UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FULLER, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 1:18-cv-872-EGS

ORAL ARGUMENT REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The District of Columbia has two separate housing development policies: One for wealthy white communities, and another for poor black communities. If a development is slated for a wealthy or white community, such as Georgetown or Cleveland Heights, the District takes good care to follow zoning laws and regulations, guaranteeing residents a meaningful voice in the process, protecting them from environmental harms, and otherwise safeguarding the character of the community. But if the development is meant for a poorer or black neighborhood East of the Anacostia River, the District willfully ignores applicable municipal regulations and federal law, giving residents no say in the future of their own neighborhoods, subjecting them to all manner of environmental injuries, and otherwise displacing families from the only homes they've ever known. The District claims all of this is necessary and, indeed, desirable for attracting a so-called "Creative Class" of millennials who work in "Creative" jobs. But the results of the District's separate and unequal housing policies are extreme and rapid gentrification of some of the most historic black communities of America's capital city, and the inexorable racial segregation of its neighborhoods.

Plaintiffs are residents and organizations from the very communities the District treats as unequal under its separate housing policies. They allege, among other things, that the Zoning Commission violated its statutory duty to assess the adverse impacts of new development, failed to conduct studies to evaluate land use changes that impact the real lives of tens of thousands of people, and cast aside fundamental administrative functions like the assignment of party status and ANC review. They allege these failures have resulted in the displacement and gentrification of vulnerable, low-income African-American residents, and have deprived Plaintiffs of their liberty and property rights under the Fifth Amendment, their rights to Equal Protection on the

basis of race, and their rights under the Federal Fair Housing Act and the D.C. Human Rights Act.

In moving to dismiss Plaintiffs' action as non-justiciable and for failure to state a claim, the District and District of Columbia Housing Authority ("DCHA") do not—and indeed cannot—challenge the key factual allegations that D.C. agencies have willfully and repeatedly failed to follow applicable municipal and federal laws and regulations, and that this failure has caused harm to Plaintiffs. Instead, Defendants argue that, even if Plaintiffs' allegations are true, this Court lacks the power under Article III standing to provide Plaintiffs redress for the injuries they've suffered and lacks the power under the political question doctrine to hold Defendants accountable. Defendants are wrong on both counts.

As to standing, Plaintiffs have standing for at least three independent reasons: First, each Plaintiff alleges specific constitutional violations, which confer standing regardless of additional injury. Second, organizational plaintiffs plausibly allege that Defendants' conduct conflicted with their missions and they had to expend resources to counteract the injury, which confers standing under prevailing precedent. Third, each individual Plaintiff alleges specific, concrete injuries to their residential homes, physical environment, physical and psychological health, and their communal, social, and professional networks.

As to justiciability, this case does not present a political question for three reasons. First, Defendants portray the narrow political question doctrine as more expansive than governing authority allows. Second, this case bears no resemblance to the Supreme Court's characterization of a political question under a framework established over fifty years ago. Third, this case seeks to remedy constitutional injuries. Federal courts are a customary forum for relief from constitutional violations, especially for minorities who have been silenced by a more powerful

majority. Not every case that involves controversial issues necessarily involves a political question. Indeed, the doctrine is a narrow exception to the rule that the judiciary has a responsibility to decide the cases properly before it. To the extent that Defendants argue this Court must abstain from deciding this case, their argument misapplies the law. The *Rooker-Feldman* and *Younger* doctrines are wholly inapplicable under established precedent.

Over twelve years and three separate administrations, the people of Barry Farm, Buzzard Point, and Union Market have watched Defendants turn the neighborhoods where they've lived for generations into playgrounds they cannot afford and where they no longer seem welcome. When they have relied on what the District claims are its zoning laws, they've been systematically ignored. Poplar Point residents are imminently facing the same fate. So, the issue in this case is not whether the District has the authority and discretion to adopt and pursue its preferred housing policy. The question is whether this Court has the power to remedy the harms plaintiffs have suffered because the District willfully violates municipal and federal law in pursuit of a Creative Class Agenda that separates residents into two unequal housing policies: one for its affluent white residents, another for its less well-off black neighborhoods.

STANDARD OF REVIEW

To survive a Rule 12(b)(1) motion to dismiss, "a plaintiff bears the burden of establishing that a court has jurisdiction over his claim." *Johnson v. Veterans Affairs Med. Ctr.*, 133 F. Supp. 3d 10, 13 (D.D.C. 2015). Courts "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). A court "may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, as long as it accepts the factual

allegations in the complaint as true." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Legal conclusions may "provide the framework of a complaint," but they must be supported by factual allegations. *Id.* at 679. Where "there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* In ruling on a motion to dismiss, a court may "ordinarily consider only the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Kelley v. Fed. Bureau of Investigation*, 67 F. Supp. 3d 240, 255–56 (D.D.C. 2014) (internal quotation marks and citations omitted).

ARGUMENT

I. THIS COURT HAS ARTICLE III AUTHORITY TO RESOLVE THIS CASE BECAUSE EACH PLAINTIFF ALLEGES A CONSTITUTIONAL INJURY, ORGANIZATIONAL PLAINTIFFS ALLEGE DEFENDANTS' CONDUCT CONFLICTS WITH THEIR MISSIONS AND CAUSED THEM TO EXPEND RESOURCES, AND EACH INDIVIDUAL PLAINTIFF HAS SUFFERED TANGIBLE INJURY

To establish Article III standing, plaintiffs must allege three basic elements: (1) an injury in fact, which is (2) fairly traceable to the challenged action of the defendant, rather than the result of the independent action of some third party, and (3) likely to be redressed by a favorable

decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because the court "presumes that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (citation omitted).

To establish injury in fact, plaintiffs must allege an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560; *see, e.g.*, *Doe v. Chao*, 540 U.S. 614, 624–25 (2004) (loss of an opportunity to compete for a benefit that may have been denied anyway was a sufficient injury); *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998) (loss of bargaining power was a sufficient injury); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–21 (1998) (inability to obtain statutorily required information was a sufficient injury); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure was a sufficient injury); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982) (standing for psychological injury).

Here, Plaintiffs have shown sufficient injury for purposes of standing in at least three independent ways. First, and most fundamental, each Plaintiff alleges a constitutional violation. It is well established that violation of a constitutional right confers standing, regardless of additional injury. Second, organizational Plaintiffs CARE and NeRAC plausibly allege Defendants' conduct conflicted with their respective missions and they expended resources to counteract the injury, which confers standing under prevailing precedent. Third, each individual Plaintiff alleges specific, tangible injuries that have already occurred.

A. Individual and Organizational Plaintiffs Allege Cognizable Injuries

In this case, each Plaintiff satisfies at least the constitutional minimum. NeRAC and CARE have organizational standing because they do more than represent only "vaguely defined groups of people with generalized concerns about the impact of development." ECF No. 26-1 at 19. The individual Plaintiffs have standing because they allege particularized injury that can be redressed by the Court. Most Plaintiffs also allege additional imminent injury.

