RAYMOND J. LOHIER, JR., *Circuit Judge*, joined by ROSEMARY S. POOLER, ROBERT A. KATZMANN, DENNY CHIN, and SUSAN L. CARNEY, *Circuit Judges*, dissenting in part and concurring in part:

Over fifty years ago, Congress pried open the door to racial equality in housing by passing Title VIII of the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601 et seq. This appeal asks us principally to consider whether a tenant has plausibly alleged that his landlord is liable for intentional discrimination under the FHA, the Civil Rights Act of 1866, and the New York State Human Rights Law (NYSHRL) for refusing to address what it knew was an extended campaign of racial terror carried out against the tenant by another tenant. Worse still, the landlord had acted against other tenants to redress prior, non-race-related issues in the past.

Given the clear text and broad legislative intent to stamp out racial discrimination that anchors the FHA and related federal and state statutes, the straightforward answer to the question before us should have favored the harassed tenant, Donahue Francis, the plaintiff in this case. In my view, Francis's complaint clearly satisfies the very minimal burden for pleading discriminatory intent that we have until today imposed. But the majority instead favors the

landlord. It does so on the narrow ground that Francis failed to allege facts that might lead a reasonable juror to decide that the landlord's inaction was motivated by race. And it does so even though the majority opinion itself assumes a landlord may be liable for being deliberately indifferent to the general circumstances Francis alleges. With no change in law or circumstance, without reason or justification, the majority raises the pleading bar imposed on victims of racial discrimination in this Circuit. By requiring Francis at the very start of his case to plead more than he has, the Court closes the door to a legitimate claim of housing discrimination.

Except for the majority's affirmance of the dismissal of Francis's claim of negligent infliction of emotional distress, I respectfully dissent.

BACKGROUND

We accept as true the allegations of harassment in the complaint, together with the documents incorporated by reference therein. See Morales v. City of New York, 752 F.3d 234, 236 (2d Cir. 2014). They tell a story that remains too common today.

In 2010 Francis signed a rental lease agreement with Defendant-Appellee Kings Park Manor, Inc. ("KPM").[1] The lease provided that Francis "shall peaceably and quietly have, hold and enjoy the Premises during the term of this Lease," and required that "Tenant . . . not allow or commit any objectionable or disorderly conduct . . . that disturbs or interferes with the rights, comforts or conveniences of other residents."[2] Francis then moved into an apartment unit of a complex owned by KPM and managed by Corrine Downing (together with KPM, the "KPM Defendants").

Starting in February 2012, Raymond Endres, Francis's next-door neighbor, began a relentless campaign of racial and religious harassment, abuse, and threats. Among other things, Endres repeatedly called Francis, who is African American, a "fucking nigger"[3] and complained about "fucking Jews," including

[1] Francis entered the lease agreement pursuant to the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), commonly known as the "Section 8" public housing program.

[2] Francis's lease, like all residential leases under New York law, contained an implied warranty of habitability, which requires that "occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety." Solow v. Wellner, 86 N.Y.2d 582, 587–88 (1995) (quotation marks omitted).

[3] For a brief history of this odious, violent word, see RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

while Francis was in his apartment with his front door open and in the parking lot of the apartment complex. On March 10, Francis overheard Endres and another tenant discussing Francis "in derogatory terms." The next day, Endres approached Francis's open front door, repeatedly called him a "nigger," and then stated, "fucking nigger, close your god-darn door, fucking lazy, god-damn fucking nigger." On at least one occasion in May, Endres even told Francis, "I oughta kill you, you fucking nigger." On yet another occasion that month, Endres approached Francis, who was leaving his apartment, and said, "keep your door closed you fucking nigger." In August, Endres called Francis a "fucking nigger" and a "black bastard." And on September 2, Endres stood in Francis's open front door and photographed the interior of Francis's apartment.

Needless to say, Francis was terrified. He felt "unwelcome in his own home" and "uncomfortable walking in the common areas at Kings Park Manor." In response, Francis repeatedly contacted the KPM Defendants, as well as the police. His first call to the police on March 11 prompted Suffolk County Police Hate Crimes Unit officers to visit the KPM apartment complex, interview witnesses, and warn Endres to stop threatening Francis with racial epithets. That

same day Francis also filed a police report, and a police officer told the KPM Defendants about Endres's conduct. The KPM Defendants did nothing.

In May 2012 Francis called the police again and filed another police report. This time, by certified letter dated May 23, 2012, Francis notified the KPM Defendants directly about Endres's racist conduct between March and May 2012. That letter reported Endres for "racial harassment," and for making "racial slurs to [Francis]," and provided contact information for the Suffolk County police officers responsible for investigating Endres. Joint App'x 33. Again, the KPM Defendants failed to respond at all.

Endres's conduct persisted. His escalating racial threats to Francis finally prodded the Suffolk County Police Department to arrest Endres on August 10, 2012 for aggravated harassment in violation of New York Penal Law § 240.30. That same day, Francis sent a second certified letter to the KPM Defendants. It informed the KPM Defendants that Endres continued to direct racial slurs at Francis and "anti-semitic, derogatory slurs against Jewish people." It also disclosed that Endres had recently been arrested for harassment.

