Averting Plausibility Pleading's Threats to Novel FHA Legal Claims

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ABSTRACT: Plausibility pleading requirements articulated by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *continue to confound even well-intentioned courts. But for courts inclined to avoid grappling with modern applications of existing law, they provide ideal camouflage: a way of relying on procedural justifications to ostensibly sidestep substantive law decisions—while in effect creating de facto law that robs litigants of their day in court. These negative, unintended consequences of* Twombly *and* Iqbal *are vividly illustrated in recent federal litigation brought under the Fair Housing Act involving claims of landlord liability for tenant-on-tenant harassment.*

This Article demonstrates how plausibility pleading, when improperly applied in cases involving unsettled law, creates substantive law sub silentio with powerful consequences. These decisions, couched as procedural rulings, in fact impose substantive limits on the rights of both the parties and future litigants, insulate courts from potentially critical appellate review, and hinder the development of legal protections. After all, absent explicit splits in authority, the already small likelihood of attracting Supreme Court or congressional attention becomes infinitesimal. In response, this Article recommends a framework for analyzing novel legal claims that promotes the development of a more coherent body of substantive law while limiting judicial time spent on objectively meritless claims. This approach is consistent with the policies underlying the Supreme Court's adoption of plausibility pleading and,

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The authors would like to thank Katherine MacFarlane and Richard Heppner at the Southeastern Association of Law School's conference, the participants at the Second Annual Asian American Pacific Islander/Middle Eastern & North African Women in the Legal Academy Workshop, the participants in the Faculty Scholarship Retreat at Texas A&M University School of Law, and research-assistant-extraordinaire Ny'esha Young, J.D. Candidate, Texas A&M University School of Law, 2024. We are grateful to all of you for your invaluable contributions to this Article.

in the specific example we address, with Congress's broad remedial goals in enacting the Fair Housing Act.

INTRODUCTION

In the fifteen years since the Supreme Court first decided *Bell Atlantic Corp. v. Twombly*[1] and then *Ashcroft v. Iqbal*,[2] their impact can hardly be over-

1. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
2. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

stated.[3] To date, each case has been cited well over half a million times.[4] In contrast, *Conley v. Gibson*,[5] the seminal 12(b)(6) case for the fifty years before *Twombly*, has been cited just over 200,000 times.[6]

Scholars for their part have written thousands of law review articles about *Twombly* and *Iqbal*.[7] Some denounced the Supreme Court's adoption of *Twombly* and *Iqbal*'s "'plausibility pleading' as a 'radical departure from prior practice'"[8] and described pleading standards as being "in crisis."[9] They declared the cases

3. Before these cases, "notice pleading," as set forth in the Federal Rules of Civil Procedure Rule 8 and explained by *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), reigned. Notice pleading merely sought to provide notice of claims to the parties and to the court. *See Conley*, 355 U.S. at 47–48. In *Twombly*, the Court abruptly announced that Rule 8 required parties to show they were entitled to relief under Rule 8 by including facts that showed their claims were "plausible." *Twombly*, 550 U.S. at 556–57. Then in *Iqbal*, the Court made clear that the plausibility standard announced in *Twombly* applied to all civil actions subject to Rule 8 and that judges should determine whether the standard is met by using their own "judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *e.g.*, Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2411–13 (2022) (discussing notice pleading under *Conley*, and its replacement with "plausibility pleading" under *Twombly* and *Iqbal*).

4. As of March 11, 2024, according to KeyCite on Westlaw Precision, *Twombly* has garnered 738,940 cites, with over 343,000 cases citing it and over 3,000 law review articles. WESTLAW, https://1.next.westlaw.com (last visited Mar. 11, 2024) (open the case *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and select "Citing References"; then select "Secondary Sources" within the "Content types" tab). At the same time, *Iqbal* had 663,477 cites total, with over 321,000 cases citing it and over 2,700 law review articles. WESTLAW, https://1.next.westlaw.com (last visited Mar. 11, 2024) (open the case *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and select "Citing References"; then select "Secondary Sources" within the "Content types" tab).

5. *See generally Conley*, 355 U.S. 41.

6. As of March 11, 2024, according to KeyCite on Westlaw Precision, *Conley* had been cited 208,351 times total, with 85,912 cases and 1,497 law review articles citing it. WESTLAW, https://1.next.westlaw.com (last visited Mar. 11, 2024) (open the case *Conley v. Gibson*, 355 U.S. 41 (1957) and select "Citing References"; then select "Secondary Sources" within the "Content types" tab). A note in the Second Circuit's opinion in the *Iqbal* case, which was later reversed by the Supreme Court, suggests the vast majority of those cites likely came in response to the *Twombly* and *Iqbal* decisions. Footnote seven in that case observes that *Conley*'s "'no set of facts' language" had been cited "at least 10,000 times" in 2007, when the Second Circuit wrote its opinion. Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009). Thus, one may reasonably extrapolate that *Conley* garnered 10,000 cites in its first fifty years compared to 190,000+ cites in the last fifteen years.

7. *See supra* text accompanying note 4.

8. William H.J. Hubbard, Swanson v Citibank *and the 1L Canon*, 87 U. CHI. L. REV. 2377, 2380 (2020) (quoting Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 22, 28 (2010)).

9. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014) (quoting Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 834 (2010)); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1254–55 (2013); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527–29 (2010).

"watershed decisions"[10] and noted "that the change came from nowhere, introducing entirely new concepts—nonconclusoriness and plausibility—that had not appeared in any pleading cases from any court."[11]

Scholars interrogated what pleading standards would look like post-*Twombly* and *Iqbal*. Many probed how courts would decide just what makes a claim plausible.[12] Some questioned how to interpret *Iqbal*'s instruction to separate conclusions from facts to determine whether a plaintiff has plausibly pleaded a claim.[13] Others examined plausibility pleading's likely effects on plaintiffs' abilities to successfully pursue civil rights and employment discrimination claims.[14] Still others conducted empirical research to analyze plausibility pleading's effect on dismissal rates.[15]

But the effects of plausibility pleading in cases alleging violations of unsettled law in the context of claims brought under the Fair Housing Act ("FHA")[16] has garnered little attention. This Article examines how courts' interpretations of plausibility pleading influence their decisions on the issues before them and how incongruous applications are both wasteful and damaging. First, it demonstrates how confusion surrounding the application of plausibility

10. A. BENJAMIN SPENCER, POUND CIV. JUST. INST., PLEADING IN STATE COURTS AFTER *TWOMBLY* AND *IQBAL* 21 (2010), https://ncji.org/wp-content/uploads/2019/04/2010-Pound-Forum-Spencer-Paper-1.pdf [https://perma.cc/W5GY-ZDEF].

11. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 319–20 (2012).

12. *See, e.g.*, Hubbard, *supra* note 8, at 2380–81; Steve Subrin, Ashcroft v. Iqbal*: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 580 (2012); Miller, *supra* note 8, at 83–84; Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1189–90 (2010).

13. *See, e.g.*, Howard M. Erichson, *What Is the Difference Between a Conclusion and a Fact?*, 41 CARDOZO L. REV. 899, 903–04 (2020); Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215, 240 (2011).

14. *See, e.g.*, Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y.L. SCH. L. REV. 719, 722 (2013); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1618–20 (2011); Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 216–17; Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 167–69 (2010); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1013–14.

15. *E.g.*, William H.J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 503, 507–08 (2017) (concluding *Twombly* and *Iqbal* affected litigation practice at the pleadings stage with increased filings of motions to dismiss and amendments to pleadings); Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 376 (2016) (concluding "empirics cannot conclusively resolve the case-quality aspects of the *Twiqbal* debate"); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015) (concluding "that dismissal rates have increased significantly post-*Iqbal*"); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (finding significant difference in treatment of motions to dismiss in civil rights cases).

16. 42 U.S.C. §§ 3601–3619 (2018).

pleading exacerbates inefficiencies—an outcome squarely at odds with the purported policy of *Twombly* and *Iqbal* of avoiding waste and inefficiency in litigation.[17] Second, it examines how inappropriate applications of plausibility pleading in the fair housing context threaten to create de facto law surrounding the FHA through neglect, while inhibiting the development of thoughtful and coherent FHA law. Third, it explains how the application of plausibility pleading in FHA cases should not require dismissal of plaintiffs' novel claims under the Act.

To illustrate these points, the Article analyzes how a staunchly divided Second Circuit, in the recent case of *Francis v. Kings Park Manor, Inc.*, erratically employed plausibility pleading to reach multiple inconsistent decisions on the same question: Whether the district court's dismissal of the plaintiff's novel FHA claims was proper.[18] Despite its reputation for avoiding en banc review,[19] the Second Circuit granted it in *Francis* and upheld the district court's dismissal.[20] That full court review, however, came after two published panel decisions, each of which had vacated the district court's order.[21] Not only did the en banc court reach an outcome at odds with the two prior Second Circuit panels, the outcome conflicted with a recent decision of the Seventh Circuit[22]—the only other circuit to have addressed similar FHA claims.[23]

Thus, in addition to exemplifying how unpredictable applications of plausibility pleading amplifies inefficiencies in litigation, the *Francis* case also reveals how such applications can result in de facto new law and how the reliance on plausibility pleading can effectively shield a decision from critical appellate scrutiny. By upholding the district court's dismissal based on the failure to plausibly plead a novel legal claim, the en banc court in *Francis* effectively rendered that kind of claim unavailable in the Second Circuit.

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17. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 483 (2008) ("Among the functions that pleadings are most ineffective at fulfilling is providing courts the ability to determine whether the plaintiff's claims are meritorious or can be proved.").

18. *See generally* Francis v. Kings Park Manor, Inc., 992 F.3d 67 (2d Cir. 2021) (en banc).

19. *See infra* note 109 and accompanying text.

20. *Francis*, 992 F.3d at 70, 82.

21. Francis v. Kings Park Manor, Inc., 917 F.3d 109, 126 (2d Cir. 2019), *aff'd*, 944 F.3d 370 (2d Cir. 2019), *and vacated en banc*, 992 F.3d 67 (2d Cir. 2021).

22. *See* Wetzel v. Glen St. Andrew Living Cmty., L.L.C., 901 F.3d 856, 859 (7th Cir. 2018) (recognizing that a landlord can be liable under the FHA when it has actual notice of tenant-on-tenant harassment based on protected status).

23. The question is an unsettled one: "[T]here is no consensus at the present time about whether landlords have an obligation under the FHA to remediate cases of tenant-on-tenant harassment and, if they do, what the justification is for reading in that legal duty." Aric Short, *Not My Problem? Landlord Liability for Tenant-on-Tenant Harassment*, 72 HASTINGS L.J. 1227, 1256 (2021); *see also id.* at 1242–52 (analyzing the trial and appellate court decisions in *Wetzel* with *Francis* as well as the relevant Housing and Urban Development ("HUD") regulations and arguing that courts should analogize the availability of claims under the FHA in the housing context to the availability of similar claims under Title VII in the employment context).

Moreover, the en banc court's reliance on plausibility pleading allowed it to avoid an explicit circuit split, making the already small likelihood that the Supreme Court or Congress would address the issue even smaller.

Part I of this Article illustrates the confusion surrounding the Second Circuit's applications of plausibility pleading in analyzing the district court's dismissal of the plaintiff's FHA claims in *Francis*. Part II examines how the application of plausibility pleading in *Francis* undermined the goals of *Twombly* and *Iqbal* and created new law regarding the FHA that undercuts goals underlying the Act. One of the effects of that stealth lawmaking is to discourage a more coherent development of law concerning whether these kinds of claims should be cognizable under the FHA. Part III suggests a framework within which to analyze motions to dismiss based on novel legal claims. It recommends analyzing the purely legal question of whether a right is recognized under the law before analyzing the mixed question of law and fact of whether a plaintiff has plausibly pleaded the legal claim. In answering the plausibility question, courts should apply a modified version of the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*.[24] This approach would avoid many of the pitfalls evident in *Francis*: It would be more efficient; it would encourage the development of coherent law on novel claims; and if applied appropriately, it would further the broad remedial goals of the FHA.

I. *FRANCIS* ILLUSTRATES PLAUSIBILITY PLEADING'S HARMFUL EFFECTS IN CASES INVOLVING UNSETTLED LAW INTERPRETING THE FHA

The Second Circuit's tortured decision-making in *Francis* exposes the degree of confusion and inefficiency that can result when courts evaluate 12(b)(6) motions in cases involving novel legal claims. Ultimately, the appellate process in *Francis* took six years and was littered with withdrawn opinions, numerous dissents and concurrences, and reversals on top of reversals.[25] In fact, the appellate history in *Francis* is so circuitous that one author in describing it included charts to communicate what happened at each stage.[26]

24. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

25. *See generally* Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420 (E.D.N.Y. 2015) (granting defendants' 12(b)(6) motion to dismiss), *vacated*, 917 F.3d 109 (2d Cir. 2019) (reversing district court dismissal of plaintiff's FHA claims, inter alia), *withdrawn*, 920 F.3d 168 (2d Cir. 2019) (mem.), *aff'd*, 944 F.3d 370 (2d Cir. 2019) (again reversing district court's dismissal of plaintiff's FHA claims, inter alia), *reh'g granted en banc*, 949 F.3d 67 (2d Cir. 2020) (mem.), *and vacated*, 992 F.3d 67 (2d Cir. 2021) (deciding the opposite of the two prior panel decisions and instead affirming the district court's grant of defendants' 12(b)(6) motion to dismiss plaintiff's FHA claims). Due to the complicated procedural history in *Francis*, later citations to *Francis* in this article will not include all prior and subsequent history. Rather, citations to the opinions published for the relevant points discussed in the text of the article will be provided.