As a preliminary matter, two things are certain: First, Plaintiffs are not merely concerned citizens. The District likens this case to *Warth v. Seldin*, where the Supreme Court found plaintiffs lacked standing because "merely being 'a person of low or moderate income and coincidentally, … a member of a minority racial or ethnic group,' did not show that they had been *injured* personally." ECF No. 27-1 at 9 (citing *Warth*, 422 U.S. at 502-508). This case is highly distinguishable. Plaintiffs have been personally injured. Each organization and individual Plaintiff alleges concrete harms that have already occurred. Any attempt by Defendants to portray Plaintiffs as nothing more than concerned citizens entirely misses the point of this lawsuit. Second, Plaintiffs allege a pattern of unlawful behavior with grave implications. The District claims "denial of the ability to file comments" is an insufficient injury. ECF 27-1 at 19. This grossly mischaracterizes Plaintiffs' injuries. This case challenges a practice of arbitrary decision-making intended to—and with the effect of—shutting current residents out of the redevelopment process, in violation of the constitution, federal statute, and D.C. law.

1. Plaintiffs Plausibly Allege Constitutional Violations

Plaintiffs have standing because they allege violations of their constitutional rights. The violation of a constitutional right is itself an injury that confers standing. Courts have traditionally recognized "the importance to organized society that [certain absolute] rights be

scrupulously observed" even in the absence of proof of actual injury by "making the deprivation of such rights actionable." *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Hobson v Brennan*, 646 F. Supp. 884, 886 (D.D.C. 1986). In *Carey*, the Supreme Court held:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, … the denial of procedural due process should be actionable … without proof of actual injury.

435 U.S. at 266. Accordingly, regardless of the actual, concrete injuries discussed below, *infra* I.A.3, this case cannot be dismissed for lack of standing.

2. NeRAC and CARE Allege Cognizable Injuries Because Defendants' Unconstitutional Actions Have Concretely and Demonstrably Interfered with the Mission of Each Organization

An organization may have standing on its own or on behalf of its members. *Abigail All. for Better Access to Dev. Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006). Standing based on an organization's own injury requires an organization, "like an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (internal quotation and citation omitted). To allege injury in fact, an organization must do more than allege "a mere setback to [its] abstract social interests." *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

In *Havens Realty Corporation v. Coleman*, the Supreme Court held an organization had sufficiently established standing by alleging a "concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources." 455 U.S.

363, 379 (1982). The D.C. Circuit has established two additional requirements for organizational standing. First, there must be a "direct conflict between the defendant's conduct and the organization's mission." *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996); *see also Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, 78 F. Supp. 3d 208, 229 (D.D.C. 2015). Second, the organization must "show that it has expended resources to counteract the injury to its ability to achieve its mission" and not simply as a product of 'unnecessary alarmism constituting a self-inflicted injury.'" *Chesapeake Climate*, 78 F. Supp. 3d at 229 (quoting *Nat'l Treas.*, 101 F.3d at 1430). Under this framework, explained below, both NeRAC and CARE allege sufficient injuries.

a. Defendants' Actions Impair NeRAC's and CARE's Ability to Carry Out Their Missions

First, there must be a conflict between the defendant's conduct and the organization's mission. *Chesapeake Climate*, 78 F. Supp. 3d at 229; *see also League of Women Voters of U.S. v. Newby*, 838 F. 3d 1, 9 (D.C. Cir. 2016) (finding that "new obstacles" imposed by a defendant's actions, which "unquestionably make it more difficult for [organizational plaintiffs] to accomplish their primary mission … provide injury for purposes … of standing"). The District's and DCHA's actions in creating the Creative Class Agenda and carrying out that Agenda by steamrolling development through arbitrary and capricious zoning decisions directly conflicts with the respective missions of NeRAC and CARE.

NeRAC is a community-based nonprofit organization that advocates for D.C. residents' environmental health and safe housing, with a particular focus on residents of Buzzard Point. Am. Compl. ¶ 112. Its mission is to "protect[] its members and area residents from environmental damage caused by redevelopment, including but not limited to toxic air resulting

from construction dust and diesel fumes emitted by construction vehicles." Am. Compl. ¶ 113. NeRAC's members have been active since 2016 and formally organized as NeRAC in January 2018. Am. Compl. ¶ 112. It did not form for litigation and certainly does not exist solely to "create a predicate conflict for Article III standing." ECF 26-1 at 23. NeRAC formed in response to problems occurring in the Buzzard Point community that threatened Plaintiffs' quality of life. Later, in response to an escalated threat, it pursued litigation. Defendants' actions directly conflict with NeRAC's mission. For example, the redevelopment construction has resulted in poor air quality for residents of Buzzard Point. Construction trucks idle next to residents' houses for long periods of time, forcing them to close their windows to avoid the buildup of diesel fumes. Toxic soil, of which the Zoning Commission was made aware, is predictably disturbed by heavy construction equipment. This occurred over NeRAC and resident objection, which questioned the suitability of the site for a soccer stadium given the site's environmental sensitivity and given the health concerns of residents. Fugitive and toxic dust from the site coats the surfaces in residents' homes and otherwise suffocates members with unclean air. Am. Compl. ¶¶ 141, 146, 150. Residents state they can "taste" the pollution in the air. Am. Compl. ¶ 141. As a result of Defendants' actions, NeRAC struggles to accomplish its mission.

CARE is a community-based non-profit that advocates for the preservation of affordable housing and seeks to improve quality of life for local residents by encouraging civic engagement with local government. Am. Compl. ¶ 117. CARE's members meet both formally and informally. Formally, they have testified before various governmental bodies on the effects of gentrification. Am. Compl. ¶ 119. Informally, they gather on neighborhood streets to raise awareness among community members unable or not inclined to attend civic meetings. *Id.*

CARE is a valuable part of the communication network between neighbors regarding current events, as well as a mechanism by which disaffected residents may be formally heard. *Id.*

Similar to NeRAC, CARE did not form for litigation. It arose in response to problems occurring in the community east of the Anacostia River that threatened Plaintiffs' quality of life and, because of that problem, CARE later turned to litigation. Defendants' actions conflict with CARE's ability to carry out its mission in three ways: First, by failing to consider the testimony of CARE members at Zoning Commission hearings, the District's actions conflict with CARE's ability to both preserve affordable housing and improve quality of life for area residents. Am. Compl. ¶ 231. The Zoning Commission Defendants repeatedly ignored CARE and its members regarding decisions about the community in which CARE's members live. Second, Defendants' Creative Class Agenda, and how Defendants implemented it, has resulted in a loss of affordable housing for low- and mid-income people due to its re-segregation of communities. Am. Compl. ¶¶ 225, 227. This directly conflicts with CARE's mission to preserve affordable housing. Third, and importantly, Defendants' arbitrary and capricious zoning decisions significantly decrease CARE's negotiating power and reputation. *See Clinton*, 524 U.S. at 433. Finally, the redevelopment construction, and Barry Farm in particular, has an adverse impact on CARE members' quality of life due to neglect and disrepair. Am. Compl. ¶¶ 125, 129, 137, 142.