After Endres attempted to photograph Francis's apartment on September 2, Francis contacted the police. The following day he sent the KPM

Defendants a third and final certified letter complaining about Endres's continued racial harassment. When it received the letter, KPM advised Downing "not to get involved." Joint App'x 16. So the KPM Defendants again declined to respond or follow up on Francis's complaints, even though they had previously "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law." Joint App'x 20. As a result, Endres lived at the apartment complex without any warning, reprimand, or so much as a word from the KPM Defendants until his lease expired in January 2013.

That month, Endres moved out of his apartment. A few months later, in April 2013, Endres pleaded guilty to harassment in violation of New York Penal Law § 240.26(1). That same month, the State court entered an order of protection prohibiting him from contacting Francis.

Francis sued the KPM Defendants and Endres, claiming primarily that they violated §§ 3604 and 3617 of the FHA and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, and that the KPM Defendants violated § 296(5) of the NYSHRL, N.Y. Exec. Law § 296(5), which bars housing discrimination in New York. Francis also sued the KPM Defendants and Endres for negligent infliction

of emotional distress and for violating NYSHRL § 296(6) by aiding and abetting a violation of NYSHRL § 296(5), the KPM Defendants for breach of contract and breach of the implied warranty of habitability under New York State law, and Endres for intentional infliction of emotional distress. The District Court entered a default judgment against Endres, who never appeared. The KPM Defendants moved under Rule 12(b)(6) to dismiss the claims against them for failure to state a claim. As relevant here, the District Court granted that motion and then granted partial final judgment in favor of the KPM Defendants so that Francis could pursue this appeal, even though damages against Endres remained to be determined. See Fed. R. Civ. P. 54(b).

The panel majority vacated the District Court's dismissal of the federal claims and the NYSHRL claims and remanded for further proceedings. See Francis v. Kings Park Manor, Inc., 944 F.3d 370 (2d Cir. 2019). The Court then reheard the appeal in banc, and the in banc majority now affirms the District Court's dismissal of all of Francis's claims.

DISCUSSION

We consider the allegations in Francis's complaint in the light most favorable to Francis. The principal question before us is whether Francis has

plausibly alleged that the KPM Defendants engaged in intentional discrimination under §§ 3604 and 3617 of the FHA. The majority opinion holds that Francis failed to state a claim under these provisions. For similar reasons, the majority opinion holds that Francis also failed to state a claim under the Civil Rights Act of 1866 or the NYSHRL.

I disagree.

I. The FHA

A. Post-Acquisition Claims Under the FHA

The majority opinion assumes that the FHA's prohibitions apply to post-acquisition conduct. See Majority Op. at 30 n.50. Instead of merely assuming the FHA applies to post-acquisition conduct, I would squarely hold that it does.

The plain text of the FHA prohibits discriminatory conduct that occurs after a plaintiff buys or rents housing—what the caselaw refers to as "post-acquisition" conduct—in at least some circumstances. The initial panel dissent in this case, authored by a member of the majority in banc, agreed with this proposition. See Francis, 944 F.3d at 386 (Livingston, C.J., dissenting) ("The majority reassures that there is no circuit split on whether § 3604 reaches post-acquisition conduct. I agree." (quotation marks omitted)). No active member of

this Court has signaled disagreement with this principle. And all eleven amici on rehearing in banc that take a position on the issue concur that the FHA extends to post-acquisition conduct.[4] Some, like the federal Government, advise us again and again that the FHA covers "post-acquisition liability" and go further by imploring us specifically to "reject any atextual limitations on that liability, such as constructive eviction." Oral Arg. Tr. at 35:6-8; see Brief for the

[4] See Brief for the State of New York as Amicus Curiae Supporting Plaintiff-Appellant at 5–6 (the panel dissent "errs in attempting to limit § 3604(b)'s post-acquisition scope to conduct that results in constructive eviction" because the FHA covers more extensive post-acquisition conduct); Brief for Debo Adegbile as Amicus Curiae Supporting Plaintiff-Appellant at 5 ("[T]he FHA unambiguously prohibits intentional discrimination against a tenant after he obtains housing."); Brief for the City of New York as Amicus Curiae Supporting Plaintiff-Appellant at 6; Brief for Nat'l Fair Hous. All. et al. as Amici Curiae Supporting Plaintiff-Appellant at 7–10 (urging this Court to join the "uniform holdings of its sister circuits" that the FHA bars post-acquisition discriminatory conduct); Brief for the ACLU et al. as Amici Curiae Supporting Plaintiff-Appellant at 16; Brief for LatinoJustice PRLDEF et al. as Amici Curiae Supporting Plaintiff-Appellant at 11; Brief for Georgetown Univ. L. Ctr. C.R. Clinic as Amicus Curiae Supporting Plaintiff-Appellant at 11 (the FHA holds landlords liable for "negligently allowing a hostile environment"); Brief for Paralyzed Veterans of Am. & Pub. Just. Ctr. as Amici Curiae Supporting Plaintiff-Appellant at 4–10 (a landlord's duty to address tenant-on-tenant harassment is consistent with the FHA's intent to end harassment and segregation); Brief for AARP et al. as Amici Curiae Supporting Plaintiff-Appellant at 23–29 (landlords are liable for failing to take corrective action for discriminatory tenant-on-tenant harassment); Brief for Laws.' Comm. for C.R. Under L. as Amicus Curiae Supporting Plaintiff-Appellant at 6. The remaining two amici did not address the issue. See Brief for the NAACP Legal Def. and Educ. Fund as Amicus Curiae Supporting Plaintiff-Appellant at 3–5 (arguing that Francis stated a claim for post-acquisition housing discrimination under the Civil Rights Act of 1866 without addressing the FHA); Brief for New C.L. All. as Amicus Curiae on Behalf of Neither Party at 6 n.4 (noting that this Court has not reached the question of whether the FHA covers post-acquisition conduct and taking no position on the issue).

