15-1823

IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,
Plaintiff-Appellant

v.

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

RAYMOND ENDRES,
Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

[PROPOSED] BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICUS CURIAE [1]

This brief is submitted by the NAACP Legal Defense and Educational Fund, Inc. ("LDF"). LDF is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in economic justice, education, criminal justice, and political participation.

Throughout its history, LDF has represented plaintiffs seeking to protect their rights under 42 U.S.C. § 1981, *see, e.g.*, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and has a strong interest in the proper interpretation and application of § 1981 on behalf of civil rights claimants in the full range of economic transactions covered by the statute, including bank

[1] Counsel for amicus curiae authored this brief in its entirety and no party or their counsel, nor any other person or entity other than amicus or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of proposed amicus's intent to file this amicus brief. Petitioner consented to the filing of the brief. Respondent declined consent. Proposed amicus thus has moved for leave to file this amicus brief.

loans, home purchases and rentals, employment discrimination, and contracts for services. LDF has also challenged policies and practices that limit African Americans' opportunities to rent and purchase homes. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

Between the months of February and September 2012, plaintiff-appellant Donahue Francis, a Black man, suffered unrelenting and pervasive harassment because of his race. Mr. Francis's next-door neighbor, Raymond Endres, repeatedly verbally attacked Mr. Francis—calling him a "f---ing n----r" and a "black bastard"—and threatened Mr. Francis's life, saying "I oughta kill you, you f---ing n----r." Mr. Francis involved local law enforcement in an attempt to curb Mr. Endres's campaign of racist and menacing behavior, which simultaneously violated Mr. Endres's obligations under his own lease with Kings Park Manor, Inc., ("KPM") and interfered with Mr. Francis's right to "peaceably and quietly have, hold and enjoy the Premises" under his lease with KPM.

KPM, the owner of Mr. Francis's apartment complex, knew that Mr. Francis was being denied the full benefits of his lease because of his race. KPM received several letters and notices of Mr. Endres's harassment targeting Mr. Francis, both from Mr. Francis himself and from the local police department. Yet, KPM did nothing to intervene on Mr. Francis's behalf. Indeed, KPM specifically instructed the property manager, Corrine Downing, not to get involved.

Based on these allegations in Mr. Francis's complaint, KPM violated Mr. Francis's rights under both 42 U.S.C. §§ 1981 and 1982. Section 1981, as amended by the Civil Rights Act of 1991, mandates that "[a]ll persons within the jurisdiction of the United States shall have the same right" to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" as "enjoyed by white citizens." 42 U.S.C. § 1981(a), (b). Section 1981, by its terms, applies to all contracts, and in amending the statute in 1991, Congress sought to remedy post-contract-formation racial harassment.

Mr. Francis endured harsh racial persecution—harassment he would not have experienced if he were white—that interfered with his right to quiet and peaceable enjoyment of his apartment under his lease.

KPM knew about that harassment but, in response to complaints from Mr. Francis, instructed its property manager not to address it. By affirmatively choosing not to address racial harassment that violated Mr. Francis's right to the peaceable enjoyment of his premises, KPM violated Mr. Francis's right to the full "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" as "enjoyed by white citizens." 42 U.S.C. § 1981(a), (b). KPM similarly violated § 1982, which guarantees all citizens the "same right . . . as is enjoyed by white citizens . . . to . . . lease [and] hold . . . real . . . property." 42 U.S.C. § 1982.

KPM cannot escape liability because Mr. Francis was subject to racial harassment by another KPM tenant rather than by KPM itself. KPM knew of the harassment and had enough control over the other tenant to address it, but KPM specifically instructed its property manager not to do anything. Just as a landlord is liable for failing to respond when the landlord knows a tenant's right to quiet enjoyment is being violated by flooding from another tenant's apartment, a landlord is liable for failing to respond when the landlord knows the tenant's right to quiet enjoyment is being violated by a neighbor's threatening harassment on account of race. Recognizing KPM's liability here thus

imposes no new duties on landlords, who, under property and contract law principles, already have an obligation to intervene in cases of known tenant-on-tenant harassment.