At the pleading stage, all that is required is that NeRAC and CARE plausibly allege the minimum requirements for standing, because the court "presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Here, they sufficiently allege that Defendants' conduct conflicts with their missions. Defendants focus primarily on this first requirement, arguing that the organizations claim an "abstract injury amounting to no more than a frustration of [the organization's] alleged purpose." *See* ECF 27-1

at 11; ECF 26-1 at 21. These arguments misstate organizational Plaintiffs' missions and operations. Their injury is not abstract: NeRAC has been prevented from fulfilling its mission of protecting residents from environmental damage and CARE has been prevented from fulfilling its mission of preserving affordable housing and improving the quality of life of its members through civic engagement.

b. NeRAC and CARE Have Diverted Resources to Counteract the Injury to their Respective Missions

Second, an organization must allege that it has expended resources to counteract the injury to its mission. *Chesapeake*, 78 F. Supp. 3d at 229. Both NeRAC and CARE expended resources to counteract Defendants' actions, which confers standing under settled precedent.

NeRAC advances its interest through grassroots organizing, leadership development, community education, and providing resident testimony at Zoning Commission meetings. Am. Compl. ¶ 114. These interests have been thwarted by Defendants' redevelopment decisions that have negatively affected the health of its members and area residents. Am. Compl. ¶ 115. NeRAC has expended its resources in response to, and to counteract, the negative effects of Defendants' actions. Am. Compl. ¶ 116. More specific allegations are not required at this stage, but specific examples include the costs of creating and distributing information with tools like flyers and brochures, and redirecting the organization's human resources efforts to build public awareness.

CARE advances its interests through grassroots organizing, leadership development, community education, and testifying at various governmental meetings. Am. Compl. ¶ 120. Its interests have been thwarted by Defendants' development decisions that have negatively affected the housing of CARE members and undermined their quality of life. Am. Compl. ¶ 121. It has

expended its resources in response to, and to counteract, the negative effect of Defendants' actions. *Id.* Again, more specific allegations are not required at this stage, but specific examples include the costs of creating and distributing information with tools like flyers and brochures, and redirecting the organization's human resources efforts to build public awareness.

The District's attempt to characterize NeRAC's and CARE's actions as expending resources on "advocacy" does not defeat standing because the D.C. Circuit has recognized that "[m]any of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and indeed, sometimes are." *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011). NeRAC and CARE were both forced to expend resources they would not have expended absent Defendants' conduct. At a minimum, Plaintiffs plausibly allege organizational standing by meeting both requirements.

DCHA disputes NeRAC's and CARE's standing on the grounds that "their alleged grievances regarding the overall well-being of certain residents are so general that they could apply to anyone living or working in the District of Columbia." ECF 26-1 at 22. This is false. These groups do not represent every resident, nor do they purport to. NeRAC members are residents of Buzzard Point. Am. Compl. ¶ 112. CARE members are African-American residents living east of the Anacostia River. Am. Compl. ¶ 118. Members have a deep, personal interest in preserving housing and quality of life in their neighborhoods and have been or are at imminent risk of being displaced. Several organization members are named individual Plaintiffs. Each group's members confront unique challenges based on the neighborhoods in which they reside—threats and injuries not faced by other D.C. residents. Moreover, each organization appeared before the Zoning Commission, which thwarted their missions through pattern and practice of unconstitutional, arbitrary zoning decisions.

3. Individual Plaintiffs Allege Concrete Injuries to their Residential Homes, Physical Environment, Physical and Psychological Health, and Communal, Social and Professional Networks

As above, each Plaintiff alleges a violation of his or her constitutional rights, which itself confers standing. *Carey*, 435 U.S. at 266. Additionally, each Plaintiff alleges concrete, particularized harms that have already occurred, above and beyond the imminent injury of displacement for those who are still living in their homes. Plaintiffs allege an array of concrete injuries: Harm to their property interests as their apartments have fallen into gross disrepair due to Defendants' failure to maintain residential buildings, Am. Compl. ¶¶ 124, 135, environmental pollution in their neighborhoods such as air and noise pollution, Am. Compl. ¶¶ 125, 130, 136, 161, harm to their health including allergies, headaches and other side effects from heavily polluted air, Am. Compl. ¶¶ 141, 146, 150, a loss of communal, social, and professional networks, Am. Compl. ¶¶ 126, 129, 137, 143, 151, 161, harm to their professional and personal reputations, Am. Compl. ¶¶ 153, 156, a palpable decrease in their faith in the democratic process, Am. Compl. ¶¶ 151, 157, the physical toll of stress due to the above harms and compounded by the high likelihood of displacement, Am. Compl. ¶¶ 151, 152, 157, and, finally, stress related to the imminent injury of displacement. Ultimately, Defendants' actions directly impact Plaintiffs' quality of life, changing where and how they live. This is sufficient to establish standing.

a. Barry Farm Plaintiffs

The Barry Farm Plaintiffs (Paulette Matthews, Michelle Hamilton, and Tendani Mpulubusi-El) have each suffered an injury in fact. Their injuries are not speculative, prospective, or theoretical. First, each alleges a violation of constitutional rights. Second, Ms. Matthews and Ms. Hamilton allege they were injured by Defendants' failure to maintain Barry Farm—allowing it to fall into gross disrepair—and Defendants' pressure to move out of their

units. Am. Compl. ¶¶ 124, 135. Third, Ms. Hamilton, Ms. Matthews and Mr. Mpulubusi-El allege Defendants caused environmental degradation that negatively affected their health and quality of life. Am. Compl. ¶¶ 125, 130, 136. For example, Ms. Matthews experienced psychological stress and Ms. Hamilton was forced to move out due to mold and other health issues. Am. Compl. ¶¶ 124, 133. Fourth, Plaintiffs allege they also suffered a cognizable loss of neighbors and friends, as well as a breakdown of a vibrant community culture, both of which have undermined their social and professional networks and significantly affected their quality of life. Am. Compl. ¶¶ 126, 129, 137. The loss of social networks and one's neighborhood ecosystem present a cognizable injury. *See Doe*, 540 U.S. at 624-25; *Clinton*, 524 U.S. at 433; *FEC*, 524 U.S. at 20-21; *Valley Forge*, 454 U.S. at 485-86. Indeed, the D.C. Court of Appeals as has recognized as much in zoning appeals. *See Barry Farm Tenants and Allies Assoc. v. Zoning Comm'n*, 182 A.3d 1214, 1227 (D.C. 2018) (discussing displacement and disruption of social networks as a form of hardship); *see also Friends of McMillan v. Zoning Comm'n*, 149 A.3d 1027, 1036-38 & n.21 (D.C. 2016) (disruption of social networks as adverse impacts). This disruption has concretely impacted Ms. Matthews, who found herself alone and afraid after a mugging in 2015, unable to confide in any trusted friends, as they had fled her dilapidated building, Am. Compl. ¶ 126, and Ms. Hamilton, who is wheelchair-bound and uniquely struggles to maintain her scattered social network from the confines of her home. Am. Compl. ¶ 137.