United States as Amicus Curiae Supporting Neither Party at 14–15, 21 (the FHA prohibits post-acquisition housing discrimination and courts should not limit the statute's reach "with alternative terminology not found in the text of the FHA (i.e., concepts such as 'constructive eviction')"). The KPM Defendants, meanwhile, note only that the post-acquisition scope of the FHA is, in their view, an open question in this Circuit. See Appellees' Br. at 31.

Without belaboring the point, there are four reasons why widespread agreement exists on this issue.

First, the text of the FHA plainly provides for coverage of post-acquisition conduct. Section 3604(b) prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). The words "conditions," "privileges," and "provisions of services or facilities" refer not just to the sale or rental itself, but to benefits and protections following the sale or rental. See Bloch v. Frischholz, 587 F.3d 771, 779–80 (7th Cir. 2009) (en banc); see also Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009). As the United States asserted at oral argument in this case, "by definition, a rental creates an ongoing legal relationship between a landlord and

a tenant for a term, [and] phrases like 'terms, conditions, or privileges' need to be interpreted using the ordinary plain language." Oral Arg. Tr. at 35:18–21.

Second, the plain language of § 3617 creates a separate cause of action that more comprehensively prohibits post-acquisition discriminatory conduct barred by § 3604(b). Section 3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604." 42 U.S.C. § 3617. As the Seventh Circuit observed, "[c]oercion, intimidation, threats, or interference with or on account of a person's exercise of his or her [§ 3604(b)] rights can be distinct from outright violations of [§ 3604(b)]." Bloch, 587 F.3d at 782.

Third, any contrary interpretations of §§ 3604(b) and 3617 would contravene Congress's central intent to use the FHA to root out discrimination in housing. See Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1994) (rejecting a defendant's "crabbed reading" of the FHA for failing to comport with the statute's "broad legislative plan to eliminate all traces of discrimination within the housing field" (quotation marks omitted)).

Finally, all seven sister circuits that have addressed the issue have acknowledged that § 3604(b) prohibits at least some post-acquisition conduct. Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005); see Bloch, 587 F.3d at 772; Modesto, 583 F.3d at 714; Ga. State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 631–33 (11th Cir. 2019); Honce v. Vigil, 1 F.3d 1085, 1088–90 (10th Cir. 1993); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 985–86 (4th Cir. 1984); see also Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994); Brief for Debo Adegbile as Amicus Curiae Supporting Plaintiff-Appellant at 10–15 (describing the uniform view of "all circuit courts to have considered the issue" that the FHA bars post-acquisition discriminatory conduct).[5]

Although the proposition that the FHA bans post-acquisition discriminatory conduct in housing is beyond serious dispute, the majority opinion merely assumes it, declining to decide an issue as to which seven circuits and the federal Government are in full agreement.

[5] We thank Mr. Debo Adegbile, Esq., who sought court-appointment and oral argument, for his outstanding service as court-appointed amicus curiae. The inaccurate claims of counsel for the KPM Defendants notwithstanding, see Appellees' Sur-Reply at 2–3; Oral Arg. Tr. at 70:11–17, the Court also secured amicus briefing in support of the KPM Defendants from New Civil Liberties Alliance, which did not seek court-appointment or oral argument, and which also deserves our great appreciation.

B. Pleading Standards: Intentional Discrimination

The principal question on rehearing in banc is thus fairly limited: Do the allegations in Francis's particular complaint plausibly plead a claim against the KPM Defendants for intentional discrimination under the FHA and related federal and state statutes? Because this appeal arises from a successful motion to dismiss Francis's complaint under Rule 12(b)(6), we accept all factual allegations in the complaint (and documents incorporated by reference therein) as true and draw all reasonable inferences in Francis's favor. To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face.

In assessing the adequacy of Francis's complaint, we start with Littlejohn v. City of New York, 795 F.3d 297 (2d Cir. 2015). There we held that because the filing of a complaint "by definition[] occurs in the first stage of the litigation," a "plaintiff cannot reasonably be required to allege more" than minimal facts to support an inference of discriminatory intent. Id. at 311. In Vega v. Hempstead Union Free School District, 801 F.3d 72 (2d Cir. 2015), we elaborated on Littlejohn, emphasizing that the burden placed on the plaintiff on a motion to dismiss is exceedingly minimal. "[T]he question is not whether a plaintiff is

likely to prevail, but whether the well-pleaded factual allegations plausibly give rise to an inference of unlawful discrimination, i.e., whether plaintiffs allege enough to 'nudge[] their claims across the line from conceivable to plausible.'" Id. at 87 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The plausibility standard thus "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 556); see Citizens United v. Schneiderman, 882 F.3d 374, 380 (2d Cir. 2018) (for plaintiffs to "'nudge[ ] their claims across the line from conceivable to plausible,' they must 'raise a reasonable expectation that discovery will reveal evidence' of the wrongdoing alleged, 'even if it strikes a savvy judge that actual proof of these facts is improbable'" (quoting Twombly, 550 U.S. at 556, 570)).