KPM's deliberate failure to respond in the face of Mr. Francis's complaints, despite its authority to act under its lease with Mr. Endres, constitutes actionable discrimination under *Gant ex rel. Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999). In *Gant*, this court held that a party is liable under § 1981 when it knows of racial harassment perpetrated by a third-party over which it has some control but does nothing to address that harassment. This case presents that precise situation: KPM chose to not intervene on behalf of a tenant experiencing pervasive racial harassment at the hands of a neighboring tenant whom KPM had the contractual right to warn or sanction. The court should therefore find that Mr. Francis has stated a claim for discrimination under § 1981.

At the pleading stage, all facts and inferences must be resolved in Mr. Francis's favor. Because Mr. Francis plausibly alleged that KPM denied him the same rights to make and enforce contracts, and to lease and hold property, as is enjoyed by white citizens, the Court should

reverse the district court's dismissal of Mr. Francis's §§ 1981 and 1982 claims.

FACTUAL BACKGROUND [2]

In 2010, Donahue Francis, a Black man, signed a "Residential Lease" to rent an apartment at Kings Park Manor. En Banc Appellant's App'x ("Appellant's App'x") A.058–059. Mr. Francis's lease gave him the right to the peaceable and quiet enjoyment of the premises during the term of the lease. Appellant's App'x A.058. Mr. Francis renewed his lease with KPM three times, and each renewal contained the same covenants and assurances regarding Mr. Francis's entitlement to "peaceably and quietly . . . enjoy the Premises during the term" of his lease. Appellant's App'x A.027, ¶¶56, 57.

From February through September 2012, however, Mr. Francis endured extreme racist harassment by his next-door neighbor, Raymond Endres, that included repeated use of racial slurs and threats to Mr. Francis's safety. Appellant's App'x A.016–17 ¶¶3–4. For example, in February 2012, Mr. Endres aggressively approached Mr. Francis near

[2] The facts as recited herein are based on the allegations in Mr. Francis's Complaint.

the front of his apartment and called him a "f---ing n----r." Appellant's App'x A.019, ¶16. In March 2012, Mr. Endres's campaign of racist harassment toward Mr. Francis continued with Mr. Endres approaching Mr. Francis in his own apartment and calling him a "n----r," a "f---ing n----r," and a "f---ing lazy, god-d--n f---ing n----r." Appellant's App'x A.020 ¶20. In May 2012, Mr. Endres directly threatened Mr. Francis's life, saying "I oughta kill you, you f---ing n----r." Appellant's App'x A.021 ¶30. And on August 10, 2012, Mr. Endres again used racial epithets and foul language towards Mr. Francis, calling him a "f---ing n----r" and a "black bastard." Appellant's App'x A.022 ¶36.

Mr. Francis called 9-1-1 on four separate occasions to report Mr. Endres's racist and threatening behavior. Appellant's Appx A.021 ¶21, A.021 ¶31, A.022 ¶36, A.024 ¶42. Suffolk County police officers notified KPM, by and through its property manager Corrine Downing, of Mr. Endres's racist behavior. Appellant's App'x A.021 ¶25, A.022 ¶34. On three occasions, Mr. Francis sent KPM and Ms. Downing certified letters notifying them of the racial harassment Mr. Francis was enduring. Appellant's App'x A.041–043, A.049, A.055. In August 2012, Suffolk

County Police arrested Mr. Endres and charged him with aggravated harassment. Appellant's App'x A.023 ¶37.

Despite Mr. Francis's repeated letters notifying KPM of Mr. Endres's menacing harassment, and despite KPM's ability to intervene, KPM did nothing. Appellant's App'x A.025 ¶48. KPM did not investigate Mr. Endres's conduct. Appellant's App'x A.024 ¶46. KPM did not notify Mr. Endres that his conduct violated his lease agreement. *Id.* KPM did not take any steps to resolve Mr. Francis's complaints of harassment. *Id.* Instead, KPM told Ms. Downing not to get involved in or intervene against Mr. Francis's claims of harassment, Appellant's App'x A.024 ¶47, even though KPM had intervened against other tenants regarding non-race-related violations of their leases or of the law. Appellant's App'x A.028 ¶63.