Moreover, Mr. Mpulubusi-El alleges his professional livelihood as a Barry Farm artist has been injured by Defendants. Am. Compl. ¶ 131. He is currently experiencing homelessness after having an established residence on Wade Road, which is in Barry Farm neighborhood, across the street from Barry Farm public housing complex. To make a living and for personal expression, he documents the history and culture of Barry Farm. Am. Compl. ¶ 131. Defendants'

decisions have injured his livelihood by scattering the people with whom he has earned a professional reputation, adulterating the social capital he has built in the community. Among other things, this has undermined his opportunity for business collaboration intrinsic to his livelihood, another cognizable injury. Am. Compl. ¶ 131. Likewise, his goodwill inhered in his name as an artist, advocate, and mentor is rooted in his immediate community, and has been diminished. Finally, as someone experiencing homelessness, he especially relies on trusted neighbors, in whose homes he is able to store personal possessions. The haphazard and illegal destruction of Barry Farm has literally made it harder for him to survive.

The Barry Farm Plaintiffs have satisfied their obligation at the pleading stage by plausibly alleging a concrete and particularized injury in fact.

b. Buzzard Point Plaintiffs

The Buzzard Point Plaintiffs (Geraldine McClain, Sylvia Carroll, and Rhonda Hamilton) have also suffered injuries in fact. Their injuries are not speculative, prospective, or theoretical. First, each alleges a violation of her constitutional rights. Second, each alleges damage to her health caused by redevelopment construction, including the foreseeable effects of air pollution, noise pollution, and proximity to active construction. Am. Compl. ¶¶ 141, 146, 150. Environmental pollution, for example, has negatively affected Ms. McClain's health: the construction exacerbates her allergies, causes headaches, and produces emotional stress and a sense of voicelessness and hopelessness, undermining her quality of life. Am. Compl. ¶ 141. Ms. Carroll similarly suffers health damage caused by air pollution from construction trucks and dust that coats surfaces throughout her house that cannot be remediated by air purifiers. Am. Compl. ¶ 146. Third, Plaintiffs allege the redevelopment construction—a foreseeable result of the PUD-approved development Plaintiffs oppose—has interrupted Plaintiffs' power and gas lines, and

shaken the ground, which caused Ms. McClain's fence to fall down. Am. Compl. ¶ 143. Fourth, Plaintiffs allege they suffer from the loss of invaluable social networks as people are forced to leave Buzzard Point. Am. Compl. ¶¶ 143, 147, 151. These injuries have significantly decreased Plaintiffs' quality of life and caused economic harm. These are concrete harms Defendants cannot deny.

Rhonda Hamilton alleges two additional cognizable injuries. After testifying before the D.C. Zoning Commission on several occasions, her negative experience with Defendants' actions and the planning process caused emotional distress and fear that she and her community are entirely voiceless about their neighborhood's future. Am. Compl. ¶ 152. Defendants' intentional destruction of Buzzard Point has transformed the area from a close-knit community of longtime neighbors to blocks of strangers living in high-density luxury buildings that Ms. Hamilton and her neighbors cannot afford, which will imminently force them to scatter, further perpetuating their social isolation. Am. Compl. ¶ 152. Ms. Hamilton is also an Area Neighborhood Commissioner (ANC) who has made it a priority to protect the character of her neighborhood. Her standing and reputation has therefore been undermined by existing and imminent construction and she has developed the distressing belief that the zoning process and its regulatory protections are a complete sham. Finally, she also suffered a loss of bargaining power, which is sufficient to confer injury. *See Doe*, 540 U.S. at 624-25.

It is difficult to ignore the list of concrete injuries alleged. Just one counterargument warrants attention: the District discounts the interruption to power and gas lines and the broken fence as insufficient on the basis that there is a process to claim property damage against the city. Its argument is entirely inapposite to the matter of standing. Whether a plaintiff may claim damage against the city in a different forum does not negate standing. Nor does the District argue

that making a damaged-property claim is a mandatory exhaustion requirement that precludes filing suit. It is therefore irrelevant.

The Buzzard Point Plaintiffs' allegations sufficiently satisfy their obligation at the pleading stage by plausibly alleging a concrete and particularized injury.

c. Poplar Point Plaintiff

The Poplar Point Plaintiff, Greta Fuller, has also suffered an injury in fact. Her injuries are not speculative, prospective, or theoretical. First, she alleges a violation of her constitutional rights. Second, she alleges she has been injured as a business owner whose business is not considered a "creative business" by the Office of Planning. Am. Compl. ¶ 13, 154, 156. Defendants do not deny this, and raising the matter in their reply briefs is too late. Third, as an ANC dedicated to protecting the character of her neighborhood, she alleges she has been injured by the existing and imminent construction and redevelopment as it has undermined her standing and reputation in the community. Am. Compl. ¶ 156. Fourth, she alleges humiliation and distress resulting from her efforts to testify before the Zoning Commission about the serious negative implications of its decision-making. Am. Compl. ¶ 157. Like Rhonda Hamilton, Ms. Fuller's faith in the zoning process has been profoundly undermined. At a minimum, she suffers a loss of bargaining power, which is sufficient to confer injury. *See Doe*, 540 U.S. at 624-25.

Ms. Fuller's allegations sufficiently satisfy their obligation at the pleading stage by plausibly alleging a concrete and particularized injury.

d. Union Market Plaintiff

The Union Market Plaintiff, Shanifinne Ball, has suffered an injury in fact. Her injuries are not speculative, prospective, or theoretical. First, she alleges a violation of her constitutional rights. Second, she alleges she lives in reasonable fear about several aspects of her imminently

changing neighborhood: environmental degradation damaging her health, increased taxes that she will soon not be able to afford on her home, stress regarding the rapidly changing character of her neighborhood, the loss of nearby businesses at which she engages in commerce, and the break-up of her social network. Am. Compl. ¶ 161. As above, these are all cognizable harms.

Ms. Ball's allegations sufficiently satisfy her obligation at the pleading stage by plausibly alleging a concrete and particularized injury.

e. Housing Insecure Plaintiffs

The Housing Insecure Plaintiffs (Tamia Wells and Ariyon Wells) have also each suffered injuries in fact. Their injuries are not speculative, prospective, or theoretical. In the Complaint, the Housing Insecure Plaintiffs allege a variety of injuries. First, each Plaintiff alleges a violation of her constitutional rights. Second, both Plaintiffs allege they have been injured by their inability to find safe, affordable housing. Am. Compl. ¶¶ 162, 167. As a result of Defendants' actions—including but not limited to the D.C. Zoning Commission's pattern and practice of not conducting comprehensive reviews of projects resulting from the discriminatory Creative Class Agenda on low-income families' racial segregation—there are fewer affordable multi-bedroom rental units for families available for low-income African-Americans in racially integrated neighborhoods. Am. Compl. ¶¶ 165, 170.

The Housing Insecure Plaintiffs' allegations sufficiently satisfy their obligation at the pleading stage by plausibly alleging a concrete and particularized injury in fact.

The District groups all Plaintiffs as one entity, concluding none of the allegations constitute an injury in fact because Plaintiffs "have not asserted any specific liberty or property interest of which they are allegedly being deprived." ECF 27-1 at 13. As the above sections demonstrate, this is not true. Each Plaintiff alleges a concrete injury resulting from Defendants'

actions, and the resulting harm to their specific neighborhoods. Neither Defendant addresses these injuries specifically or states why they are not sufficient to confer standing. Therefore, because all Plaintiffs plausibly allege a concrete and particularized harm that is not speculative, they have established injury in fact to confer standing.