A plaintiff claiming discrimination is not required to plead a prima facie case under the McDonnell Douglas framework. See Vega, 801 F.3d at 84. "Rather, because a temporary presumption of discriminatory motivation is created under the first prong of the McDonnell Douglas analysis, a plaintiff need only give plausible support to a minimal inference of discriminatory motivation." Id. (quotation marks omitted); see id. at 85 (requiring only

"minimal support for the proposition that the [defendant] was motivated by discriminatory intent" (quotation marks omitted)).[6] We have since reaffirmed the importance of this minimal pleading standard. See, e.g., Doe v. Columbia Univ., 831 F.3d 46, 55–56 (2d Cir. 2016) (applying a minimal pleading burden for sex discrimination claims under Title IX and concluding that the "temporary presumption in a plaintiff's favor reduces the plaintiff's pleading burden, so that the alleged facts need support only a minimal inference of bias").

Consistent with Littlejohn and Vega, Francis's complaint plainly asserts that the KPM Defendants engaged in intentional racial discrimination. To start, the KPM Defendants are generally alleged to have "discriminat[ed] against [Francis] by tolerating and/or facilitating a hostile environment." Joint App'x 19. As factual support for this proposition, the complaint specifically alleges that KPM had the authority to "counsel, discipline, or evict [Endres] due to his continued harassment of [Francis]." Indeed, the complaint alleges, the defendants had "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law." Joint App'x 20. This

[6] See also Littlejohn, 795 F.3d at 308 ("[T]he standard espoused by the McDonnell Douglas line of cases for prima facie sufficiency was an evidentiary standard, not a pleading requirement." (quotation marks omitted)).

suggests not only a material level of control over their tenants, but also that the KPM Defendants decided whether to intervene in tenant-related disputes "based on race." If merely alleging that the plaintiff in an employment discrimination case "was replaced by someone outside the protected class will ordinarily suffice for the required inference of discrimination at the . . . pleading stage," Littlejohn, 795 F.3d at 313, then surely nothing more was required of Francis at the same stage in his housing discrimination case.

While contesting the adequacy of Francis's complaint, the majority opinion leaves largely unchallenged the allegation that the KPM Defendants were aware of the hostile housing environment created by Endres's criminal racial harassment. Relying on the McDonnell Douglas evidentiary framework, however, it holds that the complaint "lacks even minimal support for the proposition that the KPM Defendants were motivated by discriminatory intent." Majority Op. at 14 (quotation marks omitted). In particular, the majority labels as "conclusory" Francis's assertion that "[a]ccording to the New York State Division of Human Rights Investigator's File, the KPM Defendants have intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law"—the allegation that best suggests the

defendants' racially selective enforcement of lease violations. Joint App'x 20. "To hold that Francis has plausibly pleaded discriminatory intent on these facts," the majority submits, "would be to indulge the speculative inference that 'because the KPM Defendants did something with regard to some incident involving some tenant at some past point,' racial animus explains the failure to intervene here." Majority Op. at 15. These criticisms aim only to avoid the fair application of our decisions in Littlejohn and Vega.

The majority's attack on Francis's pleading is flawed for at least two basic reasons. First, it overlooks the fact that a plaintiff's pleading (rather than evidentiary) burden in FHA cases is minimal. It confuses plausibility with probability. In the pre-acquisition context, we do not even require evidence that non-protected-class members were treated more favorably than members of the protected class to establish a prima facie case. See, e.g., Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003). Second, the majority misapplies the pleading standard set out in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Twombly by demanding significantly more than the short and plain statement of the claim under Rule 8 of the Federal Rules of Civil Procedure. The majority faults Francis for failing to "provide enough information"—thereby conceding that he provided some—"to

compare the events of which Francis complains to the KPM Defendants' responses to other violations." Majority Op. at 14–15.

Together or alone, these two flaws in the majority opinion result in a heightened pleading standard that is more demanding even than the evidentiary standard at summary judgment, let alone on a motion to dismiss.

To satisfy the plausibility threshold in a suit under the FHA, a plaintiff is under no obligation to allege facts demonstrating that the defendant more likely than not engaged in intentional discrimination. That is part of the entire point of the minimal pleading standard, and any contrary view confuses plausibility with likelihood or probability. See Vega, 801 F.3d at 87; cf. Twombly, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable" and chances of recovery remote (quotation marks omitted)); Citizens United, 882 F.3d at 380. The majority pays lip service to the lower standard but ultimately casts it aside in favor of a materially higher pleading burden.

Recall that the Supreme Court in Twombly and Iqbal adopted the plausibility standard in the context of interpreting Rule 8. The rule provides, in relevant part, that "[a] pleading that states a claim for relief must contain: . . . a

short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The majority's insistence on more (and more and more) particular information with respect to a core allegation in this case contradicts that standard and veers significantly from our decisions in Littlejohn and Vega. It also violates a central tenet of Swierkiewicz v. Sorema N.A., from which those two decisions were derived, and in which the Supreme Court pronounced that the "Federal Rules do not contain a heightened pleading standard for employment discrimination suits." 534 U.S. 506, 515 (2002). There is no reason to believe that suits under the FHA are any different for this purpose. Any "requirement of greater specificity" for FHA discrimination claims is thus "a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Id. (quotation marks omitted).

