then continued to do nothing, although they knew the harassment continued. *See Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) ("evidence of an inadequate response is pertinent to show fault and causation where the plaintiff is claiming that she was harassed or continued to be harassed after the inadequate response"); *DiStiso*, 691 F.3d at 245 ("defendants do not even argue that a teacher could think that a reasonable response to repeated complaints of repeated student racial name-calling was to do nothing") (emphasis omitted).

Defendants only had Mr. Francis's own account of the story, so they could not have acted. Def. Br. at 3. But that is only because Defendants affirmatively chose not to gather further evidence. They did not talk to Mr. Endres; they did not

talk to other neighbors. A defendant's intentional failure to make the record necessary to evaluate its actions is generally considered an *indicator* of discrimination, not an *excuse* for it. *See, e.g., Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) ("Departures from procedural regularity, such as a failure to collect all available evidence, can raise a question as to the good faith of the process where the departure may reasonably affect the decision."); *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 90 (2d Cir. 2011) (reasonable jury could find deliberate indifference where official was told of sexual advances and "did nothing to investigate"). Where, as here, a defendant has intentionally chosen not to investigate, a jury is entitled to draw inferences against it as to what it might have found and the actions it would have been required to take in response. *See Zeno*, 702 F.3d at 671 ("although Stoorvogel, the school officer charged with investigating Title VI complaints, knew that Anthony was being harassed, she elected not to investigate, which might have prompted an earlier and adjusted administrative response").

Relatedly, Defendants argue they did not have "actual knowledge" of the harassment because they did not witness it first-hand. Def. Br. at 26. That is not the standard, or even the norm. Courts generally consider an entity to have "actual knowledge" of harassment when it is reported in a manner calculated to put responsible officials on notice. *See, e.g.*, *Davis*, 526 U.S. at 653 (actual knowledge

pleaded where "the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal"); *Gant*, 195 F.3d at 141 (teacher did not witness racial harassment herself, and so "we must consider the question of what information Mrs. Candido learned from others"); *DiStiso*, 691 F.3d at 243-44 (school officials did not witness racial harassment themselves, but testimony that parents informed them of it created triable issue of their actual knowledge).

Defendants lacked the ability to do anything about Endres's conduct. Defendants assert that they could not have evicted Endres with the information they had and that they had no other options to ameliorate the severe and sustained racial harassment that Mr. Francis endured. Def. Br. at 50. Once again, this argument cannot be adjudicated on a motion to dismiss. The complaint alleges that Defendants had tools available to them to address Endres's conduct, *see, e.g.*, A. 22 ¶ 35, A. 27-28 ¶ 61, and that allegation is at least plausible in light of Defendants' standard lease and New York law. *See* Point II, *supra*.

Defendants miss the point in arguing that they have less control over their tenants than employers do over employees. That is not the standard. Indeed, employers must respond when their employees are harassed by people over whom they have less formal control, including customers and residents. *See* Adegbile Br. at 38; ACLU Br. at 19-20. Defendants thus would have a clearly established duty

to respond reasonably if Endres had been harassing their *employee*. The question in that case, as in this one, would be whether Defendants had the ability to reasonably address the harassment. Mr. Francis has pleaded that they did, and that they deliberately chose not to use the tools at their disposal.

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

As Mr. Francis explained in his opening brief, the prevailing view in intermediate New York appellate courts is that a landlord is liable for discriminatory harassment where it "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); *accord Ewers v. Columbia Heights Realty, LLC*, 44 A.D.3d 608, 609-10 (N.Y. App. Div. 2007). Accordingly, should this Court determine that federal law operates differently, it should certify to the New York Court of Appeals the question of whether prevailing New York law should be narrowed to conform to this Court's construction of federal law. Opening Br. at 52-53; NY Br. 25-26. It is for the Court of Appeals to determine whether doing so is consistent with its statutory mandate to construe the State's Human Rights Law "liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this

article, have been so construed." N.Y. Exec. Law § 300;[8] *see Ctr. for Indep. of the Disabled, v. Metro. Transp. Auth.*, No. 11412, 2020 WL 2954974, at *2 (N.Y. App. Div. June 4, 2020) (interpreting New York City Human Rights Law, which has similar provision, not to follow federal statute of limitations jurisprudence).

Defendants' only response is that New York state precedent does not acknowledge daylight between New York law and the Fair Housing Act. Def. Br. at 58-59. But the holding of *Stoute* is not that the Human Rights Law incorporates every aspect of federal Fair Housing Act jurisprudence, but rather that it follows some of the very same Fair Housing Act caselaw (as well as Title VII jurisprudence) which Defendants ask this Court reject. *See* 36 A.D.3d at 265 (citing *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490 (D. Md. 1996) as representative of Fair Housing Act jurisprudence). New York courts have construed New York law consistent with the Fair Housing Act based on the premise that "[i]t is well established that the FHA must be interpreted in accordance with its 'broad remedial intent.'" *Hollandale Apartments & Health Club, LLC v. Bonesteel*, 173 A.D.3d 55, 65-66 (N.Y. App. Div. 2019) (quoting

[8] The current version of this provision was enacted in 2019. *See* NY Br. at 25. However, comparable language has been in the Executive Law much longer, and so it has been true at all times relevant to this case that "a liberal reading of the statute is explicitly mandated to effectuate the statute's intent." *Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 26 (2002) (citing then-current Executive Law § 300).

Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) and *Trafficante*, 409 U.S. at 209). Should that understanding of the Fair Housing Act no longer hold sway in this Court, the New York courts will have to revisit the question of whether state law tracks federal.

Defendants also ignore, and thereby waive any argument against, Mr. Francis's argument that the panel majority misconstrued New York precedent regarding the negligent infliction of emotional distress tort. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). They argue only that they had no underlying duty to act. This argument is dependent on Defendants prevailing on all other claims. It fails if this Court reverses on the Fair Housing Act and/or Section 1981 and Section 1982 claims. It also fails if the New York Court of Appeals finds that Defendants had a duty under New York civil rights law. Given Defendants' decision to waive any other argument regarding Mr. Francis's negligent infliction of emotional distress tort, there is no basis for this Court to affirm dismissal of that claim on any other ground.

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 13,494 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 June 11, 2020, the foregoing En Banc 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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