Mr. Francis sued KPM and Ms. Downing for, *inter alia*, violations of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982. KPM moved to dismiss these claims, and the district court granted its motion. The court dismissed Mr. Francis's §§ 1981 and 1982 claims because "the Plaintiff . . . failed to allege specific facts sufficient to support an inference that the KPM Defendants, rather than Endres, intentionally

discriminated against him on the basis of his race." Appellant's App'x A.099.

ARGUMENT

I. Under the Plain Text of 42 U.S.C. §§ 1981 and 1982, KPM Denied Mr. Francis the Same Rights to the Full Benefits of His Lease as is Enjoyed by White Citizens.

In 1866, Congress passed 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, 422, 435 (1968) (emphasis in original). Those basic civil rights included the right of all Americans to make and enforce contracts on an equal footing with white Americans. Specifically, Congress mandated that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

In 1989, the Supreme Court interpreted § 1981 narrowly, concluding that § 1981 prohibited racial discrimination in the contract formation process but not after the contract is formed. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 179–80 (1989). Congress swiftly superseded *Patterson* by passing the Civil Rights Act of 1991. *See*

CBOCS West, Inc. v. Humphries, 553 U.S. 442, 450 (2008). Congress clarified the breadth of § 1981 by defining the term "make and enforce contracts" to "include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Thus, as amended by the Civil Rights Act of 1991, § 1981 requires that "[a]ll persons within the jurisdiction of the United States shall have the same right" to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" as is "enjoyed by white citizens." 42 U.S.C. § 1981(a), (b).

Importantly, Congress's amendment to § 1981 expressly contemplated the statute as a means of remedying post-contract-formation racial harassment. Post-formation racial harassment was the subject of *Patterson*, and the Supreme Court held there was no remedy under § 1981 because the harassment occurred after the parties' contract was formed. *See Patterson*, 491 U.S. at 181. The Civil Rights Act of 1991 "'overrule[d] the Supreme Court's 1989 decision in *Patterson*. . . . By restoring the broad scope of Section 1981, Congress will ensure that all Americans *may not be harassed*, fired or otherwise discriminated against

in contracts because of their race.'" *Lauture v. Int'l Bus. Mach. Corp.*, 216 F.3d 258, 260 (2d Cir. 2000) (quoting H.R. Rep. No. 102-40(II), at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694–95) (emphasis added).

Congress's 1991 amendment was not limited to employment contracts. By its terms, § 1981 covers *all* contracts. The plain text of the statute admits of no reading that would cover racial harassment in the workplace but exempt racial harassment in other contractual settings. As Judge Boudin explained in rejecting an argument that the statute did not reach racial harassment against an independent contractor: "Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts[.]" *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999).

The allegations in Mr. Francis's Complaint, which must be taken as true at this stage of the case, *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715 (2d Cir. 2011), state a claim for relief under the plain language of § 1981 as amended in 1991. Mr. Francis signed a contract with KPM to lease an apartment. In that lease, KPM made a contractual commitment that Mr. Francis, as the tenant, "shall peaceably and quietly have, hold and enjoy the Premises during the term of his lease."

Appellant's App'x A.058 ¶12. But, because he is Black, Mr. Francis did not enjoy the full benefits of his contractual relationship with KPM, specifically the right to peaceable and quiet enjoyment of his unit during the time of the lease. Instead, he was subject to a campaign of extreme racial harassment. That harassment, perpetrated by Mr. Endres, was so severe that it included a racist death threat, with Mr. Endres telling Mr. Francis "I oughta kill you, you f---ing n----r." Appellant's App'x A.021 ¶30. Mr. Francis repeatedly informed KPM of this threatening harassment, as did the police, but KPM did nothing. Appellant's App'x A.017 ¶6. KPM's property manager even contacted KPM concerning Mr. Francis's complaints and Mr. Endres's discriminatory conduct, but KPM told her not to get involved. Appellant's App'x A.024 ¶47.[3]

[3] Here, the campaign of unremedied racial harassment Mr. Francis endured violated an explicit provision of his lease with KPM. But the § 1981 violation would be clear even if there were no explicit provision governing Mr. Francis's rights under the parties' lease because § 1981 prohibits racial discrimination and harassment that interferes with an ongoing contractual relationship, whether that harassment implicates a specific provision of the contract or not. *See Danco, Inc.*, 178 F.3d at 13–18 (holding independent contractor may maintain § 1981 action for hostile work environment without pointing to any explicit contract provision violated by the harassment); *see also Lauture*, 216 F.3d at 262–63 (Section 1981 protects employees from racial discrimination in at-will employment relationships).