Twombly and Iqbal may have wrought a number of changes, including replacing the notice pleading standard in Swierkiewicz with the plausibility pleading standard that our decisions in Littlejohn and Vega faithfully applied. But neither of these decisions requires, as the majority does here, a particularized pleading of discriminatory intent, such as we normally reserve for fraud claims under Rule 9, rather than a "short and plain" identification of what is alleged to

have had happened, as Rule 8 requires. In the post-Iqbal case of Swanson v. Citibank, N.A., for example, the Seventh Circuit held that a complaint for discrimination under the FHA was sufficient because it identified "the type of discrimination that [the plaintiff] thinks occur[red] (racial), by whom . . ., and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint." 614 F.3d 400, 405 (7th Cir. 2010).

Under the correct application of these pleading standards, Francis has provided at least "minimal support for the proposition" that the KPM Defendants' refusal to intervene was motivated by race.[7] See Vega, 801 F.3d at 85 (quotation marks omitted); Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 864 (7th Cir. 2018). The majority worries that this view and "the panel's ruling, if undisturbed, would significantly expand landlord liability" with "the probable result of fundamentally restructuring the landlord-tenant relationship." Majority Op. at 14 n.20. But if that is true, how to explain that not one landlord or landlord advocacy group submitted an amicus brief denouncing the panel majority opinion or supporting the KPM Defendants? Why was the only amicus

[7] The KPM Defendants have never claimed that they misunderstood what Francis's allegations meant or the basis for them.

brief from a landlord in this case filed in support of Francis? See generally Brief for the City of New York as Amicus Curiae Supporting Plaintiff-Appellant.[8] Ultimately, the majority disparages the congressionally determined balance between landlords and tenants on matters of racial equality as reflected in the FHA itself. In my view, our judicial role is to enforce that balance, whether we like it or not.

Because the majority rejects Francis's plausible, well-pleaded allegations on illegitimate grounds that end this litigation, I respectfully dissent.

C. Pleading Standards: Deliberate Indifference

Francis argues that he separately alleged KPM's deliberate indifference to complaints of race-based harassment. See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999). I agree.

We have explained that a defendant's deliberate indifference to racial harassment serves as "proof of racially discriminatory intent." Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 139–40 (2d Cir. 1999). That is because

[8] Aside from this purely speculative policy concern, my colleagues in the majority who voted to proceed in banc leave unanswered why the very limited issue before us (whether the specific allegations in a complaint satisfy the plausibility pleading standard) still qualifies as a "question of exceptional importance." See Fed. R. App. P. 35(a)(2) ("An en banc . . . rehearing is not favored and ordinarily will not be ordered unless . . . the proceeding involves a question of exceptional importance.").

deliberate indifference consists of "a deliberate choice among various alternatives, rather than negligence or bureaucratic inaction." Reynolds v. Giuliani, 506 F.3d 183, 193 (2d Cir. 2007). Thus, "deliberate indifference to [known] harassment can be viewed as discrimination by [defendants] themselves." Gant, 195 F.3d at 140. As with other civil rights statutes, deliberate indifference is a theory of liability for a discrimination claim under the FHA.[9] In rejecting Francis's FHA claim, even the majority opinion appears to recognize (correctly) that this familiar theory of liability applies to the FHA.

The elements of a claim of deliberate indifference to a third party's harassment are straightforward: (1) the defendant had substantial control over the harasser, (2) the harassment was severe and discriminatory, (3) the defendant had actual knowledge of the harassment, and (4) the defendant's response was

[9] To suggest otherwise would render the FHA, a central civil rights statute, an outlier among civil rights statutes. See Wetzel, 901 F.3d at 863–64 (concluding that the FHA prohibits a landlord's deliberate indifference to known harassment because, among other reasons, Title IX is "comparable" to the FHA and "[m]uch of what the [Supreme] Court said [about discriminatory harassment in the Title IX context] can be applied readily to the housing situation"); see also, e.g., Davis, 526 U.S. at 648–49 (Title IX); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664–66 (2d Cir. 2012) (Title VI); Garcia v. State Univ. of N.Y. Health Scis. Ctr., 280 F.3d 98, 115 (2d Cir. 2001) (Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act); Gant, 195 F.3d at 140–41 (§ 1981); cf. Farmer v. Brennan, 511 U.S. 825, 847 (1994) (Eighth Amendment); Charles v. Orange County, 925 F.3d 73, 86–87 (2d Cir. 2019) (Fourteenth Amendment substantive due process); DiStiso v. Cook, 691 F.3d 226, 240–41 (2d Cir. 2012) (Fourteenth Amendment equal protection).

clearly unreasonable. Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665–66 (2d Cir. 2012) (citing Davis, 526 U.S. at 643–50).

Francis satisfied each of these elements on any fair reading of his complaint. First, Francis explicitly alleged that the KPM Defendants "exercise[d] substantial control over both the harasser and the context in which the known harassment occur[red]." Davis, 526 U.S. at 645. Specifically, he alleged that Endres's lease with KPM authorized KPM to "counsel, discipline, or evict [Endres] due to his continued harassment of [Francis]." Joint App'x 19–20. He also alleged that Endres's racial harassment was not just severe but criminal. Finally, the KPM Defendants knew that racial harassment had occurred, yet they deliberately declined to do anything about it.