26. Marianne Jennings, *From the Courts: Vicarious Liability of Landlords for Obnoxious, Boorish, and/or Threatening Tenants*, 50 REAL EST. L.J. 522, 541–44 (2021).

The final decision, like the ones that preceded it, came from a staunchly divided court, with two separate dissenting in part and concurring in part opinions.[27] Before that decision, a panel of Second Circuit judges published two separate decisions—each also containing vigorous dissents—on the same questions.[28] In both panel decisions, the majorities had vacated the district court's grant of the defendants' motion to dismiss Mr. Francis's FHA claims.[29] But a majority of the court sitting en banc disagreed and instead upheld the district court's dismissal.[30]

The numerous opinions and dissents in *Francis* reveal the Second Circuit disagreed not only about whether the district court's order should stand but also about what questions should be asked and in what order they should be asked to determine whether the dismissal was proper. The plaintiff in *Francis*, Donahue Francis, was an African American man, who was verbally harassed and threatened by a fellow tenant in his apartment complex.[31] At least once, the harasser even threatened to kill Mr. Francis.[32] Several times, Mr. Francis informed the owner and on-site housing manager of the ongoing harassment, including sending three certified letters to them detailing the harassment, but the owner and manager did nothing to help him.[33] The abuse grew so severe that Mr. Francis called the police for help at least three times.[34] Eventually, the police arrested the other tenant for aggravated harassment based on his conduct toward Mr. Francis.[35]

When Mr. Francis informed the owner and manager of the arrest and the other tenant's continued harassment even after being arrested, the owner and manager took no steps to address the situation.[36] Indeed, the owner went so far as to instruct the on-site manager "not to get involved."[37] Finding the situation untenable, Mr. Francis sued the apartment owner and the manager, as well as the harassing tenant, in federal district court in New York.[38] In his complaint, Mr. Francis alleged violations of state and federal law, including

27. *Francis*, 992 F.3d at 83 (Chin, J., dissenting in part and concurring in part); *id.* at 85 (Lohier, J., dissenting in part and concurring in part).

28. Francis v. Kings Park Manor, Inc., 917 F.3d 109, 126–42 (2d Cir. 2019) (Livingston, J., dissenting in part and concurring in part); Francis v. Kings Park Manor, Inc., 944 F.3d 370, 381–95 (2d Cir. 2019) (Livingston, J., dissenting in part and concurring in part).

29. *Francis*, 917 F.3d at 126; *Francis*, 944 F.3d at 381.

30. *Francis*, 992 F.3d at 82.

31. *Id.* at 71.

32. *Id.*

33. *Id.*

34. *See* Complaint at 5–8, Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420 (E.D.N.Y. 2015) (No. 14-cv-3555).

35. *Id.* at 8.

36. *Id.*

37. *Id.* at 9.

38. *See Francis*, 91 F. Supp. 3d at 423.

violations of § 3604[39] and § 3617[40] of the FHA.[41] When the other tenant failed to appear in the lawsuit, the district clerk noted the entry of default against him.[42] The owner and manager did appear, however. On August 1, 2014—not long after Mr. Francis filed his lawsuit, but seven long years before the Second Circuit had the last word on the issue—the defendants filed a pre-answer 12(b)(6) motion to dismiss, asking the district court to dismiss Mr. Francis's FHA claims against them.[43] In addition to questioning whether the FHA covered Mr. Francis's claims,[44] the defendants relied on *Twombly* and *Iqbal* and argued, inter alia, that Mr. Francis failed to plausibly plead his claims under the FHA.[45]

A. DISTRICT COURT DISMISSES

To start, the defendants challenged the existence of Mr. Francis's legal claims under the FHA. They argued the claims that they violated FHA § 3604 and § 3617 lacked legal support.[46] Defendants wrote, "[n]either the Second Circuit nor district courts in this Circuit have opined on whether a landlord may be held liable under the FHA for failing to intervene in harassment between tenants based on protected status."[47] In addition to the legal argument that the FHA failed to provide relief for Mr. Francis's claims, they included a mixed law and fact argument based on *Twombly* and *Iqbal*. The defendants stated, in relevant part, "[a]ssuming *arguendo* that if such a claim did exist," the plaintiff failed to plausibly establish the defendants "treated Plaintiff differently than similarly situated residents," which warranted dismissal of the claims.[48] The district court agreed but declined to answer the legal

39. Section 3604 provides, "it shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race." 42 U.S.C. § 3604(b).

40. Section 3617 provides it is:

> [U]nlawful 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.

Id. § 3617.

41. *Francis*, 91 F. Supp. 3d at 427.

42. *Id.* at 423.

43. *See id.* at 425.

44. Memorandum of L. in Support of Kings Park Manor, Inc. and Corrine Downing's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 11, *Francis*, 91 F. Supp. 3d 420 (No. 14-cv-3555), 2014 WL 11209872.

45. *See id.* at 5.

46. *Id.* at 7–8.

47. *Id.* at 9 (quoting Cain v. Rambert, No. 13-cv-5807, 2014 WL 2440596, at *6 (E.D.N.Y. May 20, 2014)).

48. *Id.* at 9, 13.

questions surrounding whether the FHA covered claims like the ones brought by Mr. Francis.[49]

As the defendants did in their motion, the district court decision began by noting that no Second Circuit court authority existed regarding whether post-acquisition harassment is covered by "the FHA and, by extension, whether a landlord or property owner's knowing failure to intervene to combat such harassment, without more, is actionable against the landlord or property owner."[50] The court further noted that while district courts in the Second Circuit had recognized the FHA applied to certain kinds of post-acquisition harassment, no district court had addressed the question of landlord liability for tenant-on-tenant harassment.[51] After considering these critical legal issues, the district court declared:

> [A]ssuming, without deciding, that a "hostile housing environment" claim is actionable against a landlord or property owner under the FHA, a question unresolved at this time by the Second Circuit, . . . would require allegations of intentional discriminatory conduct, or failure to intervene, by the landlord or property owner based on a protected category. Turning to whether the Plaintiff has adequately done so in this case, the [c]ourt concludes that he has not.[52]

Characterizing Mr. Francis's allegations as "naked assertions by plaintiffs that race was a motivating factor without a fact-specific allegation of a causal link between defendant's conduct and the plaintiff's race are too conclusory," the court found that Mr. Francis failed to allege a basis for imputing the harassment committed by the other tenant to the defendant owner and defendant manager.[53] Accordingly, the court granted the part of the defendants' motion seeking dismissal of Mr. Francis's FHA claims against them.[54]

Without deciding whether Mr. Francis's claims were or were not available under the law, the district court declared Mr. Francis would have had to have included in his complaint specific facts to show the defendants intentionally discriminated against him in violation of the FHA.[55] Against that backdrop, which included the court's own professed doubt as to whether the FHA encompassed the type of claims Mr. Francis pleaded, the district court held he failed to meet *Twombly* and *Iqbal*'s plausibly requirements.[56] Thus, the court

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49. *See Francis*, 91 F. Supp. 3d at 433.

50. *Id.* at 432.

51. *See id.*

52. *Id.* at 433.

53. *Id.* (quoting Poles v. Brooklyn Cmty. Hous. & Servs., No. 11 Civ. 4796, 2012 WL 668910, at *3 (E.D.N.Y. Feb. 29, 2012)).

54. *Id.*

55. *See id.*

56. *See id.* at 425–26, 433.

dismissed Mr. Francis's FHA claims,[57] setting off the drawn-out and contentious appeals process that followed.

The appeals of the district court's order spawned two separate decisions and four opinions by the same three-judge panel and a later en banc decision that contained two dissenting opinions.[58] The relevant portions of each are summarized below.

B. First Panel Decision Vacates District Court Dismissal Before Being Withdrawn and Replaced

Although the district court entered its order on March 16, 2015, just over seven months from the time the defendants filed their pre-answer 12(b)(6) motion to dismiss, the Second Circuit did not issue the first panel decision (*Francis I*) until nearly four years later, on March 4, 2019.[59] Judge Lohier wrote the majority opinion, in which Judge Pooler joined, and Judge Livingston dissented.[60] The majority decision in *Francis I* vacated the district court's dismissal of Mr. Francis's FHA claims.[61] Importantly, in *Francis I*, the panel appropriately answered the legal question as to whether the FHA countenanced the kinds of claims pleaded by Mr. Francis before it considered whether Mr. Francis plausibly pleaded those claims.[62] Only after it determined that the FHA encompassed the kinds of claims set forth by Mr. Francis did the panel consider whether Mr. Francis plausibly pleaded his claims.[63]

To start, the majority in the first panel decision analyzed whether the FHA provides post-acquisition protections to tenants.[64] Consistent with the statute's language and underlying purpose, the majority declared the Second Circuit would join with the other circuits in broadly interpreting the FHA to cover post-acquisition conduct.[65] The majority concluded that in addition to prohibiting discrimination in the procurement of housing, the FHA reaches conduct that would interfere with "'enjoyment of . . . a dwelling or in the provision of services associated with that dwelling' after acquisition."[66] In reaching that conclusion, the majority carefully considered the text of the relevant statutory provisions, the analogy to Title VII employment discrimination

57. *Id.* at 438.

58. *See supra* notes 27–30 and accompanying text.

59. *Francis*, 91 F. Supp. 3d at 420, 423; Francis v. Kings Park Manor, Inc. (*Francis I*), 917 F.3d 109, 109 (2d Cir. 2019).

60. *Francis I*, 917 F.3d at 114.

61. *Id.* at 126.

62. *See id.* at 116–19, 124–25.

63. *Id.*

64. *See id.* at 116–19.

65. *See id.* at 117–19.

66. *See id.* at 119 (quoting Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 714 (9th Cir. 2009)).

claims, the decisions of other circuits that had all recognized at least some post-acquisition reach, and the relevant U.S. Department of Housing and Urban Development ("HUD") regulations that supported the majority's conclusion.[67] It reasoned that "it would make no sense for Congress to require landlords to rent homes without regard to race but then permit them to harass tenants or turn a blind eye when tenants are harassed in their homes because of race."[68]

Turning to the next legal question, the majority noted, "the only other Circuit to grapple with the issue recently concluded that the FHA 'creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment.'"[69] Judge Lohier noted the statutory text and legislative history of the FHA supported the court's conclusion that the FHA covered this type of claim.[70] Judge Lohier also relied heavily on a HUD regulation that provides a landlord may face liability under the FHA if "the landlord 'knew or should have known of the discriminatory conduct'" by a tenant but fails to address it, despite having had the power to do so.[71] Thus, the court declared the FHA countenances a housing provider's liability for third-party harassment.

The majority also set forth the elements of such a claim. A plaintiff would have to prove:

> "(1) [a] third-party created a hostile [housing] environment for the plaintiff . . .; (2) the housing provider knew or should have known about the [third-party's] conduct [that] create[ed] the hostile environment;" and (3) notwithstanding its obligation under the FHA to do so, "the housing provider failed to take prompt action to correct and end the harassment while having the power to do so."[72]

Although determining liability would be fact-dependent and necessarily focus largely on the landlord's ability to control tenants engaging in harassing behaviors, the majority clearly declared the FHA covered the sorts of claims alleged by Mr. Francis.

The majority then turned to another legal question: Whether a plaintiff alleging this type of claim under the FHA must show the housing provider

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67. *Id.* at 117–19.

68. *Id.* at 119 (citing Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994)).

69. *Id.* at 120 (quoting Wetzel v. Glen St. Andrew Living Cmty., L.L.C., 901 F.3d 856, 859 (7th Cir. 2018)).

70. *See id.*

71. *Id.* at 121 (quoting 24 C.F.R. § 100.7(a)(1)(iii) (2019)).