B. Plaintiffs' Injuries Are Fairly Traceable to Defendants' Actions

In addition to alleging an injury in fact, plaintiffs must demonstrate a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Id.* (internal citations omitted). Defendants briefly address this element. The District merely attempts to shift blame for environmental or nuisance issues to the construction companies operating in these neighborhoods for their failure to comply with District requirements to protect the environment. But Defendants ignore the crux of the allegations: a repeated pattern and practice of procedural violations that resulted in the redevelopment of each respective neighborhood. Defendants cannot shift all blame to private developers because Defendants control the flood gates: they make the ultimate decision of whether to issue PUDs and on what terms. They also set the policy agenda. Private developers may celebrate the Creative Class, but it is Defendants who set and enforce the policy. As Defendants' policies corroborate, Defendants have legal obligations and clear limits to their discretion. The proper parties have been sued in the proper forum. Plaintiffs' injuries are directly traceable to the actions of the District and DCHA.

Finally, the constitutional injuries are directly traceable to how Defendants carried out their redevelopment policy through zoning procedures in violation of the law.

1. NeRAC's and CARE's Injuries Are Traceable to Defendants

In addition to the injury resulting from constitutional violations, NeRAC and CARE have been forced to expend resources to counteract the foreseeable results of Defendants' actions. Specifically, NeRAC's injuries—such as the inability to protect its members from environmental damage and the loss of its organizational resources—are fairly traceable to Defendants. First, the redevelopment construction was the foreseeable cause of the environmental damage. While Defendants attempt to shift blame to the construction companies, they still had an obligation to ensure a safe environment was preserved. Second, NeRAC would not have had to expend valuable organization resources to counteract these injuries absent Defendants' actions. Similarly, the injury to CARE's mission is directly traceable to the actions of Defendants, as the District ignored CARE's attempts to raise these issues before the Zoning Commission. Additionally, the redevelopment construction directly contributed to decreased quality of life for area residents. That CARE had to expend organizational resources is directly traceable to Defendants. NeRAC and CARE plausibly allege injuries traceable to Defendants.

2. Individual Plaintiffs' Injuries Are Traceable to Defendants' Actions

a. Barry Farm Plaintiffs

In addition to the injury resulting from constitutional violations, the Barry Farm Plaintiffs allege a variety of injuries traceable to Defendants. First, the District failed to maintain Barry Farm, allowing it to fall into disrepair. Defendants also placed pressure on tenants to move so Defendants could realize their redevelopment plans in pursuit of the Creative Class Agenda. In effect, Defendants waged a war of attrition against Barry Farm tenants. Am. Compl. ¶ 124.

Second, Defendants' decisions regarding construction resulted in the environmental degradation that negatively affected Plaintiffs' health and quality of life. Third, Defendants'

Creative Class Agenda and the redevelopment plan for Barry Farm destroyed a vibrant neighborhood ecosystem as Plaintiffs' neighbors and friends fled the poor conditions. Finally, Defendants' actions have directly undermined Mr. Mpulubusi-El's artistic livelihood, and social support networks, detailed above. Therefore, the Barry Farm Plaintiffs plausibly allege injuries that are fairly traceable to Defendants.

b. Buzzard Point Plaintiffs

In addition to the injury resulting from constitutional violations, the Buzzard Point Plaintiffs allege a variety of injuries, all of which are traceable to Defendants. First, Defendants' redevelopment construction predictably resulted in air pollution, which caused injuries to Plaintiffs' health. Second, Defendants' redevelopment construction caused interruptions in Plaintiffs' power and gas lines. Third, Defendants' Creative Class Agenda and the redevelopment plan for Buzzard Point led to the loss of social networks, as many of Plaintiffs' neighbors and friends were forced to move. Finally, Defendants' actions at Zoning Commission hearings directly injured Rhonda Hamilton, both individually and in her capacity as ANC. Therefore, the Buzzard Point Plaintiffs plausibly allege injuries that are traceable to Defendants.

c. Poplar Point Plaintiff

In addition to the injury resulting from constitutional violations, Greta Fuller alleges a variety of injuries, all of which are traceable to Defendants. First, Defendants' Creative Class Agenda directly injured Ms. Fuller because her business was not considered "creative." Defendants do not deny this. Second, Defendants' decisions to redevelop without considering Ms. Fuller's arguments as an ANC injured her reputation. Third, Defendants' failure to accord her testimony in front of the Zoning Commission proper weight directly caused Ms. Fuller humiliation and distress. Therefore, Ms. Fuller plausibly alleges traceable injuries.

d. Union Market Plaintiff

In addition to the injury resulting from constitutional violations, Shanifinne Ball alleges several injuries, all of which are traceable to Defendants. Due to Defendants' Creative Class Agenda and resulting redevelopment construction, her neighborhood is changing daily, which has resulted in environmental degradation, the changing character of the neighborhood, the loss of businesses she seeks to patronize, the destruction of her social network, and the imminent threat of increased cost of living and taxes that threaten her ability to maintain her current housing. Therefore, Ms. Ball plausibly alleges injuries traceable to Defendants.

e. Housing Insecure Plaintiffs

In addition to the injury resulting from constitutional violations, the Housing Insecure Plaintiffs allege injuries traceable to Defendants. Defendants' actions, including the Zoning Commission's pattern and practice of not conducting comprehensive reviews of projects that account for the impact of Creative Class development on low-income families and racial segregation, have resulted in fewer affordable multi-bedroom rental units available for low-income African-Americans families in racially integrated neighborhoods.

The District argues there is no link between Plaintiffs' increased housing costs and the alleged violations. This argument is limited to the two Housing Insecure Plaintiffs and it misses the point: The District is removing vital housing in neighborhoods affordable to low-income African-American families that need multi-bedroom units, not luxury condos. This results in fewer units, regardless of the District's alleged commitment to one-for-one unit replacement.[1]

[1] A word of caution about one-for-one replacement: As Defendants are likely to admit, in practice, no replacement is actually 100 percent effective because people—fearing for their survival—are scattered. Some move away or others may not return for many reasons, including that they no longer trust the government's promises or moving again is especially burdensome when you have children, disabilities or live on a fixed income. Ultimately, the reality is that

At the pleading stage, the Court may accept as true the plausible allegation that Defendants' policies create and result in the phenomenon of making fewer—rather than more—affordable units available to low-income African-American families in racially integrated neighborhoods. This is especially true given the corroborating factual allegations in Plaintiffs' Amended Complaint, such as: the massive out-flow of African-Americans from the District at the same time as a massive in-flow of white residents, particularly millennials, and the undeniable fact that redevelopment projects designed to suit Creatives replace affordable units with smaller unit sizes in luxury condo and apartment buildings that dramatically increase the cost of living in the neighborhood, from higher rents to higher food prices and parking costs. The Housing Insecure Plaintiffs plausibly allege injuries that are traceable to Defendants.