The majority disputes only that Francis's pleading satisfies the first element, that KPM could exercise substantial control over Endres, or that it satisfies the final element, that KPM's response to the harassment in this case was inadequate. I address each of these elements in turn on the assumption that they involve New York law.

1. The Landlord's Substantial Control

As an initial matter, Francis satisfied the substantial control element by alleging that the KPM Defendants could have exercised substantial control over and even evicted Endres under its lease. See Joint App'x 20 ("According to the New York State Division of Human Rights," the KPM Defendants previously had "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law."). The KPM Defendants' prior interventions, if true, plausibly suggest that the KPM Defendants retained the power to discipline tenants for violating the terms of their leases.

The majority opinion disagrees, holding that Francis failed to plead deliberate indifference because the KPM Defendants lacked substantial control over Endres or any of its tenants as a matter of state law. Going further, the majority opinion announces a "clear" rule under New York law that landlords have "no general duty to protect tenants" from other tenants because "the 'power to evict cannot be said to . . . furnish'" control over the offending tenant.

Majority Op. at 23 (quoting Blatt v. N.Y.C. Hous. Auth., 506 N.Y.S.2d 877, 879 (2d Dep't 1986)).[10]

To be sure, "[w]here the basis of liability" under New York law "is a claim that the landlord failed to protect one tenant from the aggression of another tenant, it must first be established that the landlord had the ability and a reasonable opportunity to control the aggressor' and that 'the harm complained of was foreseeable.'" Reinert v. 291 Pleasant Ave., L.L.C., 938 N.Y.S.2d 229 (App. Term. 2011) (table) (quoting Hughes v. City of New York, 656 N.Y.S.2d 649, 649 (2d Dep't 1997)); see Luisa R. v. City of New York, 686 N.Y.S.2d 49, 53 (1st Dep't 1999). But this means that New York law contemplates, more flexibly than the majority allows, that a landlord's duty to address a discriminatory housing practice carried out by another resident will depend largely on the facts. What is the extent of the landlord's actual level of control over the resident in a particular case? Determining the actual degree of a landlord's control turns principally on the terms of the tenant's lease, the rights and obligations imposed by state law on

[10] In support of this view, the majority compares the level of control by a landlord over tenants with an employer's control over its employees. The comparison to employers is a red herring. It is true that "an employer's manner and degree of control over its agent-employees" differs, sometimes markedly, from "that of a landlord over its tenants." Majority Op. at 21–22. But those differences do not mean that landlords can never control their tenants regardless of the circumstances.

landlords and tenants, and the landlord's prior history of remedial action, all with the understanding that the landlord need not have "[c]ontrol in the absolute sense." Wetzel, 901 F.3d at 865. It depends, in other words, on facts and circumstances developed in discovery.

Here, even assuming that Francis's allegations themselves do not adequately support a plausible inference that the KPM Defendants could exercise control over Endres in the circumstances of this case, then the lease between KPM and both Endres and Francis "nudges" his claim of landlord control over the plausibility line. The lease provides, for example, that the "Tenant shall not allow or commit any objectionable or disorderly conduct . . . that disturbs or interferes with the rights, comforts or conveniences of other residents." Joint App'x 53. The lease thus points to that "arsenal of incentives and sanctions that" the KPM Defendants could have applied to affect Endres's conduct but failed to use. Wetzel, 901 F.3d at 865 (quotation marks omitted); see Brief for the City of New York as Amicus Curiae Supporting Plaintiff-Appellant at 17 (describing remedial actions available to landlords); Brief for the State of New York as Amicus Curiae Supporting Plaintiff-Appellant at 17 (same).

New York's warranty of habitability, under which landlords warrant that "tenants are not subjected to any conditions endangering or detrimental to their life, health or safety," also persuades me that KPM could have responded to Endres's criminal harassment—because it was affirmatively obligated to do so. Park W. Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316, 325, 327 (1979). A landlord is liable for breaching the implied warranty whenever it "deprive[s] [tenants] of the quiet enjoyment of their apartment" by "fail[ing] to take any effective steps to abate" detrimental conditions created by other tenants "despite having ample notice." Nostrand Gardens Co-Op v. Howard, 634 N.Y.S.2d 505, 505–06 (2d Dep't 1995). The scope of the obligation stretches from ordinary tenant-on-tenant complaints about noise to tenant-on-tenant criminal acts. See Restatement (Second) of Property: Landlord and Tenant § 6.1 (1977).[11] Although the majority opinion attempts to distinguish Nostrand Gardens on the ground that it involves "contractual liabilities," Majority Op. at 22 n.34, that has no bearing on a landlord's authority to take remedial action in a particular case. Regardless of a lease's terms, New York law requires landlords to take "minimal precautions to

[11] See also 24 C.F.R. § 966.4(f)(11), (l)(2)(i) (a public housing agency may terminate a tenancy for "serious or repeated violation of material terms of the lease," including the obligation that tenants act "in a manner which will not disturb other residents' peaceful enjoyment of their accommodations").

protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct." Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 548 (1998) (quotation marks omitted).

The majority opinion latches on to a single New York case, Blatt v. New York City Housing Authority, to assert that the power to evict is never enough to show control under New York law. But Blatt demonstrates that whether a landlord has a duty under New York law to address tenant-on-tenant wrongdoing depends on the facts and circumstances developed in each case. See 506 N.Y.S.2d at 879–80; see also Simmons v. City of New York, 562 N.Y.S.2d 119, 120 (1st Dep't 1990).