72. *Id.* (omission in original) (quoting Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054, 63069 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100)).

intentionally discriminated against the plaintiff.[73] Quoting Second Circuit precedent, Judge Lohier noted the court had previously "held that, '[t]o establish a violation of the FHA, a plaintiff need [only] show . . . that the challenged [actions] ha[ve] a discriminatory effect,'" not necessarily that the violation was the result of "discriminatory intent."[74] Judge Lohier stated, "[i]nsofar as the [d]istrict [c]ourt required Francis to allege that the KPM [d]efendants' conduct was the result of direct, intentional racial discrimination, we conclude that this was error."[75] Thus, the majority rejected the idea that, at the dismissal stage, the FHA required proof of discriminatory intent on the part of the landlord in failing to intervene.[76]

Having rejected intent to discriminate as a requirement, Judge Lohier nevertheless noted that had it been required, Mr. Francis's allegations were sufficient to withstand the defendants' 12(b)(6) motion:

> Finally, even assuming that such a requirement exists, we think that Francis's complaint, viewed in the light most favorable to Francis, plausibly and adequately alleges that the KPM Defendants engaged in intentional racial discrimination. Specifically, it alleges that the KPM Defendants "discriminat[ed] against [Francis] by tolerating and/or facilitating a hostile environment," even though the defendants had authority to "counsel, discipline, or evict [the harasser] due to his continued harassment of [Francis]," and also had "intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law."[77]

The majority reasoned that "[Mr.] Francis ha[d] alleged that the . . . [d]efendants had actual knowledge of [the other tenant]'s criminal racial harassment of Francis."[78] And, Mr. Francis alleged that because the other tenant's harassment of him involved race, the defendants "intentionally allowed it to continue[,] even though they had the power to end it" if they had chosen to take some action.[79]

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73. *See id.* at 124.

74. *Id.* (first alteration in original) (quoting Davis v. N.Y.C. Hous. Auth., 278 F.3d 64, 81 (2d Cir. 2002)).

75. *Id.*

76. *See id.* (citing *Davis*, 278 F.3d at 81); *see also* Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996) (stating that a § 3604(b) violation "may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect" (citing Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986))).

77. *Francis I*, 917 F.3d at 124 (alterations in original except the third) (quoting Joint Appendix at 19–20, *Francis I*, 917 F.3d 109 (No. 15-1823)).

78. *Id.*

79. *Id.*

The majority recognized its duty in deciding a 12(b)(6) dismissal to treat Mr. Francis's allegations as true.[80] Thus, the majority determined that the "[d]efendants 'subjected [Francis] to conduct that the FHA forbids.'"[81] In reaching that determination, the majority specifically pointed out the possibility that discovery could show that the defendants tried to respond but failed to do so effectively.[82] It also posited that discovery could show the defendants "were powerless to evict or otherwise deal with" the tenant who engaged in the criminal, racially motivated harassment of Mr. Francis.[83] The majority conceded discovery might prove Mr. Francis's claims to be without merit.[84]

But, critically, the majority declared Mr. Francis was "entitled to discovery" at least as to the question of "the level of control the . . . [d]efendants actually exercised over tenants and whether they had the power to act to redress" the abuse directed at Mr. Francis by the other tenant.[85] In dissent, Judge Livingston disagreed with the majority's determination that the FHA could cover a claim, like Mr. Francis's, that is premised on a landlord's failure to intervene in situations involving tenant-on-tenant harassment.[86] She criticized the majority's use of the HUD rule to bolster its decision and characterized the majority's analogy to Title VII as "flawed."[87] She argued the FHA requires plaintiffs to allege discrimination by the landlords themselves, and the statute should not be read to impose on landlords any "ongoing duty to *prevent* discrimination by others."[88] Disagreeing with the majority's conclusion that the FHA did not require Mr. Francis to plead discriminatory intent on the part of the owner or manager, Judge Livingston warned of dire consequences that would result from the majority's decision.[89]

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80. *See id.*

81. *Id.* (alteration in original) (quoting Wetzel v. Glen St. Andrew Living Cmty., L.L.C., 901 F.3d 856, 864 (7th Cir. 2018)).

82. *See id.* at 124–25.

83. *Id.* at 124.

84. *See id.*

85. *Id.* at 124–25.

86. *See id.* at 126–41 (Livingston, J., dissenting).

87. *Id.* at 140.

88. *Id.* at 127. As a preliminary matter, Judge Livingston questioned the broad post-acquisition scope of the FHA adopted by the majority, noting Judge Posner's observation that "[t]he [FHA] contains no hint either in its language or its legislative history of a concern with anything but *access* to housing." *Id.* at 128 (first alteration in original) (quoting Halprin v. Prairie Single Fam. Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004)).

89. *See id.* at 139 ("Today's decision may benefit law firms and insurance companies . . . . [T]he real winners today will not include those in pursuit of fair housing, and certainly not the renters among them, who will likely be left to foot the bill."). Judge Livingston further disagreed with the majority's conclusion that Francis had adequately pled discriminatory intent when he alleged the defendants had investigated and remedied allegations of tenant-on-tenant harassment that did not involve race. *See id.* at 132.

C. Second Panel Decision Again Vacates District Court Dismissal Before Being Withdrawn and Replaced

Shortly after rendering its decision in *Francis I*, the court, without explanation, withdrew it,[90] and eight months later, the same panel issued a new decision—*Francis II*.[91] The judges in *Francis II* split in the same way they did in their earlier decision.[92] Judge Lohier, again writing for the majority, and Chief Judge Livingston, again writing in dissent, each issued revised opinions. But neither side changed their minds on whether the district court's dismissal was proper.[93] Instead, the majority reiterated its reversal of the district court order dismissing Mr. Francis's claims, and Judge Livingston disagreed, warning of the parade of horribles that would flow from the majority's decision.[94]

The majority in *Francis II* rested its legal conclusions that Mr. Francis's claims were cognizable under the FHA on statutory language and on Congress's intent, in passing the FHA, "to root out discrimination in housing."[95] It deleted, however, its earlier reliance on HUD's guidance and on Title VII as an analogy.[96] It also retreated from its holding in *Francis I* that intentional discrimination is not a required element of an FHA violation.[97] Instead, the majority in *Francis II* declined to directly engage that question and merely stated, "we assume without deciding that intentional discrimination *is* an element of an FHA violation."[98] In doing so, perhaps the majority hoped to stave off en banc review, but that effort failed.[99]

In any event, the majority in *Francis II* determined that Mr. Francis plausibly pleaded intentional discrimination when he alleged the defendants chose not to take reasonable steps within their control to address the tenant-on-tenant harassment he had suffered based on his race, but the defendants had taken reasonable steps when confronted with claims of non-race-related tenant-on-tenant harassment in the past.[100]

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90. Francis v. Kings Park Manor, Inc., 920 F.3d 168, 169 (2d Cir. 2019) (mem.).

91. *See generally* Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370 (2d Cir. 2019).

92. *Id.* at 373.

93. *See id.* at 381.

94. *Id.*; *see also id.* at 395 (Livingston, J., dissenting) (describing the consequences of the majority's decision).

95. *See id.* at 378 (majority opinion) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972)).

96. *See, e.g.*, *id.* at 391, 394 (Livingston, J., dissenting) (observing "the majority . . . abandoned the HUD Rule, which it relegates to a footnote," and suggested the Title VII analogy "only under a '*cf.*' signal").

97. *Id.* at 379 (majority opinion).

98. *Id.* (emphasis added).

99. *See* Francis v. Kings Park Manor, Inc., 949 F.3d 67, 67 (2d Cir. 2020) (mem.) (granting rehearing en banc).

100. *Francis II*, 944 F.3d at 379.

Judge Livingston writing in dissent, however, began by criticizing the majority for basing its opinion on a theory that was different from that relied on by Mr. Francis.[101] She also questioned how there could be liability under the FHA for a landlord's failure to address a complaint about a tenant when, as she put it, "the majority cannot even suggest what the [landlords] might have done differently when Francis contacted them."[102] Judge Livingston described "the majority's analysis [a]s not rooted in the [p]laintiff's complaint, statutory text, precedent or the common law," but as "float[ing] on the FHA's 'broad and inclusive compass.'"[103]

She complained that the majority acted as if it had "a 'roving license . . . to disregard clear language simply on the view that . . . Congress must have intended something broader.'"[104] Insinuating the majority acted cavalierly in reaching its decision, she warned, "[f]rom now on, any landlord who fails to intervene following a tenant's complaint of another tenant's harassment on the basis of a protected ground is vulnerable to an FHA claim."[105] She proclaimed, "[t]his decision may benefit law firms and insurance companies, which sometimes profit from legal anomalies. But the winners today will not include those in pursuit of fair housing, and certainly not the renters among them, who will likely be left to foot the bill."[106] She predicted the decision in *Francis II*, "like the one issued and then withdrawn, is but another stumble along the path to ever more litigation" that would harm some of the most vulnerable in their search for affordable housing.[107]

D. EN BANC DECISION UPHOLDS DISTRICT COURT DISMISSAL, CONTRARY TO THE TWO PRIOR PANEL DECISIONS THAT VACATED THE DISMISSAL

In a remarkable turn of events, after the two panel decisions, the Second Circuit sitting en banc decided to weigh in. That fact is noteworthy not just because two lengthy decisions considering the propriety of the dismissal had already been rendered but also because the Second Circuit has long been well known for being the one least likely to grant an en banc rehearing.[108] Indeed,

101. *Id.* at 384 (Livingston, J., dissenting) ("Francis himself does not argue that the . . . Defendants are liable because they acted with racial animus.").

102. *Id.* at 393 (emphasis omitted).

103. *Id.* at 395 (emphasis omitted) (quoting *id.* at 376 (majority opinion)).

104. *Id.* (omissions in original) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 794 (2014)).

105. *Id.*

106. *Id.* (citation omitted).

107. *Id.*

108. *See, e.g.*, Ricci v. DeStefano, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring) (citing Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311–12 (1986)); Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, N.Y. L.J., Aug. 24, 2016, at 1 (noting that from 2011 to July 2016, "the Second Circuit has reconsidered only two appeals en banc, compared to an average of 12 across all circuits during

its judges have frequently declared the court proceeds "en banc only in rare and exceptional circumstances."[109] One such type of circumstance is when a panel decision creates a conflict with another circuit.[110]

Neither *Francis I* nor *Francis II*, however, created such a conflict. Indeed, those decisions were consistent with the only other circuit court to have considered the question of whether a landlord could be held liable under the FHA for tenant-on-tenant harassment. In the *Wetzel v. Glen St. Andrew Living Community, L.L.C.* case, the Seventh Circuit determined that a landlord could violate the FHA by failing to reasonably respond in a situation involving

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the same period" (footnote omitted)); Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014) ("In the Second Circuit, which grants the lowest percentage of en banc petitions, en banc cases were only 0.03 percent of its total docket in 2010."); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 818 (1993) (noting that "[o]ne of the distinctive characteristics of the United States Court of Appeals for the Second Circuit is the infrequency of rehearings en banc" (alteration in original) (quoting Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 365 (1984))); Feinberg, *supra*, at 311 (describing how the then Chief Judge for the Second Circuit, noted the circuit's "tradition of hostility to" en banc review which had a long history tracing back to the time when Learned Hand was Chief Judge, and no such reviews were granted); Judah I. Labovitz, Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 222 (1962) ("Although it has been said that the Court of Appeals for the Second Circuit never sits en banc, the court does provide for the procedure in its rules."(footnote omitted)). One justification for en banc review is that it can "provide[] a safeguard against unnecessary intercircuit conflicts." Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 808 (2020) (quoting FED. R. APP. P. 35 advisory committee's note to 1998 amendment). But in *Francis*, both earlier panel decisions agreed with the Seventh Circuit's holding in *Wetzel v. Glen St. Andrew Living Community, L.L.C.*, 901 F.3d 856, 864 (7th Cir. 2018), which recognized the FHA allowed for landlord liability for tenant-on-tenant harassment. *See* Francis v. Kings Park Manor, Inc. (*Francis I*), 917 F.3d 109, 119–20 (2d Cir. 2019); *Francis II*, 944 F.3d at 378. Instead, the en banc decision, while not explicitly stating that such claims are not cognizable under the FHA, cast doubt on whether a plaintiff could ever plausibly state such a claim under the FHA against a landlord. *See* Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 78 (2d Cir. 2021) (en banc).

109. *See, e.g.*, *Ricci*, 530 F.3d at 89–90 (Katzmann, J. concurring) (citing Feinberg, *supra* note 108, at 311–12) ("Throughout our history, we have proceeded to a full hearing en banc only in rare and exceptional circumstances."); Lopinsky v. Hertz Drive-Ur-Self Sys., Inc., 194 F.2d 422, 429 (2d Cir. 1951) (Clark, J., concurring) (per curiam). Similarly, rehearing by a panel is rare and often limited to situations in which a change in the law occurs simultaneously or close in time to a panel's original decision. For example, in the *Bissonnette v. LePage Bakeries* case, a three-judge panel of the Second Circuit issued an opinion in May of 2022, affirming the district court's dismissal of the plaintiff's case because the plaintiff did not qualify as a transportation worker under the Federal Arbitration Act ("FAA"). Bissonnette v. LePage Bakeries Park St., L.L.C., 49 F.4th 655, 663 (2d Cir. 2022). Shortly thereafter, the U.S. Supreme Court decided the *Southwest Airlines Co. v. Saxon* case, which provided guidance on who qualified as a transportation worker. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 462–63 (2022) (holding airplane cargo loaders were covered by exemption to the FAA because their activities involved interstate transportation). Thus, the plaintiff in *Bissonnette* requested rehearing, which was granted. *See* Bissonnette v. LePage Bakeries Park St., L.L.C., 144 S. Ct. 479, 479 (2023) (mem.).