KPM's decision not to address this severe racial harassment denied Mr. Francis "the enjoyment of all benefits, privileges, terms, and conditions of [his] contractual relationship" with KPM that he would have enjoyed had he been white. 42 U.S.C. § 1981(b). Mr. Francis was thus denied the same right to "make and enforce contacts . . . as is enjoyed by white citizens," within the meaning and per the plain text of § 1981. *Id.* § 1981(a).

This violation of Mr. Francis's rights under § 1981 is confirmed by the Supreme Court's recent decision in *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020). In *Comcast*, the Court explained that § 1981's "guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white?" *Id.* at 1015. 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. Had he been white, Mr. Francis would have enjoyed the full "benefits, privileges, terms, and conditions of the contractual relationship" with KPM,

including his right to the peaceable and quiet enjoyment of his apartment. 42 U.S.C. § 1981(b). But, because he was Black, he was denied those benefits and privileges.

This same logic applies to Mr. Francis's claim under 42 U.S.C. § 1982. That provision, which also derives from the Civil Rights Act of 1866, mandates that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real . . . property." 42 U.S.C. § 1982. Had Mr. Francis been white, his rights to "lease [and] hold . . . real . . . property," 42 U.S.C. § 1982, would not have been interfered with by an unprovoked onslaught of racist harassment, which went unaddressed by KPM. *See Comcast Corp.*, 140 S. Ct. at 1016 ("Because § 1982 was also first enacted as part of the Civil Rights Act of 1866 and uses nearly identical language as § 1981, the Court's 'precedents have construed §§ 1981 and 1982 similarly.'") (citation and alteration omitted).

Under the plain language of §§ 1981 and 1982, Mr. Francis has stated a claim for relief. And, as the Supreme Court has repeatedly stressed, "where, as here, the words of [a] statute are unambiguous, the

"'judicial inquiry is complete.'" *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), and *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

II. KPM's Deliberate Indifference to Known Racial Harassment Constitutes Intentional Discrimination.

In granting KPM's motion to dismiss, the district court did not conduct any meaningful analysis of the text of 42 U.S.C. § 1981 (or § 1982). In fact, the district court quoted only § 1981(a), without mentioning Congress's addition of § 1981(b) as part of the Civil Rights Act of 1991. The district court therefore did not address the expansive definition of to "make and enforce contracts" for purposes of § 1981 as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Without analyzing this key statutory text, the district court granted KPM's motion to dismiss on the ground that Mr. Francis had not made specific allegations that KPM intended to discriminate against him. The court stated that Mr. Francis failed to allege "derogatory remarks directed at him by a KPM agent" or other "specific facts sufficient to support an inference that the KPM Defendants, rather than Endres,

intentionally discriminated against him on the basis of his race." Appellant's App'x A.099.

The district court's reasoning is inconsistent with the plain text of § 1981 and with this Court's precedent. Section 1981 requires allegations of intentional discrimination, but intentional discrimination includes a defendant's deliberate indifference to known racial harassment when the defendant has the authority to remedy that harassment. This interpretation is not only mandated by this Court's precedent, *see Gant*, 195 F.3d at 141, it is required by the statutory text. Section 1981 focuses on whether the plaintiff was denied the same contract rights as enjoyed by white citizens, not whether the defendant expressed racial animus. Here, the allegations in Mr. Francis's complaint raise a plausible inference of deliberate indifference by KPM, such that his claims under §§ 1981 and 1982 should be allowed to proceed.