C. Plaintiffs' Injuries Are Redressable By Specifically Requested Relief

Finally, for standing, plaintiffs must allege that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citations omitted). This is not a particularly high burden, but an inquiry designed to narrow standing to cases "likely [to] alleviate the particularized injury alleged by the plaintiff." *Abulhawa v. U.S. Dep't of Treas.*, 239 F. Supp. 3d 24, 36 (D.D.C. 2017) (internal quotation marks omitted). "The key word is 'likely' … and thus, the prospect of obtaining relief from the injury as a result of a favorable ruling cannot be too speculative." *Id.*

Defendants' practice is not full replacement. The Agenda and its resulting PUDs result in more small condos and apartments and fewer affordable family homes, not one-for-one unit replacement. Thus, it is short-sighted to assume that every person currently housed in an East of the Anacostia River community facing redevelopment would actually be securely re-housed or returned to the community, even under a one-for-one replacement policy. Loss and displacement is inherent to the redevelopment process.

(internal quotation marks and citation omitted). "The starting point in the redressability analysis is necessarily the relief sought." *Id.*

In this case, Plaintiffs carefully selected specific relief designed to redress the injuries alleged. Specifically, the relief is intended to (1) redress the specific substantive rights Defendants violated and (2) provide effective remedy to the injuries detailed above. The proposed relief can be divided into two main categories: damages and injunctive relief.

1. Damages

First, Plaintiffs seek damages to compensate their injuries. Am. Compl. at Relief Requested ¶ I. Damages are a customary form of redressing both constitutional violations and injuries in fact. Damages are necessary in this case to redress injuries in fact, including damage to Plaintiffs' health, loss of social network, stress, and harm to reputation, among other injuries.

2. Injunctive Relief

Second, Plaintiffs seek several forms of injunctive relief designed to address Defendants' actions. The requested injunctive relief can be divided into three categories: restorative, prophylactic, and structural. All requests were selected because they can redress the injuries alleged and prevent future harm.

Plaintiffs also request restorative injunctions. For instance, Plaintiffs request that Defendants cease pre-construction activity at Barry Farm, make timely and necessary repairs on every unit, and maintain the conditions of the property that has fallen into disrepair. Plaintiffs selected these restorative measures to correct the present wrong by undoing the effects of a past wrong.

Plaintiffs also request prophylactic injunctions to maintain the status quo and prevent additional harm to Plaintiffs and putative class members. For instance, Plaintiffs request that the

court issue an immediate injunction against the Zoning Commission, enjoining it from further activity regarding phase one PUD approvals, issue an immediate emergency injunction prohibiting various D.C. entities from amending the District's Comprehensive Plan, and order that outstanding Requests for Proposals be halted and reviewed for Creative Class preferences.

Finally, Plaintiffs request structural injunctions designed to mitigate the risk that Defendants' unlawful activity continues to harm Plaintiffs or others similarly situated. For instance, Plaintiffs request that Defendants be required to follow the controlling law by considering the effects of gentrification and the segregative effects in approving all future development. Plaintiffs also request the Court to order that D.C. residents have access to an independent People's Counsel before the Zoning Commission and the D.C. Court of Appeals.

To the extent that Defendants challenge the redressability prong of standing, their arguments are unavailing. Indeed, a recent case in this Court illustrates the difference between "speculative" relief and the nature of the relief requested in this case. In *Abulhawa*, Plaintiffs brought an action seeking declaratory judgment against the Department of Treasury regarding the tax-exempt status of organizations allegedly supporting Israeli settlement efforts. 239 F. Supp. 3d at 27-30. There, the district court dismissed for lack of standing, finding the proposed relief purely speculative: "Plaintiffs do not seek damages for any losses or injuries they have already sustained, but rather seek [an] order … [requiring the Treasury Department] to initiate an investigation into any and all tax-exempt entities …" *Id.* at 36. The court observed that, for the plaintiffs alleging past injuries, an investigation would not redress those injuries. *Id.* This case illustrates the fundamentally different nature of Plaintiffs' requested relief: Plaintiffs have specific past injuries that can be remedied by damages and injunction. These remedies have been

carefully structured to redress the individual and systemic injuries resulting from Defendants' actions. Plaintiffs have sufficiently alleged redressability.

II. THIS CASE IS JUSTICIABLE BECAUSE IT DOES NOT IMPLICATE THE NARROW POLITICAL QUESTION DOCTRINE AND EVEN APPLYING THE DOCTRINE DOES NOT WARRANT DISMISSAL IN THIS CASE

In arguing that this case presents a non-justiciable political question, Defendants entirely misstate Plaintiffs' complaint. Plaintiffs neither challenge nor ask this Court to review the power of the Mayor's Office or City Council to set housing policy that encourages investment in luxury studio condominiums over family homes. What is not a political question is whether the District may violate Plaintiffs' constitutional rights in pursuing that policy. That is the question before this Court.

This case does not present a political question for three reasons. First, Defendants portray the political question doctrine as more expansive than the governing authority allows. Second, over fifty years ago the Supreme Court in *Baker v. Carr* established the framework for identifying so-called political questions. This case bears no resemblance to the *Baker* court's list of balancing factors for determining non-justiciable political questions. Third, Plaintiffs bring this case to remedy repeated violation of their constitutional rights. Relief from such violations is a customary function of the federal courts, which necessarily offer a forum to citizens challenging their government, particular for insular minorities who have been silenced by the will of a more powerful majority. *Cf. U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

A. This Case Is Justiciable Under Well-Established Precedent

The ultimate authority on the doctrine is *Baker v. Carr*, which defines what constitutes a nonjusticiable political question. 329 U.S. 228 (1962). There, the Supreme Court emphasized that the political branches do not have free rein to trample on the civil rights of their constituents

behind the guise of policy. "[S]tate action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted'" are justiciable if they concern the deprivation of constitutional rights. *Id.* at 229 (quoting *Boyd v. Nebraska*, 143 U.S. 135, 183 (1892)). "Because the judiciary is the ultimate interpreter of the Constitution in most instances claims alleging its violation will rightly be heard by the courts." *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836, 841–42 (D.C. Cir. 2005) (internal quotation marks and citations omitted). It is a fundamental precept of American law that courts cannot obfuscate their role in deciding cases and controversies simply because the question has political implications. *INS v. Chadha*, 462 U.S. 919, 943 (1983). The political question doctrine "is one of political *questions*, not one of political *cases*." *U.S. v. Sum of $70,990,605*, 234 F. Supp. 3d 212, 237 (D.D.C. 2017) (internal quotation marks omitted).

"The political question doctrine is essentially a function of the separation of powers." *El-Shifa*, 607 F.3d at 840 (D.C. Cir. 2010) (quoting *Baker*, 329 U.S. at 217). The doctrine is a "narrow exception to the rule that the Judiciary has a responsibility to decide cases properly before it." *Sum of $70,990,605*, 234 F. Supp. 3d at 236 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (internal quotation marks omitted)). The narrow political question doctrine is only implicated in one of six specific circumstances:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* (quoting

Baker, 369 U.S. at 217); *see Schneider v. Kissinger*, 412 F.3d 190, 194. None applies here.

B. Challenging a Discriminatory Pattern Does Not Present a Political Question

That Plaintiffs' claims arise in the context of a political issue—be it affordable housing or gentrification—does not mean this case presents a political question. In this case, Defendants' actions in pursuit of the Creative Class Agenda actually replicate the very case the *Baker* court found justiciable. *See Baker*, 369 U.S. at 229. Both cases reflect failures of the political branches to grant citizens meaningful access to the political process on the basis of their race. As the Supreme Court found in *Baker*, such an injury is redressable by the courts. Defendants' redevelopment policy and the manner in which it has been executed through the Zoning Commission has deprived Plaintiffs of their procedural and substantive due process rights and abridged equal protection. This is a case about the systematic denial of rights, best pursued in as a stand-alone lawsuit in federal district court.