110. Menell & Vacca, *supra* note 108, at 808.

tenant-on-tenant harassment.[111] The conclusions in *Francis I* and *Francis II* that the plaintiff had pleaded a viable claim under the FHA against the defendants who knew of the ongoing harassment of Mr. Francis but failed to take reasonable steps to address it were therefore consistent with the Seventh Circuit's conclusion in *Wetzel*.[112]

Nevertheless, in an extraordinary move, the majority of the Second Circuit—seven of the twelve judges—voted to rehear the *Francis* case en banc (*Francis III*).[113] Writing for the majority in *Francis III*, Judge Cabranes reasoned that the case raised questions sufficiently exceptional to break from the Second Circuit's historical reluctance to grant rehearing en banc.[114] In doing so, the decision echoed Chief Judge Livingston's warnings that "the panel's ruling, if undisturbed, would significantly expand landlord liability, with the probable result of fundamentally restructuring the landlord-tenant relationship."[115]

The majority criticized Mr. Francis's reliance on a deliberate indifference theory of liability as "an apparent attempt to avoid the obligation to plead facts that plausibly support an inference that the [owner and manager] were motivated by racial animus."[116] The majority noted that theory of liability required a showing of "substantial control over the context in which [the] harassment occur[red]," such as the type of control existing in custodial environments like public schools and prisons.[117] Without directly answering the question, however, the majority stated that it "assume[d], for purposes of this appeal, that deliberate indifference may be used to establish liability under the FHA when a plaintiff plausibly alleges that the defendant exercised substantial control over the context in which the harassment occurs and over the harasser."[118]

The court then declared that Mr. Francis failed to plead a factual basis from which to infer that the defendants exercised the requisite substantial control and that no "such control [could] be reasonably presumed to exist in the typically arms-length relationship between landlord and tenant."[119] Distinguishing "[t]he typical powers of a landlord" to evict from the kind of

111. *See Wetzel*, 901 F.3d at 864.

112. *Compare id.*, *with Francis I*, 917 F.3d at 119–20, *and Francis II*, 944 F.3d at 378.

113. *Francis III*, 992 F.3d at 70.

114. *See id.* at 73 n.20.

115. *See id.* Like the panel decisions in *Francis I* and *Francis II*, the en banc decision was not unanimous. *Id.* at 70. In fact, two dissenting in part and concurring in part opinions accompanied the en banc opinion. *Id.*

116. *See id.* at 74.

117. *Id.* (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999)).

118. *Id.* at 75.

119. *Id.*

powers to control behavior in schools and prison settings, the court concluded that Mr. Francis failed to plausibly plead that the defendants established the kind of "control necessary to state a deliberate indifference claim under the FHA"—if such a claim were to even exist under the statute.[120]

Going beyond the allegations in Mr. Francis's complaint, the majority announced that in its view, "landlords typically do not, and therefore cannot be presumed to, exercise the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant harassment."[121] And it also concluded that Mr. Francis failed to allege he had requested action from the owner.[122] It acknowledged, however, that Mr. Francis had sent three certified letters to the owner and manager recounting the other tenant's aggressive behavior directed at him—including at least one death threat against Mr. Francis—the police's involvement, and the other tenant's arrest for aggravated harassment against him.[123] Mr. Francis also alleged that the owner and manager failed to investigate or intervene and that the owner directed the "manager, 'not to get involved.'"[124]

The majority explicitly took issue with what it described as the dissent's suggestion that the Second Circuit "assumes a landlord may be liable for . . . deliberate[] indifferen[ce] to the general circumstances" alleged by the plaintiff.[125] In response to that suggestion and "[Mr.] Francis['s] argu[ment] that a landlord may be held liable for intentional discrimination if the landlord 'ignore[d] the known discriminatory harassment of a third party,'" the majority stated it merely "assume[d], for purposes of this appeal, that deliberate indifference may be used to establish liability under the FHA when a plaintiff plausibly alleges that the defendant exercised substantial control over the context in which the harassment occurs and over the harasser."[126] The majority also rejected the analogy to the employment context, describing the court as "hard-pressed to presume that an employer's manner and degree of control over its agent-employees is equivalent to that of a landlord over its tenants."[127]

The majority, however, went out of its way to avoid suggesting its decision conflicted with that of the Seventh Circuit in *Wetzel*. Citing favorably Judge Livingston's dissents in *Francis I* and *II*, the majority in *Francis III* declared that "[i]n the absence of any factual allegations suggesting that the . . . [d]efendants had a similarly unusual degree of control over the premises and tenants, or actively facilitated or compounded harm to Francis, the Seventh

120. *See id.*
121. *Id.* at 70.
122. *Id.* at 71.
123. *Id.*
124. *Id.* (quoting Complaint, *supra* note 34, ¶ 47, at 9).
125. *Id.* at 75 n.28 (quoting *id.* at 85 (Lohier, J., dissenting in part and concurring in part)).
126. *Id.* at 74–75 (majority opinion) (third alteration in original).
127. *Id.* at 76.

Circuit's decision in *Wetzel* does not suggest, much less compel, a different outcome here."[128]

Still, the majority chose to not explicitly state its position on the legal question of whether the FHA countenanced the type of claim brought by Mr. Francis and recognized by the Seventh Circuit in *Wetzel*. The majority in *Francis III* described the Seventh Circuit's action in *Wetzel* as "ha[ving] recognized a deliberate indifference theory of liability for a claim of discrimination under the FHA" but declined to state whether the Second Circuit also recognized such a theory of liability under the FHA.[129] Instead, it distinguished the *Wetzel* decision by reasoning that there, the plaintiff's allegations "gave rise to the plausible inference that the defendant-landlord had unusual supervisory control over both the premises and the harassing tenants."[130]

Thus, the opinion in *Francis III* avoided answering legal questions by relying on plausibility pleading to distinguish otherwise conflicting authority and to justify upholding the district court's dismissal. The opinion begins with the following question and answer: "Does a plaintiff state a claim under the [FHA] for intentional discrimination by alleging that his landlord failed to respond to reports of race-based harassment by a fellow tenant? On the record before us, we answer this question in the negative."[131] The words "on the record before us" in the answer appears to reflect the court's reliance on *Twombly* and *Iqbal*. In reaching the opposite conclusion in *Francis III* compared to what was reached in both of the earlier panel decisions, the majority observed "that Francis's [c]omplaint alleged *some* information, but not enough to transform his claim from conceivable to plausible."[132]

Further closing the door to Mr. Francis's claim, the majority wrote "that even if Francis had plausibly pleaded that the . . . [d]efendants had substantial control over" the harassing tenant, his complaint still would have failed.[133] In the majority's view, to plausibly plead his claim, Mr. Francis would have had to have pleaded specific facts showing "that the defendant's response to harassment by a third party was 'clearly unreasonable in light of the known circumstances.'"[134] Mr. Francis did, however, include in his complaint the allegation that the defendants knew "the police were involved," that the harassing

128. *Id.* at 78.

129. *See id.* at 77.

130. *Id.* (citing Wetzel v. Glen St. Andrew Living Cmty., L.L.C., 901 F.3d 856, 860–65 (7th Cir. 2018)).

131. *Id.* at 70 (footnote omitted).

132. *Id.* at 74 n.23 (explaining that "*Twombly* and its progeny require[d]" the court to consider "whether plaintiffs allege enough to 'nudge[] their claims across the line from conceivable to plausible'" (second alteration in original) (quoting Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 87 (2d Cir. 2015))).

133. *Id.* at 78.

134. *Id.* (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

tenant was arrested and prosecuted, and that the defendants took no actions.[135] Nevertheless, the majority—apparently "draw[ing] on [their] judicial experience and common sense"[136]—declared they "ha[d] no factual basis to infer that the . . . [d]efendants clearly acted unreasonably."[137] Thus, it upheld the district court's dismissal.[138]

The majority justified this outcome as consistent "with the aims of those who are concerned about mounting housing costs for renters and increasing risks of housing loss for some of the most vulnerable among us."[139] Not applying plausibility pleading to preclude claims like the ones alleged by Mr. Francis, in the majority's opinion, "would generate considerable uncertainty about the scope of a landlord's responsibility for tenant behavior."[140] To hold otherwise, warned the majority, would result in landlords seeking to take "prophylactic measures" in response to avoid potential liability.[141] And the majority predicted the cost of those precautions would be borne by renters rather than landlords.[142]

In a dissent joined by four other judges, Judge Lohier (who wrote for the majority in *Francis I* and *Francis II*) opined that "Francis's complaint [had] clearly satisfie[d] the very minimal burden for pleading discriminatory intent that we have until today imposed."[143] In the dissent's view, Mr. Francis had plausibly alleged his landlord was liable for intentional discrimination under the FHA and other laws "for refusing to address what it knew was an extended campaign of racial terror carried out against the tenant by another tenant."[144] "Worse still," he wrote, "the landlord had acted against other tenants to redress prior, non-race-related issues in the past."[145]

The dissent noted that while both "the clear text and broad legislative intent [of the FHA] to stamp out racial discrimination . . . should have favored the harassed tenant," the majority's opinion "favor[ed] the landlord."[146] It decried that "[w]ith no change in law or circumstance, [and] without reason or justification, the majority [had] raise[d] the pleading bar" for "victims of

135. *Id.* at 78.

136. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

137. *Francis III*, 992 F.3d at 78–79.

138. *See id.* at 82.

139. *Id.* at 79 (citing Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370, 395 (2d Cir. 2019) (Livingston, J., dissenting)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 85 (Lohier, J., dissenting in part and concurring in part) (dissenting to all and concurring only on the dismissal of the negligent infliction of emotional distress claim).

144. *Id.*

145. *Id.*

146. *Id.*

racial discrimination in" the Second Circuit.[147] By requiring plaintiffs, at the very start of their cases, to plead facts to which they lack access before discovery, the majority opinion effectively closed the door to these legitimate claims of housing discrimination that should be allowed to proceed to determine whether landlords have acted in ways that violate the FHA.[148]

The appellate saga that followed the district court's original dismissal of Mr. Francis's FHA claims exposes many of the pitfalls that can result when courts do not follow a logical framework to analyze novel legal claims and shows that the order in which courts address or choose not to address certain issues can influence their ultimate decisions. The numerous opinions and dissents in *Francis I*, *Francis II*, and *Francis III* reveal the Second Circuit disagreed about whether the district court's order should stand, of course, but they also reveal that different approaches to what questions should be asked and in what order the questions should be answered can affect the answers. To increase efficiency and predictability, this Article posits courts should answer legal questions about the viability of novel legal claims before analyzing whether a plaintiff has plausibly pleaded a claim. *Twombly* and *Iqbal* should not be used to provide cover for courts to render legal claims unavailable without those courts explicitly making clear they are doing so and explaining why doing so is legally sound.

II. IMPROPER APPLICATION OF PLAUSIBILITY PLEADING UNDERMINES THE GOALS OF *TWOMBLY* AND *IQBAL*, UNDERCUTS THE GOALS UNDERLYING THE FHA, AND HINDERS THE COHERENT DEVELOPMENT OF LAW

The lack of a logical framework in which to analyze novel legal claims can cause, as it did in *Francis*, conflicting outcomes and an enormous loss of time and resources. In addition, allowing plausibility pleading as the Second Circuit did conflicts with the broad construction ordinarily given to FHA claims in recognition of its goal to provide fair housing to all.[149] Finally, upholding a dismissal on plausibility grounds related to a claim for which the court simultaneously signals significant concerns can both create and obscure conflicts with other authorities, which can thwart the development of substantive laws and undermine faith in the legal system.

A. UNDERMINING GOALS UNDERLYING TWOMBLY *AND* IQBAL

A primary justification for requiring plausibility pleading in *Twombly* and *Iqbal* was the belief that unreasonable discovery costs improperly pushed defendants to settle claims, and sometimes that pressure to settle meant defendants would settle claims for which there existed absolutely no basis in

147. *Id.*
148. *See id.*
149. *See* 42 U.S.C. § 3601.

law for recovery.[150] To better understand this concern, it is helpful to recall the historical context and the notice pleading system that preceded *Twombly* and *Iqbal*, as well as, the context in which *Twombly* and *Iqbal* were decided.