For the reasons already explained, landlords in New York may be obligated to respond to complaints of severe or pervasive tenant-on-tenant harassment, regardless of whether that harassment is motivated by discrimination. "Depending on the particular circumstances, a landlord's appropriate remedial actions may include warning the offending tenant, involving agencies with expertise investigating charges of discrimination in housing . . . , or—if less drastic action proves ineffective—beginning formal eviction proceedings." Brief for the City of New York as Amicus Curiae

Supporting Plaintiff-Appellant at 17. "The mere reminder that eviction . . . [i]s a possibility might . . . deter[] some of the bad behavior" directed at fellow tenants. Wetzel, 901 F.3d at 865.[12] In the alternative, landlords can investigate tenant complaints and issue fines. See Brief for the State of New York as Amicus Curiae Supporting Plaintiff-Appellant at 17. Although the FHA provides important additional remedies where a landlord neglects those obligations with discriminatory impact, the fact remains that landlords already bear responsibility to address severe or pervasive harassment. Explicitly recognizing FHA liability in this context places no additional administrative burden on landlords.

In response, the majority says that "broad liability regimes might place landlords in the role of 'cops' who threaten their tenants with 'unrestrained vigilantism.'" Majority Op. at 27 n.44 (quoting B.A. Glesner, Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 Case W. L. Rev. 679, 791 (1992)). But that again puts a

[12] The majority casts Wetzel, in which the Seventh Circuit held that a landlord could be liable for tenant-on-tenant harassment, as a case involving an "unusual degree of control" over a community of senior citizens. Majority Op. at 24–25. But Wetzel addressed the landlord-tenant relationship generally, while explicitly "say[ing] nothing" about the FHA's application to "a skilled nursing facility[] or an assisted living environment," each of which is "different enough that they should be saved for another day." Wetzel, 901 F.3d at 864.

policy concern ahead of a legal mandate. See Bostock v. Clayton Cnty., --- U.S. ---, 140 S. Ct. 1731, 1745 (2020). Even the academic article the majority cites in support of its concern acknowledges that landlords already may be "liable for criminal activities of tenants that victimized other tenants," and that where "a tenant's dangerousness could be readily predicted," courts have "establish[ed] a landlord's duty to police tenants." Glesner, Landlords as Cops, 42 Case W. L. Rev. at 790. Unfazed, the majority observes that the "potentially dramatic and arguably undesirable implications" of a text-based interpretation of the FHA could not "have gone unnoticed for over fifty years after the passage of that much-discussed and much-litigated legislation." Majority Op. at 30. But when we interpret statutes there is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case" (or "implication") "creates a tacit exception" to a "general statutory rule." Bostock, 140 S. Ct. at 1747.

If we ignore these extra-legal policy concerns, then the allegations in Francis's complaint, read in light of the duties imposed on KPM by New York law and Francis's lease, and by the FHA itself, clearly raise a plausible inference that the KPM Defendants had the "authority to take remedial action" against

Endres. Davis, 526 U.S. at 644. Whether KPM was equipped with the actual tools to do so is a question of fact to be resolved at a later stage in this litigation.

2. The Adequacy of the Landlord's Response

As noted, the majority also concludes that Francis failed to allege that KPM's response to Endres's harassment was inadequate, as our precedent on deliberate indifference requires. See Majority Op. at 26–27; Gant, 195 F.3d at 141 ("[T]he defendant's response to known discrimination" must not be "clearly unreasonable in light of the known circumstances." (quotation marks omitted)). The majority first says that the complaint alleged only that the "landlord failed to respond to reports of race-based harassment by a fellow tenant." Majority Op. at 5. To the contrary, the complaint alleged much more: a landlord ignored repeated requests to take action against a tenant who engaged in criminal harassment. The majority then accepts that KPM instructed Downing "not to get involved" in response to Francis's repeated letters asking KPM to address Endres's criminal behavior. Nevertheless, the majority summarily asserts, because "[t]he KPM Defendants were aware that the police were involved" there is "no factual basis to infer that the KPM Defendants clearly acted

unreasonably." Majority Op. at 26–27. This defense draws all relevant inferences in favor of the KPM Defendants, not Francis.

As New York City explains, landlords in fact enjoy significant "flexibility" to "respond to known [tenant-on-tenant] harassment in a manner that is not clearly unreasonable" in light of the known circumstances. Davis, 526 U.S. at 648–49; Brief for the City of New York as Amicus Curiae Supporting Plaintiff-Appellant at 13–19. Whether KPM's explicit instruction not to act was "clearly unreasonable," or whether KPM's awareness that Francis had reported Endres to the police absolved KPM of liability for its inaction, depends on the actual degree of control exercised by the landlord rather than a fixed rule. It is for a jury, not judges, to decide.

For all the reasons set forth above, I would vacate the District Court's dismissal of Francis's FHA claims.

II. The Civil Rights Act of 1866

Moving beyond the FHA, Francis also stated claims under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, which indisputably also prohibits post-acquisition housing discrimination. I therefore respectfully disagree with the majority's decision to affirm the District Court's dismissal of those claims.

"Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves." Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020). The Act is a "sweeping" civil rights law "forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433, 435 (1968). Specifically, Congress provided that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," 42 U.S.C. § 1981, and that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," id. § 1982.

This Court has explicitly recognized that § 1981 plaintiffs may prove discriminatory intent through evidence of a defendant's deliberate indifference to discrimination by third parties within their control. Gant, 195 F.3d at 139–40 (holding that the "proof of racially discriminatory intent" required to state a claim under § 1981 includes a showing of "deliberate indifference on the part of the defendants themselves"); Comcast Corp., 140 S. Ct. at 1016 (explaining that §§ 1981 and 1982 are construed similarly because they were enacted together and "use[] nearly identical language"). Even the majority acknowledges that

"Sections 1981 and 1982 reach . . . purposeful discrimination." Majority Op. at 31 (quotation marks omitted). For the reasons described at length above, Francis has adequately alleged that KPM was deliberately indifferent to Endres's known racial harassment. That is enough to support Francis's claim that KPM acted with racially discriminatory intent under §§ 1981 and 1982.

III. The NYSHRL

For the same reasons, I would also vacate the District Court's dismissal of Francis's claims brought under the NYSHRL, N.Y. Exec. Law § 296, a powerful state antidiscrimination statute that is at least as protective of Francis's rights as the FHA. The majority opinion concludes that dismissal of Francis's claims under the FHA necessarily requires dismissal of his NYSHRL claims because the claims are evaluated under the same framework. But this misunderstands that the FHA serves only as a "floor . . . below which states and localities may not fall." Phillips v. City of New York, 884 N.Y.S.2d 369, 381 (1st Dep't 2009), abrogated on other grounds, Jacobsen v. N.Y.C. Health & Hosps. Corp., 22 N.Y.3d 824, 838 (2014). Recently, in fact, the NYSHRL was amended to expressly provide that it be "construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights law,

including those with provisions worded comparably to the provisions of this article, have been so construed." N.Y. Exec. Law § 300 (emphasis added). And the State of New York, as amicus, has urged this Court not to assume that the FHA and NYSHRL should be similarly interpreted, "especially in light of [these] recent amendments to the [NYSHRL] that the New York Court of Appeals has not had an opportunity to interpret." Brief for the State of New York as Amicus Curiae Supporting Plaintiff-Appellant at 24.

Unfortunately, the majority refused to heed the State's warning, declined to certify this important question of New York law, and proceeded with its own misinterpretation of state law. Of course, this does not spell the end of claims like Francis's under state law, since nothing prevents the New York State courts from correcting this awful error in the future.[13]

[13] The majority opinion also affirms the District Court's dismissal of Francis's state law claim for negligent infliction of emotional distress under New York law on the ground that a landlord owes no common law duty to prevent one tenant from harassing another tenant. See Majority Op. at 34–36. As explained above, that interpretation of New York law is mistaken. I concur in the dismissal of this claim for a quite different reason unrelated to KPM's duty. Any injury for negligent infliction of emotional distress "is compensable only when [it is] a direct, rather than a consequential, result of the breach" of a duty that a defendant owes to a plaintiff. Kennedy v. McKesson Co., 58 N.Y.2d 500, 506 (1983). Here, as alleged in the complaint and when viewed in the light most favorable to Francis, the KPM Defendants' intentional breach of the duty they may have owed Francis did not directly result in Francis's emotional distress, which Endres directly caused with his continued campaign of racial harassment.

IV. Final Considerations

Offering a final justification for its flawed reading of Francis's complaint under the FHA and the remaining statutes at issue in this case, the majority suggests that its ruling will help "the most vulnerable among us." Majority Op. at 28. In reality, it will do no such thing, and not a single feature of the majority's interpretation reflects such a concern. The experts—amici here—who so aptly describe what serves their clients' interests tell a far different story. If anything, they suggest, the consequences of the majority opinion's holding will harm those most in need. Tenant-on-tenant sexual harassment in housing, for example, is a widespread problem that "[p]rompt and appropriate responses by housing providers to tenant complaints of harassment are critical to preventing—or stopping." Brief for ACLU et al. as Amici Curiae Supporting Plaintiff-Appellant at 6–12, 23. "Absent liability under the FHA," another amicus explains, "landlords receiving complaints of harassment may ignore the discrimination . . . or even worse, they may further the discrimination by retaliating against the complainant," thereby causing "harmful escalations." Brief for LatinoJustice PRLDEF et al. as Amici Curiae Supporting Plaintiff-Appellant at 27–28. Organizations representing paralyzed veterans and the elderly agree. See Brief

for Paralyzed Veterans of Am. & Pub. Just. Ctr. as Amici Curiae Supporting Plaintiff-Appellant at 10–25; Brief for AARP et al. as Amici Curiae Supporting Plaintiff-Appellant at 12–29.

CONCLUSION

For the very limited reason provided above, I agree that we should affirm the dismissal of Francis's tort claim. But my agreement ends there. Because the pleading burden on Francis in this case was minimal, because he needed only to "raise a reasonable expectation that discovery will reveal evidence of the wrongdoing alleged, even if it strikes a savvy judge that actual proof of those facts is improbable," Citizens United, 882 F.3d at 380 (quotation marks omitted), and because he has plausibly alleged intentional discrimination by the defendants in this case under both federal and state law, I respectfully dissent as to all of Francis's remaining claims.