In their endeavor to silence Plaintiffs in yet another forum, Defendants attempt to force this Court into a false choice: entering the policy-making arena or dismissal. *See* ECF 27-1 at 16. The Court need not be fooled. It is not a political question to assert that constitutional rights may not be infringed. Nor is this Court's vindication of those rights considered policy-making under *Baker*. *El-Shifa.,* 607 F.3d at 841–42.

Defendants appear to suggest that Plaintiffs may only seek redress in the D.C. Court of Appeals on direct review. This assertion is both unavailing and impractical. Plaintiffs seek redress of a larger pattern across multiple cases. In other words, their allegations address a systemic problem. Nor is it practical that every low-income person who is denied an opportunity to be heard in zoning process be required to hire counsel to appeal every Zoning Commission decision. Where the protections are perfunctory and repugnant to federal law, federal court intervention is necessary.

C. Application of the Political Question Doctrine Does Not Require Dismissal

Even if the Court agrees that this case may fall within the Political Question framework, application of precedent does not counsel in favor of dismissal. None of the "contours" described by the *Baker* Court are relevant to the instant case. "Unless one of these formulations is inextricable from the case at bar, we may not dismiss the claims as nonjusticiable," *bin Ali Jaber v. U.S.*, 861 F.3d 241, 245 (D.C. Cir. 2017) (quoting *Baker*, 369 U.S. at 217) (internal quotation marks omitted)). A "discriminating analysis of the particular question posed" will make clear that Plaintiffs' claims are meritorious and deserving of further review. *Baker*, 369 U.S. at 211.

Defendants' analysis emphasizes that it is within Defendants' province to set housing policy. This is uncontested. However, the policy must still be conceived and imposed in a constitutionally permissible manner. *El-Shifa*, 607 F.3d at 841. Defendants themselves concede that Plaintiffs "may challenge specific District actions they contend promote" the Creative Class Agenda. ECF 27-1 at 18. Plaintiffs agree. The Creative Class Agenda, as implemented, violates the Constitution, the Fair Housing Act, and the D.C. Human Rights Act. Congress may have empowered the District's political branches to set housing policy, but implicit in that delegation is a mandate to operate within the confines of the law. The District has failed to abide by that mandate.

III. ABSENTION DOCTRINE IS INAPPLICABLE

To the extent that Defendants argue this case implicates abstention doctrine, both the *Rooker-Feldman* and *Younger* doctrines are wholly inapplicable. Both abstention doctrines are narrow exceptions to the general rule that courts should hear the cases and controversies before them. *Rooker-Feldman* abstention is confined to instances where state court "losers" try to appeal an adverse decision to the federal district court. Administrative action, though often

adjudicative in nature, is explicitly precluded from consideration as a state court proceeding for the purposes of *Rooker-Feldman*. As with *Rooker-Feldman*, *Younger* abstention is also unwarranted here. The Supreme Court has consistently laid out three narrow categories of cases in which *Younger* abstention is appropriate. Those circumstances are: ‘‘state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions.’’ *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013). (internal quotation marks omitted). None of these categories applies.

A. The *Rooker-Feldman* Doctrine Is Wholly Inapplicable in the Instant Case

The Supreme Court has ruled that lower federal courts may not act as appellate courts over state court judgments. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). The question is jurisdictional: the Supreme Court exercises exclusive jurisdiction over state court judgments. *Id.*; *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The *Rooker-Feldman* doctrine is meant to prevent “cases brought by state-court losers complaining of injuries caused by state-court judgments” from “inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). That narrow set of circumstances represents the limits of the *Rooker-Feldman* doctrine. *Id.*; *see also Thana v. Bd. of License Comm'rs*, 827 F.3d 314, 319–20 (4th Cir. 2016) (“the *Rooker–Feldman* doctrine is narrow and focused”). This case cannot be shoehorned into the narrow doctrine.

This case is not a collateral attack on a state court judgment or review of a final determination of a state court decision. Rather, Plaintiffs ask this Court to review the District’s abdication of its constitutional and statutory responsibilities. When an executive agency, even acting in an adjudicatory capacity, violates constitutional rights, or operates in an arbitrary and

capricious manner, a court is not bound by *Rooker-Feldman*. The Supreme Court has held that '[t]he doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency.'" *Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d 1, 17 (D.D.C. 2016) (quoting *Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002)). In *Borum*, the court considered an identical defense: the court lacked jurisdiction to hear a challenge to a determination of the District of Columbia Zoning Commission. 218 F. Supp. 3d at 17. The *Borum* court rightly determined that abstention would be contrary to the explicit directions of Supreme Court precedent. *Id.* The rule is clear, Defendants' invocation of the doctrine contravenes the "black-letter of *Verizon Maryland*." *Borum*, 218 F. Supp. 3d at 17.

B. The *Younger* Doctrine Is Similarly Inapplicable

DCHA next contends that the Court must exercise its discretion to abstain based on the *Younger* abstention doctrine. *Younger* applies "[w]hen there is a parallel, pending state criminal proceeding," and mandates that federal courts abstain from "enjoining the state prosecution." *Jacobs*, 571 U.S. at 72. The Court has subsequently "extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions." *Id. Younger* abstention requires "exceptional" circumstances, none of which are present here. *See id.* at 73. Those circumstances are: ''state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'' *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367-68 (1989) (internal quotation marks omitted)). These three categories "define

Younger's scope." *Jacobs*, 571 U.S. at 78. Therefore, *Younger* abstention may only be triggered if it falls within one of those three categories. *Id.* at 79.

This case lies squarely outside of *Younger.* The only recognized category of state proceeding that could possibly be relevant here is category two, civil enforcement proceedings. To trigger *Younger*, these proceedings must "bear a close relationship to proceedings criminal in nature." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The Court has characterized such proceedings as "initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." *Jacobs*, 571 U.S. at 80. Therefore, the civil action should have some punitive aspect to it. *Id.* (citing *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986) (state-initiated administrative proceedings to enforce state civil rights laws); *Moore v. Sims*, 442 U.S. 415, 419–420 (1979) (state-initiated proceeding to revoke child custody); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (civil proceeding "brought by the State in its sovereign capacity" to recover welfare payments defendants had allegedly obtained by fraud). By invoking *Younger*, DCHA tries to fit a square peg into a round hole. Nothing in this case remotely resembles a criminal prosecution.

DCHA argues that the ongoing administrative proceedings constitute state proceedings for the purposes of Younger abstention.[2] However, even with the existence of a parallel proceeding in state court, abstention is "the exception, not the rule." *Id.* (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 813 (1976)). Longstanding Supreme Court precedent, reaffirmed as recently as 2013, suggests that *Younger* is wholly inapplicable to the claims before this Court. As long as

[2] Only two of the original zoning matters are open: Poplar Point and Union Market. Barry Farm and Buzzard Point zoning matters are not pending before any governmental body.

there is no punitive nor prosecutorial nature to the action, and the action is not in furtherance of the state courts' ability to perform their judicial functions, the circumstances do not meet the Court's well-established exceptional circumstances test.[3] *Younger* does not apply.