The Federal Rules of Civil Procedure, which were adopted in 1938, replaced the former common law fact pleading and code pleadings systems.[151] A primary theme motivating the adoption of the new procedural rules was the idea "that procedure should step aside and not interfere with substance."[152] Thus, a core goal underlying the Federal Rules of Civil Procedure was to promote neutrality while also "not favoring one side or the other" with regard to substantive outcomes.[153] Indeed, the Rules Enabling Act, by which the federal rules were created, prohibits the rules from "abridg[ing], enlarg[ing] or modify[ing] any substantive right."[154] Thus, trans-substantivity—meaning the rules apply equally to all cases, no matter the substance of the underlying claims—is a central component of the federal rules.[155]

As for pleading claims, the language of Federal Rule of Civil Procedure 8 requires nothing more than "a short and plain statement of the claim showing that the pleader is entitled to relief."[156] For fifty years, before *Twombly*, courts understood Rule 8 to mean, as the Supreme Court stated in *Conley v. Gibson*, that federal courts should not dismiss a complaint "for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of

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150. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

151. Miller, *supra* note 8, at 3–4.

152. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 973 (1987).

153. Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1515–16 (2015).

154. 28 U.S.C. § 2072(b).

155. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 372 (2010). Since the adoption of the Federal Rules of Civil Procedure, scholars have disagreed on the merits of trans-substantivity. *Compare, e.g.*, Wasserman, *supra* note 11, at 318–20 (discussing the Supreme Court's shift in focus on civil procedure), Marcus, *supra*, at 426 (analyzing "[t]he uncertain future of trans-substantivity" while identifying its "important role as a mechanism for the allocation of rulemaking power"), Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2069 (1989) (positing "that substantively-based variations are not likely to be useful"), *and* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238 (1989) (concluding that academics' criticisms to the trans-substantive application of the Federal Rules of Civil Procedure should be given less weight than it had been accorded), *with* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 377 (2010) ("I have argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed."), *and* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013) (suggesting that "consideration should be given to abandoning the transsubstantive principle requiring that the Federal rules be 'general' and applicable to all cases" (quoting 28 U.S.C. § 2072(a))).

156. FED. R. CIV. P. 8(a)(2).

facts . . . [that] would entitle [the pleader] to relief."[157] According to Professor Miller, "[t]he Rules, it was thought, were designed to keep cases in court at the pleading stage, rather than to exclude them."[158]

In 2009, however, the U.S. Supreme Court in *Twombly* abruptly announced that *Conley*'s "no set of facts" language had "earned its retirement."[159] Instead, the Court announced the plausibility pleading requirement, which transformed the function of a plaintiff's complaint from the limited role it performed under *Conley* to something much more rigorous and akin to the common law fact pleading and code pleading regime that the adoption of the federal rules was meant to replace.[160] *Twombly* was an alleged antitrust class action case against several telecommunications firms alleging they had violated antitrust laws by engaging in anticompetitive parallel conduct.[161] The complaint alleged the companies illegally agreed not to compete with one another in their respective markets and to prevent other companies from accessing those markets.[162] The Sherman Act required the plaintiffs to show the defendants acted pursuant to "a 'contract, combination . . . , or conspiracy.'"[163] To do so, the plaintiffs in *Twombly* pleaded:

> In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[164]

157. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

158. Miller, *supra* note 8, at 18.

159. *Twombly*, 550 U.S. at 562–63.

160. *See* Miller, *supra* note 8, at 19–20 ("By establishing plausibility pleading, *Twombly* and *Iqbal*, have transformed the function of a complaint from *Conley*'s limited role by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended. . . . In reality, that is a form of fact pleading by another name.").

161. *Twombly*, 550 U.S. at 548–51.

162. *Id.* at 550–51.

163. *Id.* at 548 (omission in original) (quoting 15 U.S.C. § 1).

164. *Id.* at 551 (alterations in original) (quoting Consolidated Amended Class Action Complaint ¶ 51, at 19, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220), 2003 WL 25629874).

Defendants moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted, which the district court granted.[165] The district court reasoned that the circumstantial evidence pleaded by the plaintiffs could suggest a conspiracy, but the allegations of parallel business conduct alone were not sufficient to withstand the defendants' 12(b)(6) challenge.[166] Relying on precedent, the Second Circuit reversed the district court, as the plaintiffs had satisfied the *Conley* standard.[167] The U.S. Supreme Court, however, reversed the Second Circuit and upheld the district court's dismissal.[168] The Supreme Court determined that the plaintiffs' allegations were "'merely legal conclusions resting on the prior allegations' of parallel conduct," and the plaintiffs "ha[d] not nudged their claims across the line from conceivable to plausible."[169] The Court observed that the kind of parallel conduct alleged by the plaintiffs was consistent "with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[170]

In announcing plausibility pleading, the Court in *Twombly* expressed efficiency concerns about allowing claims with less than a plausible likelihood of success to survive a 12(b)(6) motion to dismiss.[171] The Court declared that "when the allegations in a complaint . . . could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[172] Although recognizing the need for caution when dismissing a complaint before discovery can take place, the Court emphasized that discovery was expensive, and courts lacked sufficient control to contain potentially abusive discovery given litigants' historical control over the legal claims to be presented.[173] Thus, it required in antitrust cases that allegations "reach the level suggesting conspiracy . . . to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support" the claim.[174]

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165. *See id.* at 552.

166. *See id.*

167. *See* Twombly v. Bell Atl. Corp., 425 F.3d 99, 118–19 (2d Cir. 2005).

168. *Twombly*, 550 U.S. at 570.

169. *Id.* at 589 (Stevens, J., dissenting) (quoting *id.* at 564 (majority opinion)); *id.* at 570 (majority opinion).

170. *Id.* at 554.

171. *See id.* at 557–58. *But see id.* at 593 n.13 (Stevens, J., dissenting) (arguing that cost inappropriately drove the majority's decision).

172. *Id.* at 558 (majority opinion) (second omission in original) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 n.23 (4th ed. 2021).

173. *See id.* at 559–60, 560 n.6.

174. *Id.* at 559–60 (alteration in original) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

The Court acknowledged that in *Conley* it had been concerned primarily with providing the defendant with "fair notice of the grounds for [plaintiffs'] entitlement to relief."[175] Thus, the Court allowed that *Conley* expressed "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [the claimant's] claim which would entitle [the claimant] to relief."[176] It went on, however, to reject the understanding of *Conley*'s "no set of facts" standard as suggesting "statement[s] revealing [a] theory of [a] claim [would] suffice unless its factual impossibility [could] be shown from the face of the pleadings . . . . On such a focused and literal reading of *Conley*'s 'no set of facts,'" the Court opined, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[177]

Thus, the Court declared, "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[178] The Court explained, "once a claim for relief has been stated, a plaintiff 'receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.'"[179] In upholding the district court's dismissal, the Court cautioned, "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[180]

Two years after deciding *Twombly*, the Supreme Court returned to the plausible pleading standard in *Iqbal*—this time making clear it intended the standard to apply trans-substantively—meaning in all civil cases governed by Rule 8.[181] The plaintiff in *Iqbal* was a Muslim man from Pakistan who was arrested on criminal charges after the September 11, 2001 terrorist attacks.[182] Alleging they deprived him of his constitutional rights, the plaintiff sued, among others, former Attorney General John Ashcroft and former FBI Director Robert Mueller.[183] The complaint identified "Ashcroft as the

175. *Id.* at 561.

176. *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. 544).

177. *Id.* (last alteration in original) (quoting *Conley*, 355 U.S. at 45–46).

178. *Id.* at 563 (citing Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994); *accord* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 256 (1994); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249–50 (1989); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

179. *Id.* (quoting *Sanjuan*, 40 F.3d at 251).

180. *Id.* at 570.

181. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

182. *Id.* at 666.

183. *Id.*

'principal architect' . . . and identifie[d] Mueller as 'instrumental in adopti[ng], promulgati[ng], and implement[ing]'" an unlawful policy of subjecting the plaintiff "to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[184] In his complaint, the plaintiff alleged that Ashcroft and Mueller "arrested and detained thousands of Arab Muslim men . . . as part of [the] investigation of the events of September 11."[185] The complaint "further allege[d] that '[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.'"[186]

Ashcroft and Mueller responded to the plaintiff's claims by filing a motion to dismiss and raising the defense of qualified immunity.[187] After the district court denied their motion, Ashcroft and Mueller sought an interlocutory appeal.[188] The Second Circuit then affirmed the district court's denial of their motion to dismiss.[189] But again, the Supreme Court granted certiorari and reversed.[190] The Supreme Court described the question before it as follows: "Did respondent, as the plaintiff in the [d]istrict [c]ourt, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights[?]"[191] In response, the majority held that the "respondent's pleadings [were] insufficient."[192] It reasoned that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[193]

Building on the plausibility standard announced in *Twombly*, the Court in *Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[194] The Court denied that the plausibility standard was "akin to a 'probability requirement,'" but warned a

184. *Id.* at 669 (second and sixth alterations in original) (quoting First Amended Complaint and Jury Demand ¶ 10, at 4, ¶ 11, at 4–5, ¶ 96, at 17–18, Elmaghraby v. Ashcroft, No. 04-cv-01809 (E.D.N.Y. Sept. 27, 2005)).

185. *Id.* (omission in original) (quoting First Amended Complaint and Jury Demand, *supra* note 184, ¶ 47, at 10).

186. *Id.* (second alteration in original) (quoting First Amended Complaint and Jury Demand, *supra* note 184, ¶ 69, at 13–14).

187. *Id.* at 666.

188. *Id.*

189. *Id.*

190. *Id.* at 670.

191. *Id.* at 666.

192. *Id.*

193. *Id.* at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

194. *Id.* (citing *Twombly*, 550 U.S. at 556).

complaint that contains mere "'naked assertion[s]' devoid of 'further factual enhancement'" would not suffice.[195] The plausibility standard then, according to the Court, demands "more than a sheer possibility that a defendant has acted unlawfully."[196] The Court noted that the adoption of Rule 8 of the Federal Rules of Civil Procedure had "mark[ed] a notable and generous departure from the hypertechnical, code-pleading regime . . . but [Rule 8] [did] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[197]

Plausibility pleading thus reflects the majority's view that motions to dismiss should play a key role in eliminating the abuse and expense of what it saw as meritless litigation—litigation that the majority expressed had been historically allowed to proceed under *Conley*'s notice pleading regime.[198] The majority expressed skepticism over whether courts could limit unwarranted costs and delays that imposed large discovery costs on defendants if cases that it viewed as meritless were not eliminated through motions to dismiss.[199] Thus, it tasked judges with determining at the outset whether a complaint meets the plausibility standard—a context-specific inquiry that would "require[] the reviewing court to draw on its judicial experience and common sense."[200]

Applying the plausibility standard is thus a subjective task, but the Supreme Court has provided little guidance on how to determine whether the standard has been met.[201] As Professor Malveaux observed, "[b]ased on the differences among judges, one judge may dismiss a complaint, while another judge may conclude that an identical complaint survives, solely because of the way in which each judge applies his or her 'judicial experience and common sense.'"[202] Thus, perhaps it is unsurprising given this direction that courts "draw on [their] judicial experience and common sense,"[203] that the Second Circuit judges in *Francis* would not agree on whether the plaintiff had plausibly pleaded his FHA claims sufficiently to withstand the defendants' 12(b)(6) challenge. After all, studies show there exist significant perceived differences among different racial groups concerning the existence and pervasiveness of racial discrimination.[204] In fact, as others have noted, "[r]esearch has shown that people make decisions based on various biases and

195. *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 556–57).

196. *Id.*

197. *Id.* at 678–79.

198. *Id. But see* Miller, *supra* note 8, at 53 ("Judicial gatekeeping seemed to be working. The Supreme Court's coup de grace simply was not needed.").

199. Miller, *supra* note 8, at 58–59.

200. *Iqbal*, 556 U.S. at 679.

201. *See* Malveaux, *supra* note 14, at 723–24.

202. *Id.* at 724 (quoting *Iqbal*, 556 U.S. at 679).

203. *Iqbal*, 556 U.S. at 679.

204. Malveaux, *supra* note 14, at 724.

categorical stereotypical reasoning, particularly when they lack complete information about an individual or a situation."[205]

Although marginal disagreements about plausibility pleading are to be expected, the magnitude of confusion exhibited in the *Francis* appellate process[206] is shocking—and it reveals an inefficiency that is squarely at odds with the goals of *Twombly* and *Iqbal*. Recall that during the course of the appeal from the district court's dismissal, the original three-judge panel issued two different opinions, both of which were accompanied by a concurring opinion with a vigorous dissent.[207] In the en banc decision, not one, but two, concurring opinions with vigorous dissents accompanied the majority's order.[208] Thus, considering the district court's order along with the three published decisions regarding, inter alia, the propriety of that order, courts in the Second Circuit have published 108 pages of text analyzing whether Mr. Francis's claims should be allowed to proceed to discovery.[209]

To add insult to injury, despite the years of "hard-fought litigation" and the pages and pages of court opinions that followed, the ultimate decision in *Francis III* refused to explicitly answer the critical substantive issue: Whether the FHA encompassed liability for landlords in situations involving post-acquisition tenant-on-tenant, racially motivated harassment.[210] When faced with a difficult substantive question on which it appears its members could not agree, the majority in *Francis III* chose to avoid answering the question and instead rely on *Twombly*'s and *Iqbal*'s plausibility pleading requirement to uphold the district court's dismissal.[211]

B. Undermining the FHA's Goals and Hindering the Coherent Development of Law Consistent with Those Goals

Congress enacted the FHA in 1968 at a time of significant racial tension and racially motivated violence committed against members of minority groups

205. A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 CARDOZO L. REV. 1015, 1043 (2020).

206. *See* discussion *supra* Part I.