A. A Landlord's Choice Not to Respond to Known Racial Harassment Is Intentional Conduct that Violates § 1981.

The intent requirement under 42 U.S.C. § 1981 derives from the Supreme Court's decision in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). In *General Building Contractors*, the district court held that employers in the construction

industry violated § 1981 by relying on union referral lists because the union engaged in racial discrimination. *See id.* at 381. The district court so held even though it found the employers were not aware of the union's discrimination. *See id.*

The Supreme Court disagreed, holding that intentional discrimination is required to state a claim under § 1981. *See id.* at 389. But the Court did not define the scope of intentional discrimination under the statute, and it suggested that intentional discrimination includes circumstances where a defendant fails to respond to known discrimination by a third-party that affects the parties' contractual relationship. At the beginning of its opinion, the Supreme Court explained that there was no "proof of intentional discrimination" in *General Building Contractors* because the employers "did not intentionally discriminate against minority workers *and neither knew nor had reason to know of the Union's discriminatory practices*." *Id.* at 383 (emphasis added).

This Court confronted this question directly in *Gant* and held that intentional discrimination for purposes of § 1981 includes the defendant's deliberate indifference to a third party's racial harassment. In *Gant*, the

plaintiff was a public-school student who was subject to racial harassment by other students at school. *See* 195 F.3d at 138. The student sued school officials under § 1981 for failing to respond to the harassment. In an opinion by Judge Cabranes, joined by Judge Calabresi and then-Judge Sotomayor, this Court held that the plaintiff could succeed on such a claim if he could show deliberate indifference on the part of school officials. *Id.* at 140. The Court explained that "in cases of alleged student-on-student harassment," school officials' "deliberate indifference to such harassment can be viewed as discrimination by school officials themselves." *Id.* at 140. That is because a "defendant's actions or inaction in light of known circumstances," *i.e.*, known discrimination by a third party whom the defendant has authority over, may show that "the defendant intended the discrimination to occur." *Id.* at 141.

This Court further explained that intentional discrimination does not require proof "that the defendant fully appreciated the harmful consequences of that discrimination, because deliberate indifference is not the same as action (or inaction) taken 'maliciously or sadistically for the very purpose of causing harm.'" *Id.* (quoting *Farmer v. Brennan*, 511

U.S. 825, 835 (1994)). "Instead, deliberate indifference can be found when the defendant's response to known discrimination 'is clearly unreasonable in light of the known circumstances.'" *Id.* (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

In ruling that § 1981 covers deliberate indifference, this Court relied on the Supreme Court's decision in *Davis*, which reached a similar conclusion with respect to school officials' liability for student-on-student harassment under Title IX. *See Davis*, 526 U.S. at 642–44. In *Davis*, the Supreme Court similarly explained that deliberate indifference to known harassment is a form of intentional discrimination. When a school district acts with such deliberate indifference, it takes intentional action (or inaction) that violates Title IX, which means that it "intentionally violates Title IX." *Id.* at 643; *see id.* ("deliberate indifference to known acts of" student-on-student harassment "amounts to an intentional violation of Title IX" in certain circumstances).

In sum, when a defendant knows that the plaintiff is facing harassment by a third party over whom the defendant has some control, but the defendant does not address the harassment, the defendant's

deliberate indifference satisfies the intent requirement under § 1981. *See Gant*, 195 F.3d at 140 (citing *Davis*, 526 U.S. at 643).

This understanding of § 1981's intent requirement is also compelled by the plain text of the statute. When, as here, a defendant knows that the plaintiff is being denied full enjoyment of the parties' contract on account of race but instructs its employee not to address the situation, the plaintiff has been denied the "benefits, privileges, terms, and conditions of the contractual relationship" on account of race. 42 U.S.C. § 1981(b). Nothing in the text of the statute suggests that the defendant must do something beyond that, i.e., act for "'the very purpose of causing harm,'" to violate the plaintiff's rights under the statute. *Gant*, 195 F.3dat 141 (citation omitted). And this same deliberate indifference standard applies to claims under § 1982, which contains nearly identical language to § 1981, and which has been construed similarly to § 1981. *See Comcast Corp.*, 140 S. Ct. at 1016.

This does not mean that §§ 1981 and 1982 "expos[e] all manner of private actors to suit for the acts of third parties." *Francis v. Kings Park Manor*, 917 F.3d 109, 142 (2d Cir. 2019) (*Francis I*) (Livingston, J., dissenting). Deliberate indifference constitutes intentional

discrimination only when the defendant has "some control over harassment," and therefore has "the authority to take remedial action." *Davis*, 526 U.S. at 644. In the context of § 1981, the defendant must have sufficient control over a third party to address the racial harassment for a plaintiff to be able to establish she has been denied the full benefits and privileges of the "contractual relationship" between the plaintiff and the defendant on account of race. 42 U.S.C. § 1981(b).