207. *See supra* note 29 and accompanying text.

208. Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 70 (2d Cir. 2021) (en banc).

209. The district court's order is eighteen pages long. Francis v. Kings Park Manor, Inc., 91 F. Supp. 3d 420, 420–38 (E.D.N.Y. 2015). The decision in *Francis I* is thirty-three pages long. Francis v. Kings Park Manor, Inc. (*Francis I*), 917 F.3d 109, 109–42 (2d Cir. 2019). The decision in *Francis II* is twenty-five pages long. Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370, 370–95 (2d Cir. 2019). And, finally, the decision in *Francis III* is thirty-two pages long. *Francis III*, 992 F.3d at 67–99.

210. *See Francis III*, 992 F.3d at 71 n.4, 75 n.28, 82 (dismissing for plaintiff's failure to plausibly plead a claim for intentional discrimination based on fellow tenant's harassment).

211. *See id.* at 75 n.28, 81–82.

and civil rights advocates.[212] In its efforts to address the moral problems of racial discrimination, the federal government sought to force desegregation and integration on states that continued to resist those efforts.[213] The enactment of civil rights legislation in the 1960s played a significant role in the "efforts to address racial tensions."[214] The publication of the National Advisory Commission's Report on Civil Disorders was a significant catalyst for the eventual passage of federal housing legislation.[215] That report recommended, among other things, that Congress pass "a comprehensive and enforceable open housing law."[216] But that recommendation was easier said than done, and the efforts to realize the promise of a comprehensive and enforceable housing law continued. The eventual passage of the FHA resulted, in part, from immense social pressure in light of the significant growing racial tensions that accompanied concerns about unequal employment and housing opportunities.[217]

The FHA prohibits discrimination in housing due to a person's "race, color, religion, sex, familial status, . . . national origin," or disability.[218] Among other things, "harassment based on any protected status may violate the FHA."[219] The FHA itself declares, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[220] Correspondingly, courts have understood Congress's intent that the FHA should be broadly construed.[221] That understanding is crucial to achieving the FHA's goals. In this country, important civil rights laws are enforced through the use of private attorneys general. In civil rights cases, including those seeking to vindicate claims under the FHA, plaintiffs face a daunting task of overcoming the problem of information asymmetry.[222] To

212. For a detailed discussion of the social context and legislative history underlying the FHA's enactment, see Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 222–25 (2006).

213. *Id.* at 222–23.

214. *Id.*

215. *Id.* at 223.

216. *Id.*

217. *See id.* at 223–35 (detailing the various bills, amendments, debates, and other efforts that preceded the eventual passage of the FHA).

218. 42 U.S.C. §§ 3601–3619.

219. Short, *supra* note 23, at 1235.

220. 42 U.S.C. § 3601.

221. *E.g.*, Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994) ("We first note that Congress intended [the FHA] to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class." (citing S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 882 (7th Cir. 1991))).

222. *See* Miller, *supra* note 8, at 45–46 ("Particularly affected are civil rights and employment-discrimination cases, in which issues of motivation, state of mind, and insidious practices are hidden by agents and employees or are buried deep within an entity's records."); *see also* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 146–47 (2009) (discussing information asymmetry in which defendant possesses information vital to plaintiff's ability to plead a claim

plead a plausible claim, plaintiffs must access information held in the landlord's records to which the plaintiffs do not have access absent discovery.[223]

That information asymmetry proved fatal to the plaintiff's claims in *Francis III*. Rather than construing the FHA broadly, particularly in light of the existing information asymmetry, the en banc majority's decision has the practical effect of constricting the FHA protections in the Second Circuit. The decision thus weakens the development of "comprehensive and enforceable open housing laws" and undercuts the provision of "fair housing throughout the United States," which undermines Congress's intent in passing the FHA.

Although not explicitly ruling the FHA did not apply to Mr. Francis's claims, the majority's reliance in *Francis III* on plausibility pleading, as a practical matter, makes it nearly impossible for plaintiffs to bring such claims in the Second Circuit and survive a 12(b)(6) motion to dismiss. Mr. Francis, and future plaintiffs like him, are trapped in an untenable catch-22: They need evidence not in their possession to survive a motion to dismiss, but they cannot access that evidence because they cannot survive a motion to dismiss.[224]

Francis III, of course, cannot technically preclude future litigation brought by plaintiffs situated similarly to Mr. Francis. The Supreme Court, in the *Taylor v. Sturgell* case, held a later litigant cannot be bound by a judgment in a prior case to which the later litigant was not a party or, at least, legally treated as having been a party, such as in certain types of representative litigation.[225] *Taylor* involved litigation brought under the Freedom of Information Act ("FOIA").[226] After the government successfully resisted a FOIA request, it urged the Court to adopt a theory of "virtual representation" to prohibit future litigants from seeking identical FOIA requests.[227] It argued that otherwise, a potentially limitless number of future plaintiffs could "mount a series of repetitive lawsuits," demanding the same documents.[228] But the Court found the argument unpersuasive in light of basic human nature.[229] The Court reasoned, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."[230] That "human tendency not to waste money" will likewise deter future plaintiffs in the Second Circuit who are subjected to the same

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and cost asymmetry in which the defendant faces larger costs because it possesses most of the information subject to discovery).

223. *See* Miller, *supra* note 8, at 45–46 (discussing the challenges of information asymmetry in employment discrimination claims).

224. *See, e.g.*, Malveaux, *supra* note 14, at 727 (discussing the catch-22 situation); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (same).

225. Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (citing Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

226. *Id.* at 885.

227. *See id.* at 888.

228. *Id.* at 903.

229. *See id.* at 903–04.

230. *Id.* (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001)).

kind of aggressive, persistent, and inexcusable harassment that Mr. Francis suffered at the hands of his neighbor from bringing the kind of FHA claims Mr. Francis asserted. Seeing that Mr. Francis's claims were ultimately dismissed and recognizing the information necessary to avoid a similar dismissal is inaccessible outside of formal discovery in litigation, those potentially future plaintiffs will logically choose to forego pursuing their potential FHA claims.

Thus, the Second Circuit undercut the Federal Rules of Civil Procedure's goal of not allowing procedure to interfere with substance when it upheld the procedural dismissal under Rule 12(b)(6) of Mr. Francis's claims. Instead, the dismissal has the very real substantive effect of forcefully deterring future plaintiffs who might otherwise pursue rights under the FHA. Those plaintiffs, like Mr. Francis, would likely not have access to other tenants' lease agreements or to facts about how the landlord has treated other tenants. Thus, like Mr. Francis, those potential plaintiffs will not be able to pass the unreasonably high plausibility hurdle the Second Circuit has erected against such claims.

Francis III also illustrates how the application of plausibility pleading can hinder the coherent development of law interpreting the FHA. A circuit split appears to be developing on whether landlords can be liable for some forms of tenant-on-tenant harassment.[231] The multiple decisions in the *Francis* case may be read to suggest the Second Circuit stepped in en banc in *Francis III* because it disapproved of the panel's recognition that landlords could be held liable for tenant-on-tenant harassment under the FHA. However, rather than unambiguously holding that such a right does not exist, the majority chose to cast doubt on the existence of such a right but rest its holding on Mr. Francis's supposed failure to plausibly plead his claim.[232]

A clearer ruling from the Second Circuit would have set up the sort of situation that dramatically increases the likelihood that the Supreme Court might grant certiorari to decide whether the FHA protects tenants like Mr. Francis.[233] The Seventh Circuit in *Wetzel* held that the FHA covers this type of

231. Ngiendo v. Univ. Partners, L.L.C., No. 20-cv-02393, 2022 WL 888132, at *3 (D. Kan. Mar. 25, 2022); Kelli Conway, Note, *Who's the Fairest of Them All: Circuit Split over Landlord Liability for Tenant-on-Tenant Discrimination Under the Fair Housing Act*, 88 BROOK. L. REV. 423, 425 (2022) (describing the situation as a circuit split and citing *Wetzel v. Glen St. Andrew Living Cmty.*, 901 F.3d 856, 859 (7th Cir. 2018) and *Francis v. Kings Park Manor, Inc.* (*Francis III*), 992 F.3d 67, 71 (2d Cir. 2021) (en banc)).

232. *See supra* notes 210–11 and accompanying text.

233. The likelihood that the Supreme Court would grant certiorari in any case is extraordinarily small. According to the U.S. Courts website, the Supreme Court accepts only 100 to 150 cases out of the more than 7,000 petitions filed each year. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/CYT2-53M7]. The Court's rules make clear that review is discretionary and lists splits in authority as an example of the type of compelling reason the Court may agree to hear a case. *See* SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for

claim when a landlord "has actual notice of tenant-on-tenant harassment based on" the complaining tenant's protected status.[234] Unfortunately, in refusing to state its position on this issue, the majority in *Francis III* greatly diminished the likelihood of further appellate review.[235] The lack of an explicit ruling on the legal issue makes it even more unlikely that either Congress or the Supreme Court would step in and clarify the answer.

As explained above, although the Second Circuit's decision does not explicitly reject the viability of an FHA claim like Mr. Francis's, reliance on plausibility pleading has the effect of dramatically dissuading future claims, thus creating de facto law. Future plaintiffs will understand that, like Mr. Francis, their claims will not pass the plausibility hurdle. Those future plaintiffs' interpretation of *Francis III* to preclude their ability to successfully pursue similar claims is logical, and results in the very kind of nontechnical, but still very real, preclusive-type effect that the Supreme Court itself reasoned in *Taylor v. Sturgell* made it unnecessary to adopt the virtual representation theory pursued by the government to prohibit future litigation.[236] As a result, potential future plaintiffs will likely not even attempt to seek redress under the FHA in the Second Circuit,[237] which will further prevent an explicit circuit split from forming.

Meanwhile, plaintiffs in the Seventh Circuit will enjoy protections under the FHA that are unavailable to victims in the Second Circuit. In this way, *Francis III* undermines the broad remedial goals of the FHA of providing protections to tenants who suffer discrimination based on their race, gender, or other protected status. And it did so without reaching the kind of consensus that provides confidence in the legitimacy of courts' decision-making processes.[238] Law developed in this way is also less likely to result from the kind of thorough, comprehensive processes that serve to undergird society's confidence in the rule of law.

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compelling reasons," such as when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

234. *Wetzel*, 901 F.3d at 859.

235. *See Francis III*, 992 F.3d at 75 n.28 ("The dissent suggests that 'the majority opinion . . . assumes a landlord may be liable for being deliberately indifferent to the general circumstances Francis alleges.' Not so. We assume, without deciding, that deliberate indifference may be used to ground an FHA claim when a plaintiff plausibly alleges that a defendant had the requisite control over both the alleged harasser and the context in which the harassment occurs." (omission in original) (citations omitted) (quoting *id.* at 85 (Lohier, J., dissenting in part and concurring in part))).

236. *See* Taylor v. Sturgell, 553 U.S. 880, 903–04 (2008).

237. *See, e.g.*, Malveaux, *supra* note 14, at 743–44 (observing some lawyers in response to *Twombly* and *Iqbal* have abandoned pursuing even potentially meritorious claims).

238. *See, e.g.*, Malveaux, *supra* note 3, at 2413 (discussing *Twombly* and *Iqbal* and explaining that "the Court should [have] hesitate[d] to overturn rule-based precedent without sufficient justification for abandoning stare decisis").

As one of the dissenters in *Francis III* observed, Congress "inten[ded] to stamp out racial discrimination" when it passed the FHA.[239] Thus, the Second Circuit "should have favored the harassed tenant," Mr. Francis.[240] Instead, the majority chose to favor the landlord.[241] That choice furthers the view that there exist "judicial presumptions of non-discrimination, which research has proven are unwarranted."[242]

The unfairness of the outcome in *Francis III* is even more troubling because "harassment in the housing setting is a real and growing problem."[243] In addition, housing is among the most fundamental of needs. Unfortunately, fair housing "law is a confusing tangle," and in recent cases, "courts have struggled to make sense of the FHA's scope."[244] When courts do find coverage under the FHA, some have argued that the protection afforded—even when plaintiffs are able to plausibly plead their claims—is not sufficient.[245] For example, scholars have argued that compensation to a renter under the FHA, which is tied to the value lost related to rent but does not extend to damages the renter suffered from living in a place where one has to endure injuries to one's dignity and threats to one's personal safety, fails to sufficiently provide redress for the kind of harm suffered in FHA cases.[246]

Unfortunately, the decision in *Francis III*, which undermines even the likely insufficient protections of the FHA, is not an isolated example of courts' increasing resistance to processes that support private rights of action in the civil rights arena:

> Over several decades, the pendulum has swung from judicial support for robust, private enforcement of civil rights to intolerance of, if not outright hostility to, such claims. Less obvious, but no less harmful, has been the way *procedure* has undermined, and even eradicated, civil litigation designed to redress these grievances. The cumulative effect of such procedural jurisprudence has been to obstruct court access and substantive rights contrary to the lawmakers' and federal rule-makers' intentions.[247]

If a trend towards decisions like *Francis III* develops, the most vulnerable among us will be the ones least likely to have access to legal recourse because

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239. *Francis III*, 992 F.3d at 85 (Lohier, J., dissenting in part and concurring in part).

240. *See id.*

241. *Id.*

242. Spencer, *supra* note 205, at 1047.

243. Short, *supra* note 23, at 1231 & n.17 (citing numerous works largely focused on landlord's harassment of tenants and whether the FHA reaches post-acquisition harassment).

244. *Id.* at 1232.

245. *See, e.g.*, Mollie Krent, Note, *Remediating Racism for Rent: A Landlord's Obligation Under the FHA*, 119 MICH. L. REV. 1757, 1772–77 (2021).

246. *Id.* at 1777.

247. *See, e.g.*, Malveaux, *supra* note 3, at 2405–06.

they will be unable to overcome the unreasonably high plausibility hurdles that prevent them from pleading their claims without access to the tools of discovery.[248]

III. PROPOSED FRAMEWORK PROTECTS EFFICIENCY AND PROMOTES COHERENT LAW DEVELOPMENT

Although robust changes to increase access to justice are warranted,[249] this Article recommends a more modest change that courts can immediately implement. This procedural framework would avoid many of the problems wrought by the varying approaches to plausibility pleading employed by the district court, appellate panels, and en banc court in *Francis*. And this framework would prove especially useful when confronting novel legal claims under the FHA.

A. ANALYZE PURELY LEGAL QUESTIONS FIRST AND SEPARATE FROM MIXED QUESTIONS OF LAW AND FACT

When deciding 12(b)(6) motions raising both a purely legal question regarding whether a claim is cognizable and a mixed question of law and fact regarding whether a plaintiff has plausibly pleaded the claim, courts should analyze these questions separately. For example, in *Francis*, the governing law was unclear as to whether a plaintiff's claim is legally cognizable,[250] so the court should have first answered the legal question before determining whether Mr. Francis cleared the plausibility hurdle. If the plaintiff alleges a claim that is not recognized under the law, the court should grant the motion to dismiss. Only if the court finds the legal claim is one cognizable under the law must the court consider whether the plaintiff has plausibly pleaded the claim. This approach would increase efficiency, allow for the vindication of substantive rights that courts have determined the law should recognize, and increase the likelihood that the parties and the public would see the process as fair and thus legitimate.

In answering the legal question, courts should frame it narrowly to clearly focus the analysis on the legal question of whether a novel claim exists under the law. If a court determines a plaintiff has brought a claim that is not recognized under the law, the court could dismiss on that ground alone and forgo the analysis of whether a plaintiff plausibly pleaded the claim. Thus, answering the legal question first would save judicial time and resources.

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248. For a discussion of and citation to sources discussing the degree to which *Twombly* and *Iqbal* have impacted civil rights and employment discrimination cases, see *id.* at 2413–14 and authorities cited therein.

249. *See, e.g.*, *id.* at 2446–53 (arguing Congress should pass a new act focused on correcting regressive procedural rulings to increase the ability to enforce civil rights protections in the courts).

250. "[T]here is no consensus at the present time about whether landlords have an obligation under the FHA to remediate cases of tenant-on-tenant harassment and, if they do, what the justification is for reading in that legal duty." Short, *supra* note 23, at 1256.

In addition, this approach would enhance the development of substantive law. In answering the legal question, the court would not be able to rely on plausibility pleading while casting doubt on the existence of a legal claim. Instead, in reaching an answer on the legal issue, the court would explain its rationale and state its holding clearly. The court's order then would be subject to appeal. To the extent that other courts reach contrary holdings on the existence of a legal claim, a split in authority would be more readily revealed. Requiring courts to make clear their holdings and disagreements would encourage rational, logical developments of substantive law. When courts explicitly disagree, a split in authority is more readily apparent, and such splits are more likely to draw the attention of other courts, including the Supreme Court, as well as Congress. The resulting appellate or congressional review would aid in the development of a coherent body of substantive law on the existence (or nonexistence) of the claim.

Answering the legal question first would also avoid a situation in which a court's doubt regarding the viability of a legal claim in the first instance affects its analysis of whether a plaintiff has plausibly pleaded a claim in the second instance. Without this separation, however, judges who are skeptical about the existence of a legal claim might allow that skepticism to influence their decision regarding whether a plaintiff plausibly pleaded the claim.

Indeed, in the majority opinion in *Francis III*, the analysis of whether the plaintiff plausibly pleaded his claim was likely infected by the majority's doubt regarding the existence of such a claim under the FHA. In both *Francis I* and *Francis II*, the majority decided the legal issue first—finding the FHA encompassed the type of claims for which Mr. Francis sought relief—before it analyzed whether he plausibly pleaded his claim under *Twombly* and *Iqbal* and found he had.[251]

But the majority in *Francis III* avoided explicitly addressing the legal question of whether the FHA encompasses the sort of claims brought by Mr. Francis.[252] Instead the majority cast doubt on the existence of such claims, going so far as to correct a statement in the dissent that the court "assumes a landlord may be liable for deliberate indifferent to the general circumstances" alleged by the plaintiff.[253] The majority clarified it merely assumed such potential liability might exist in theory for the purpose of the appeal, but it refused to answer the legal question directly.[254] Thus, rather than separating the legal issues from the pleading issues, the majority in *Francis III* based its conclusion that the district court's dismissal was proper on its view that Mr.

251. Francis v. Kings Park Manor, Inc. (*Francis I*), 917 F.3d 109, 116–24 (2d Cir. 2019); Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370, 375–79 (2d Cir. 2019).

252. Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 75, 75 n.28 (2d Cir. 2021) (en banc).

253. *Id.* at 75 n.28 (quoting *id.* at 85 (Lohier, J., dissenting in part and concurring in part)).

254. *Id.* at 74–75.

Francis failed to plausibly plead his claims.[255] But that view was likely influenced by the majority's doubts regarding the existence of such claims under the FHA.[256]

After all, the majority warned that holding otherwise would actually harm renters by creating uncertainty that would encourage landlords to take "prophylactic measures" to avoid potential liability.[257] Thus, the majority reasoned, holding in favor of Mr. Francis could lead to increased housing costs "and increase[ed] risks of housing loss for some of the most vulnerable among us."[258] These concerns reflect an unwillingness or at least uneasiness with recognizing the kinds of claims brought by Mr. Francis as viable under the FHA. As plausibility pleading requires judges to employ their judgment as to whether plaintiffs have cleared the plausibility hurdle, however, it is difficult to imagine their judgment was not negatively swayed by their professed serious doubts as to the existence of Mr. Francis's legal claims. Rather than relying on plausibility, the court should have addressed head-on the legal issue of whether such claims are covered by the FHA. But quietly holding that a plaintiff—who cannot access relevant information before discovery—failed to plausibly plead specific facts and thus dismissing the plaintiff's claim on plausibility grounds, as the court in *Francis III* did, is, for the reasons discussed above, inappropriate, wasteful, and unnecessarily confusing to future litigants.

Separating the question of whether a claim exists from the question of whether a plaintiff has plausibly pleaded the claim, on the other hand, would cabin the analysis of each issue so that the answer to one does not improperly influence or drive the answer to the other. Courts would be required to analyze plausibility only if they determined the novel claim is one countenanced by the law. In this way, requiring courts to answer the legal question before analyzing plausibility would inoculate judges from the likelihood that their own doubts as to the existence of legal claims and their vague worries about an imaginary parade of meritless cases would negatively influence their analysis of plausibility.

B. If the Court Determines the Law Provides for the Novel FHA Claim, the Court Should Analogize to Title VII Claims and Apply Burden Shifting

After the court determines a novel legal claim is cognizable, only then should it analyze whether a plaintiff has plausibly pleaded the claim. In analyzing plausibility, the court should consider whether necessary proof is solely in the possession of defendants. If so, the court should avoid placing the plaintiff in a catch-22 situation in which a plaintiff needs evidence to

255. *Id.* at 82.

256. *See id.* at 74–75.

257. *Id.* at 79.

258. *Id.* (citing Francis v. Kings Park Manor, Inc. (*Francis II*), 944 F.3d 370, 395 (2d Cir. 2019) (Livingston, J., dissenting)).

survive a motion to dismiss, but the plaintiff cannot access that evidence because the claim cannot survive a motion to dismiss without the evidence.

Where the potential for this unwinnable situation exists, courts should apply a modified version of the burden shifting framework announced in *McDonnell Douglas Corp. v. Green*.[259] In that case, decided nearly fifty years ago, the U.S. Supreme Court analyzed "the proper order and nature of proof in" civil rights cases.[260]

Although *Twombly* and *Iqbal* changed the pleading requirements, the Supreme Court in those cases did not repudiate *McDonnell Douglas*, and the rationale underlying that decision applies equally to cases alleging violations of the FHA. The plaintiff in *McDonnell Douglas* was a Black man who worked for McDonnell Douglas for years before the company laid him off, claiming the termination was part "of a general reduction in [the company]'s work force."[261] The plaintiff, however, claimed "his discharge and the general hiring practices of [the company] were racially motivated."[262] Thus, he and others organized protests against the company, including a "stall-in," in which they blocked the main roads leading to the company's plant during a shift change.[263] During the stall-in, the plaintiff was arrested for obstructing traffic, pleaded guilty, and was fined.[264] In addition, although the extent of his involvement was unclear, the plaintiff knew about another protest—a "lock-in" that took place during which the front door of a building was obstructed to prevent company employees from leaving.[265] A few weeks after the lock-in, the company advertised jobs for qualified mechanics.[266] Being a qualified mechanic, the plaintiff applied for re-employment, but the company refused to re-hire him because of his involvement in the stall-in and lock-in.[267]

After filing formal complaints with several administrative agencies and the Equal Employment Opportunity Commission ("EEOC"), he sued in federal court, alleging violations of the Civil Rights Act § 703(a)(1) and § 704(a).[268] Section 703(a)(1) "generally prohibits racial discrimination in any employment decision," and § 704(a) prohibits "discrimination against applicants or employees for attempting to protest or correct allegedly

259. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

260. *See id.* at 793–94.

261. *Id.* at 794.

262. *Id.*

263. *Id.* at 794–95 (quoting Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 849 (E.D. Mo. 1970)).

264. *Id.* (citing *Green*, 318 F. Supp. at 849).

265. *Id.* at 795.

266. *Id.* at 796.

267. *Id.*

268. *Id.* at 794 n.2, 796–97.

discriminatory conditions of employment."[269] The district court dismissed the complaint on both counts.[270] Regarding the alleged violation of § 703(a)(1), the district court relied on the EEOC's failure to find "reasonable cause to believe that a violation of that section had" taken place.[271] Regarding the alleged violation of § 704(a), the district court concluded that plaintiff's involvement in the stall-in and lock-in were illegal activities, neither of which were protected activities.[272]

On appeal, the Eighth Circuit agreed regarding the unlawful protests not being protected "under § 704(a), but reversed the dismissal of [the plaintiff]'s § 703(a)(1) claim relat[ed] to" the allegedly discriminatory hiring practices.[273] The Supreme Court granted certiorari to clarify the standards that should be applied to actions challenging employment discrimination.[274] The Court agreed with the Eighth Circuit that the absence of a finding of reasonable cause by the EEOC did not preclude the plaintiff from suing under § 703(a)(1).[275] The Court reasoned it should avoid "engraft[ing] on the statute a requirement" that might discourage plaintiffs from seeking federal court review of claims of employment discrimination.[276] Describing the confusion regarding the nature and order of proof, the Court wrote the following:

> In this case respondent . . . charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case. We now address this problem.[277]

The Court then declared a plaintiff in a Title VII case satisfies the initial burden of proof by showing: (1) "that [the plaintiff] belongs to a racial minority;" (2) "that [the plaintiff] applied and was qualified for a job for which

269. *Id.* at 796.
270. *See id.* at 797.
271. *Id.*
272. *Id.*
273. *Id.* (footnote omitted).
274. *Id.* at 798 (citing McDonnell Douglas Corp. v. Green, 409 U.S. 1036 (1972) (mem.)).
275. *Id.*
276. *Id.* at 798–99.
277. *Id.* at 801 (footnotes omitted) (quoting Green v. McDonnell Douglas Corp., 463 F.2d 337, 339 (8th Cir. 1972)).

the employer was seeking applicants;" (3) "that, despite [the plaintiff's] qualifications, [the plaintiff] was rejected; and" (4) "that, after [the plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications."[278] If a plaintiff makes this showing, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[279]

Although *McDonnell Douglas* dealt with actions under Title VII of the Civil Rights Act of 1964, courts interpreting the scope of the FHA have repeatedly analogized it to Title VII,[280] which supports the application of *McDonnell Douglas*'s burden shifting in cases involving novel FHA claims as well. In fact, even the majority in *Francis III*, which cast doubt on the propriety of analogizing to Title VII in FHA cases, purported to employ the *McDonnell Douglas* framework in its analysis.[281] It stated that to make a prima facie showing of discrimination under the FHA where the FHA claim does not require direct evidence of landlord discrimination, one must show: (1) the plaintiff "is a member of a protected class"; (2) the plaintiff "suffered an adverse . . . action"; and (3) there exists "at least minimal support for the proposition that the [landlord] was motivated by discriminatory intent."[282]

Although these requirements set forth by the majority in *Francis III* appear similar to the requirements set forth in *McDonnell Douglas* as modified to reflect the housing rather than employment situation, they failed to effectively shift the burden in *Francis*.