Here, KPM had sufficient control over the harassing tenant to trigger liability under § 1981. Indeed, it is precisely because landlords have sufficient control over the conduct of their tenants that courts have recognized a landlord breaches a tenant's right to the quiet enjoyment of an apartment by failing to respond to harassing or extremely disruptive conduct by another tenant. *See, e.g.*, *Benitez v. Restifo*, 167 Misc. 2d 967, 969 (City Ct., Yonkers County 1996) (landlord breached the covenant of quiet enjoyment by failing to act when it knew that another tenant repeatedly left water running, causing damage to plaintiff's downstairs apartment, but "chose not to act"); *Matter of Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637 (2d Dep't 1995) (same, when landlord, "despite having ample notice, failed to take any effective steps to abate the

nuisance"); *Auburn Leasing Corp. v. Burgos*, 160 Misc. 2d 374, 376–77 (Civ. Ct., Queens County 1994) (same, when landlord knew that "tenant and her family were bullied, harassed, threatened with violence in many forms" by other tenants but "took inadequate steps to remedy the situation").[4]

Therefore, recognizing KPM's liability under §§ 1981 and 1982 would not impose novel duties on landlords. As Judge Livingston suggested in dissent, *see Francis v. Kings Park Manor, Inc.*, 944 F.3d 370, 389 n.11 (2d Cir. 2019) (*Francis II*), a landlord's duty to intervene and remedy interference with a tenant's lease has existed as an element of property and contract law for years. *See Benitez*, 167 Misc. 2d at 969; *Matter of Nostrand Gardens Co-Op*, 221 A.D.2d 637; *Auburn Leasing Corp.*, 160 Misc. 2d at 376–77.

In the words of another court, "the covenant of quiet enjoyment requires a reasonable response by the landlord, which may include conducting an investigation and thereafter, taking appropriate action,"

[4] The landlord's duty to provide a tenant with quiet enjoyment may either be an express obligation of the parties' contract, as it is here, or implied by law. *See, e.g.*, *Benitez*, 167 Misc. 2d at 969 (implied duty); *Auburn Leasing Corp.*, 160 Misc. 2d at 376–77 (express term).

such as, "inter alia, the issuance of a warning to the offending party, the pursuit of injunctive relief against the tenant to enjoin the violation, or, if necessary, the commencement of eviction proceedings." *Andrews v. Mobile Aire Estates*, 125 Cal. App. 4th 578, 597 (2005) (internal citations omitted); *see also Wiesman v. Hill*, 629 F. Supp. 2d 106, 114 (D. Mass. 2009) ("A landlord . . . may be liable for a third party's breach of a tenant's quiet enjoyment, if the breach is a 'natural and probable consequence of what the landlord did, what he failed to do, or what he permitted to be done.'") (citations omitted); *Bocchini v. Gorn Mgmt. Co.*, 515 A.2d 1179, 1185 (1986) (recognizing that the landlord "ought not to be able to escape his obligation under a covenant of quiet enjoyment by steadfastly refusing to exercise his authority").

Similarly, as explained by one of the illustrations in § 6.1 of the Restatement (Second) of Property, Land. & Ten. (1977), a landlord is liable when the landlord "refuses to do anything" in response to complaints about one tenant's conduct that interferes with the rights of another:

> L leases an apartment to T. L leases another apartment in the same building to A. Under the terms of each lease, L reserves the right to terminate the lease if a tenant persists in making noises disturbing to other tenants after being requested to

> stop the disturbing noises. *T complains to L about disturbing noises of A and L refuses to do anything. The noises of A are attributable to L for the purposes of applying the rule of this section.*

Id. (emphasis added). And, in this very case, the district court held that Mr. Francis adequately pleaded that KPM breached the statutorily implied warranty of habitability by failing to address harassing behavior by a third-party tenant. Appellant's App'x A.119–120.