Thus, the burden shifting should be modified to account for the fact that in certain kinds of FHA cases, especially those like *Francis* that deal with post-acquisition harassment, plaintiffs do not have access to the evidence necessary to otherwise plausibly plead claims. The majority in *Francis III* relied on its earlier decision in *Littlejohn v. City of New York*,[283] but it failed to account for the uneven access to proof. The plaintiff in *Littlejohn* had access to specific facts of a sort that plaintiffs in post-acquisition harassment cases under the FHA often would not have access.[284]

In *Littlejohn*, the Second Circuit considered how it should interpret the Supreme Court's adoption of plausibility pleading in *Iqbal* to a suit in which a

278. *Id.* at 802.

279. *Id.*

280. Short, *supra* note 212, at 240–44 (describing cases that employ the Title VII analogy in FHA litigation).

281. Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 73 (2d Cir. 2021) (en banc).

282. *Id.* (quoting Littlejohn v. City of New York, 795 F.3d 297, 311 (2d Cir. 2015)).

283. *Id.* at 89–92.

284. *See Littlejohn*, 795 F.3d at 312–13 (citing Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000) ("An inference of discrimination . . . arises when an employer replaces a terminated or demoted employee with an individual outside the employee's protected class.")). Without formal discovery, an employee can learn who has replaced the employee and see whether that person is a member of the employee's protected class.

district court had dismissed, among other things, the plaintiff's Title VII disparate treatment claims.[285] Although the court acknowledged that *Twombly* and *Iqbal*'s plausibility pleading applied to such claims, it cautioned, "[t]o the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to *show* to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be *pleaded* under *Iqbal*."[286] The court quoted the Supreme Court's admonition that "[t]he plausibility standard is not akin to a 'probability requirement,' but [the standard] asks for more than a sheer possibility that a defendant has acted unlawfully."[287]

In *Littlejohn*, the Second Circuit noted that while ultimately a plaintiff would have to produce evidence to prove discriminatory intent, at the 12(b)(6) stage, the plaintiff need only "sustain a *minimal* burden of showing facts suggesting an inference of discriminatory motivation."[288] It declared that the facts alleged in the complaint did not have to "plausibl[y] support . . . the ultimate question of whether the adverse employment action was attributable to discrimination."[289] The facts "need only give plausible support to a minimal inference of discriminatory motivation."[290]

Focusing then on whether the plaintiff's allegations "g[a]ve plausible support to the reduced prima facie requirements that arise under *McDonnell Douglas* in the initial phase of a litigation," the Second Circuit in *Littlejohn* held that they did.[291] Although the plaintiff had not alleged facts that directly indicated racial bias, the court concluded an inference of discrimination arose because the employer had replaced the plaintiff with an individual outside of the plaintiff's protected class.[292] Because the plaintiff knew who replaced her, she met the plausibility hurdle by naming the white employee and alleging the new employee was less qualified by stating the new employee's prior job and attendant focus and alleging the employee lacked the relevant experience because that job had nothing to do with the matters covered by the plaintiff's prior job.[293] The court stated the plaintiff's allegations were "more than sufficient to make plausible" the "inference of discrimination."[294]

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285. *Id.* at 309–10.

286. *Id.* at 310.

287. *Id.* (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

288. *Id.* at 311.

289. *Id.*

290. *Id.*

291. *Id.* at 312–13.

292. *Id.* (citing Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000); de la Cruz v. N.Y.C. Hum. Res. Admin. Dep't of Soc. Servs., 82 F.3d 16, 20 (2d Cir. 1996); and Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1239 (2d Cir. 1995)).

293. *Id.* at 313.

294. *Id.*

In *Francis III*, however, the majority of the Second Circuit was less generous. Although the majority characterized Mr. Francis's burden as "modest" and noted that he had alleged that the "[d]efendants ha[d] intervened against other tenants . . . regarding non-race-related violations of their leases or the law," the court dismissed these allegations as conclusions of law, rather than fact.[295] One can see, however, as the dissent also pointed out, how these allegations could also have been characterized as facts.[296] Indeed, disagreements and confusion about whether particular allegations constitute allegations of facts or conclusions of law are not new.[297] Such disagreements preexisted the federal rules themselves.[298]

In justifying its decision to uphold the district court's dismissal, however, the majority warned of potentially dire consequences to the availability of affordable housing if it ruled otherwise, opening the gates to a potential flood of cases against landlords.[299] The majority's uncharitable application of plausibility pleading to Mr. Francis's claims, however, was both inconsistent with the other applicable pleading rule in the Federal Rules of Civil Procedure and unnecessary to prevent the imagined threat that its decision would create such uncertainty that landlords would react in costly ways and pass those costs on to renters. Although Rule 8 sets forth the general rules of pleading, Rule 9 applies to pleading special matters.[300] Among those are "[c]onditions of [the] [m]ind."[301] Rule 9 provides "intent . . . and other conditions of a person's mind may be alleged generally."[302] Mr. Francis complied with Rule 9. He alleged that the defendants failed to intervene in his case, although they had in others. He further alleged that the failure was due to his race. Having complied with Rule 9, his claims should not have been dismissed.

To the extent that the majority worried the plaintiffs would file wholly unsupportable claims, Rule 11 serves a gatekeeping function while also supporting an argument that Mr. Francis, at the outset of litigation, should not have been required to plead more specific facts than those to which he had access before discovery. Rule 11 provides that in signing a pleading or motion, an attorney (or pro se litigant) "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further

295. Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 73 (2d Cir. 2021) (en banc) (quoting Complaint, *supra* note 34, ¶ 63, at 13).

296. *Id.* at 89–92 (Lohier, J., dissenting in part and concurring in part).

297. *See, e.g.*, Erichson, *supra* note 13, at 903–04; Kochan, *supra* note 13, at 240–41.

298. *See* Subrin, *supra* note 152, at 941.

299. *See Francis III*, 992 F.3d at 79.

300. FED. R. CIV. P. 8, 9.

301. FED. R. CIV. P. 9(b).

302. *Id.*

investigation or discovery."[303] This language from Rule 11 recognizes that initially a party may not have evidentiary support for all factual allegations until after discovery takes place.[304] But it protects defendants against baseless claims by requiring the signer to "certif[y] that to the best of the person's knowledge, information, and belief, formed after [a reasonable] inquiry," evidentiary support for the allegation will be found "after a reasonable opportunity for . . . discovery."[305]

If a defendant received a complaint with allegations that the defendant knows have no basis and could never have a basis in evidence, Rule 11 provides a mechanism for the defendant to demand the plaintiff remove the unsupportable allegations.[306] If the plaintiff refuses, the defendant could file a motion for sanctions, which a court should grant if the defendant proves that factual allegations lack support and further investigation or discovery would not uncover any such support.[307]

In *Francis III*, however, the majority responded to the defendant's motion to dismiss by requiring Mr. Francis to have shown additional specific facts—facts that it said would allow it to compare the events Mr. Francis complained of to the "[d]efendants' responses to other violations."[308] Facts concerning the defendants' responses to other violations would require Mr. Francis to know the details about the defendants' interactions with other tenants. That information, however, was in the defendants' possession, not Mr. Francis's.

Unlike pre-acquisition discrimination under the FHA, where a plaintiff can allege sufficient facts to shift the burden on discrimination by showing the apartment or home that the defendant refused to rent or sell the plaintiff was still available, in post-acquisition discrimination cases, the comparative facts are more difficult to access. In pre-acquisition cases, a plaintiff can see whether the apartment or home is still listed or can inquire as to whether the apartment or home is still available without disclosing the plaintiff's race. But that sort of readily accessible information is not available in post-acquisition cases, like Mr. Francis's. Forcing Mr. Francis, at the outset, to produce information in the defendants' possession meant that information would stay in the defendants' possession despite the little effort that would have been required for the defendant to produce it. That outcome could have been avoided by applying Rule 9 to allow Mr. Francis to plead generally the defendants' intent to discriminate, and the defendants would be sufficiently protected by the strictures of Rule 11 that apply to all pleadings and motions signed and filed with a court.

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303. FED. R. CIV. P. 11(b)(3).

304. *Id.*

305. *Id.*

306. *See* FED. R. CIV. P. 11(c)(2).

307. *See id.*

308. Francis v. Kings Park Manor, Inc. (*Francis III*), 992 F.3d 67, 73–74 (2d Cir. 2021) (en banc).

Fifty years ago, the Court chose to impose burden shifting in civil rights cases in *McDonnell Douglas* because it realized that defendants are in a better position than plaintiffs to access proof of discriminatory intent in some cases.[309] The reasons for adopting burden shifting in *McDonnell Douglas* apply equally in cases like Mr. Francis's, and his pleading that the defendants treated non-race-related violations of their leases or the law differently should have resulted in shifting the burden to the defendants. Instead, the Second Circuit upheld the district court's premature dismissal of Mr. Francis's claims after an unreasonably long appellate process.

Although no "scorecard for evaluating [the] procedural system" embodied in the federal rules exists, central questions include whether the system efficiently effectuates the substantive law and whether it "engender[s] a sense of fairness and legitimacy" in the participants and the public.[310] Neither of those concerns is adequately addressed when courts apply plausibility pleading in conflicting and unpredictable ways in cases alleging novel violations of the FHA.

CONCLUSION

The plausibility pleading requirements articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* continue to confound even well-intentioned courts. *Francis v. Kings Park Manor, Inc.* provides a striking example of how the application of plausibility pleading can generate powerful negative consequences. It can prevent plaintiffs from effectively accessing the civil justice system despite possessing potentially viable claims of discrimination in violation of the FHA. It can also encourage courts to reach decisions, couched as procedural rulings, that in fact impose substantive limits on the rights of both the present and future parties. At the same time, plausibility pleading can insulate courts from potentially critical appellate review, which can hinder the development of legal protections by rendering the already small likelihood of attracting Supreme Court or congressional attention infinitesimal.

The years-long appellate battle that followed the district court's dismissal of Mr. Francis's claim suggests the Second Circuit grappled with modern applications of the FHA but could not agree on the legal issue of whether the FHA allowed for post-acquisition claims alleging landlord liability for tenant-on-tenant harassment. And, whether intentional or not, the majority in *Francis III* employed plausibility pleading as camouflage—providing a procedural justification to side-step the substantive law decision on which the court apparently could not agree. The majority's insistence that Mr. Francis had to plead facts to which he lacked access deprived him of justice and effectively created de facto law in the Second Circuit that deprives other litigants of their day in court. Moreover, as a practical matter, the majority's decision concealed

309. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

310. *See* Subrin & Main, *supra* note 9, at 1877.

this de facto split in authority, making it less likely to attract the Supreme Court's or Congress's attention. Thus, the decision operates incognito, quietly shaping litigants' behaviors and causing them not to pursue these kinds of claims, while refusing to overtly declare such claims unavailable under the FHA.

In response, this Article's theoretical framework would promote the rational development of substantive law in unsettled areas while limiting judicial time spent on objectively meritless claims. When deciding a motion to dismiss a plaintiff's novel FHA claims, this Article posits that courts should first analyze the legal question and clearly state whether the law supports the kind of claim alleged. Requiring courts to state and justify a position regarding the legal issue before analyzing whether *Twombly* and *Iqbal*'s plausibility pleading requirements are met would avoid the kind of inefficiency exhibited in *Francis*. It would also ensure that doubts about the legal claim's existence would not negatively influence the analysis of whether plaintiffs plausibly pleaded their claims. This approach is consistent with the policies underlying the Supreme Court's adoption of plausibility pleading and, in the specific example we address, with Congress's broad remedial goals in enacting the Fair Housing Act.