All these authorities are premised on the reality that landlords have sufficient control over tenants to address conduct by one tenant that interferes with the rights of another tenant. To be sure, a landlord does not have the same amount of control over tenants as employers do over their employees or school districts do over students. Certain kinds of remedial action that are available to an employer or school officials may not be available to a landlord. But, the landlord unquestionably has "authority to take remedial action" in response to tenant-on-tenant racial harassment, just as the landlord has the authority to take remedial action in response to other kinds of harassment, and nuisances such as excessive noise and water leaks. *Davis*, 526 U.S. at 644. And if the landlord's failure to take any steps to exercise that authority is "'clearly

unreasonable'" in light of known tenant-on-tenant racial harassment, the landlord's deliberate indifference violates § 1981. *Gant*, 195 F.3d at 141.

B. KPM Acted with Deliberate Indifference to Mr. Endres's Pervasive and Severe Racial Harassment Against Mr. Francis.

KPM's knowledge of, and failure to address, the pervasive tenant-on-tenant harassment Mr. Francis endured on account of race amounts to deliberate indifference under §§ 1981 and 1982, as interpreted by *Gant*. Mr. Francis sent KPM three certified letters over the course of five months describing both the abusive harassment he experienced, and the Suffolk County police department's involvement, including Mr. Endres's arrest for harassment against Mr. Francis. Appellant's App'x A.041–043, 049, 055. KPM received Mr. Francis's complaints and was aware that his enjoyment of his property was being interfered with by another tenant. And KPM had significant control over Mr. Endres's use of, and conduct while using, the premises. Still, KPM instructed its property manager to not get involved and did not itself investigate or attempt to remedy Mr. Francis's complaints of racial threats and harassment. Appellant's App'x A.024 ¶¶46–47. These allegations raise a plausible inference that KPM acted with deliberate indifference. *See, e.g.*, *Farmer*, 511 U.S. at 842

(deliberate indifference when a person unreasonably acts or fails to act despite knowledge of a substantial risk of harm).

In her opinion dissenting from the panel's second opinion, Judge Livingston suggested that it was not clear what KPM could have done differently in response to Mr. Endres's harassing and racist behavior. *See Francis II*, 944 F.3d at 393. But Mr. Endres was in clear violation of KPM's lease provision prohibiting tenants from committing "any objectionable or disorderly conduct, noise or nuisances . . . that disturbs or interferes with the rights, comforts, or conveniences of other residents," and KPM therefore could have taken some corrective action to address Mr. Endres's conduct. Appellant's App'x A.027–028 ¶61, A.061 ¶B.4. As noted, "the covenant of quiet enjoyment requires a reasonable response by the landlord, which may include conducting an investigation and . . . taking appropriate action," such as "the issuance of a warning to the offending party, the pursuit of injunctive relief against the tenant to enjoin the violation, or, if necessary, the commencement of eviction proceedings." *Andrews*, 125 Cal. App. 4th at 578 (citations omitted).

Here, KPM certainly could have issued a warning to Mr. Endres, or posted prominent signs that racial threats or harassment would not be

tolerated and would be reported to law enforcement. KPM also could have responded to Mr. Francis to determine if there were ongoing incidents that were jeopardizing his safety and that of other tenants. Notwithstanding its options to act, KPM affirmatively instructed its property manager to do nothing.

It will ultimately be for the factfinder to determine whether KPM's choice to do nothing in response to menacing harassment was "'clearly unreasonable in light of the known circumstances.'" *Gant*, 195 F.3d at 141 (quoting *Davis*, 526 U.S. at 648). But at least at the pleading stage, where all facts and inferences must be resolved in Mr. Francis's favor, *Litwin*, 634 F.3d at 715, Mr. Francis has stated a claim for deliberate indifference. His claims should survive KPM's motion to dismiss and proceed to discovery.

CONCLUSION

For the foregoing reasons, amicus curiae LDF respectfully urges this Court to reinstate Mr. Francis's §§ 1981 and 1982 claims against KPM.

Dated: May 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief of NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae in Support of En Banc Appellant:

(1) Complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,527 words; and

(2) Complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2020, I electronically filed the Brief of NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae in Support of En Banc Appellant with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

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