IV. PLAINTIFFS ALLEGE FIVE VALID CLAIMS FOR VIOLATION OF THEIR PROCEDURAL DUE PROCESS RIGHTS IN A DOCUMENTED PATTERN OF ARBITRARY DECISIONS BY THE ZONING COMMISSION (COUNTS 1-5)

The Plaintiffs plausibly allege five procedural due process claims. Each illustrates how the Zoning Commission flatly ignored basic zoning procedure to push through Planned United Development (PUD) applications in favor of the Creative Class. To be clear, Plaintiffs do not contend the District lacks proper zoning procedures. Rather, this case is about Defendants' unprincipled and illegal failure to follow those procedures.

Procedural due process "imposes [procedural] constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (alteration in original). At a minimum, this means that a person with a protected liberty or property interest must receive: (1) "notice" of the impending deprivation and (2) "an opportunity to be heard at a *meaningful* time and in a *meaningful* manner" regarding that interest. *Zaidan v. Trump*, 317 F. Supp. 3d 8, 28 (D.D.C. 2018) (quoting *Mathews*, 424 U.S. at 333) (emphasis

[3] DCHA erroneously relies on lower court holdings that predate the Supreme Court's express limitation of the doctrine in *Jacobs*. *See* ECF 26-1 at 40, 41. In each of the cited cases, the proceedings that initiated the series of local and federal lawsuits were administrative enforcement actions, but each is highly distinguishable from this case. For instance, *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1119 (D.C. Cir. 2004), presented an administrative enforcement action brought by the District against an adult video store for zoning and permit violations. But the District's punishment of an adult video store operating without the necessary permit is incomparable to a group of individuals seeking protection of their constitutional rights.

added) (internal quotation marks omitted). In other words, the constitution requires the procedures to be meaningful, not perfunctory.

"To state a facially plausible claim for violation of procedural due process a plaintiff must allege that he or she has a (1) protected liberty or property interest that the defendant has (2) deprived him or her without adequate procedural protections." *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 274 (D.D.C. 2018) (citation omitted).

Property interests do not originate in the constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). To have a property interest, a person must have more than a mere desire for a benefit, she "must have a unilateral expectation" or "legitimate claim of entitlement to it." *Id.*; *see Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) (finding that reliance on current zoning regulations by a purchaser of property created valid property interest).

Liberty interests, on the other hand, are generally derived from the Constitution, but "[t]he government may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Aref v. Holder*, 774 F. Supp. 2d 147, 164 (D.D.C. 2011) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). These liberty interests encompass most of the enumerated rights in the Bill of Rights, and "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (extending the right to marry to same-sex couples); *see e.g. Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (finding that the right of association is a liberty interest that must be protected against undue intrusion by the

state due to the role certain relationships play in safeguarding individual freedom); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (explaining that the free and unimpaired right to vote is necessary to preserve other basic civil and political rights); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding a liberty interest in establishing a home and bringing up children). The outer bounds of what is considered to be a liberty interest is constantly evolving and not set solely on historical grounds, "[r]ather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell*, 135 S.Ct. at 2598. When new insights show tension between foundational constitutional protection and current legal norms, "a claim to liberty must be addressed." *Id*.

A statute or regulation may create a constitutionally protected property or liberty interest where "the statute or implementing regulations [places] substantive limitation on official discretion to revoke or curtail benefits." *Parker v. District of Columbia*, 293 F. Supp. 3d 194, 205 (D.D.C. 2018) (emphasis added) (citing *Doe v. Gates*, 981 F.2d 1316, 1320 (D.C. Cir. 1993)) (discussing creation of property interests). "Statutes or regulations limit official discretion if they contain" mandatory language and specific directives "to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997); *see U.S. v. Tubwell*, 37 F.3d 175, 179 (5th Cir. 1994) (citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)) ("A regulation may create a protected liberty interest if it uses mandatory language to place a substantive limit on official discretion.").

A. D.C. Law Places Clear Limits on Zoning Commission Discretion

In light of the significant interests at stake, D.C. law and regulation mandate certain zoning procedures. The PUD process is meant to "provide higher quality development through

flexibility in building controls" provided that a PUD: "(a) results in a project *superior* to what would result from a matter-of-right standards; (b) offers a *commendable number or quality* of meaningful public benefits; and (c) *protects and advances* the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive plan." 11-X D.C.M.R. § 300.1 (emphasis added). After a PUD application is submitted, the Office of Planning is *required* to provide a report to the Zoning Commission addressing whether the application is "(a) not inconsistent with the Comprehensive Plan; (b) consistent with the purpose of the PUD process; and (c) generally ready for a public hearing to be scheduled." 11-X D.C.M.R. § 308.1. Following receipt of this report, the Zoning Commission "*shall* review the application and determine whether a public hearing shall be granted." 11-X D.C.M.R. § 308.2 (emphasis added).

If a public hearing is granted, "the Office of Planning *shall* coordinate review of the application and *prepare an impact assessment* of the project, which *shall include* reports in writing from relevant District of Columbia departments, including, but not limited to the Department[] of . . . Housing and Community Development." 11-X D.C.M.R. § 308.4 (emphasis added). Additionally, the Office of Planning *must* report on the suitability of the site for use as a PUD, discuss the appropriateness of the uses proposed, identify public benefits, and judge the application's compatibility of the proposed development with the Comprehensive Plan and the goals of the PUD process. 11-X D.C.M.R. § 308.5.

Next, the Zoning Commission *must* conduct a comprehensive public review of the PUD application to assess whether the proposed project satisfies the PUD Evaluation Standards under 11-X D.C.M.R. § 304. When evaluating a PUD application, the Zoning Commission *must* "judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any *potential adverse effects*

according to the specific circumstances of the case." *Howell v. District of Columbia Zoning Comm'n*, 97 A.3d 579, 581 (D.C. 2014) (quoting 11-X D.C.M.R. § 304.3) (emphasis added).

Upon final decision, the Zoning Commission order, according to the D.C. Administrative Procedures Act, "*shall* be in writing and *shall* be accompanied by findings of fact and conclusions of law." D.C. Code § 2-509(e) (emphasis added). These "[f]indings of fact and conclusions of law *shall* be supported by and in accordance with the reliable, probative, and substantial evidence." *Id.* (emphasis added).

In D.C., there are three requirements for substantial evidence: "(1) findings *must* be made on *each* contested issue of fact; (2) the decision *must* rationally follow from the facts; i.e., there must be a "rational connection between the facts found and the choice made, and (3) there *must* be sufficient evidence to support each finding." *Citizens Coalition v. District of Columbia Bd. of Zoning Adjustment*, 619 A.2d 940, 946 (D.C. 1993) (emphasis added) (citations and internal quotations omitted).

In this case, each PUD approval identified in Plaintiffs' Amended Complaint is a documented departure from the substantive limitations placed on the Zoning Commission as a matter of law. The Zoning Commission enjoys great power, and with great power comes great responsibility. When the commission uses the PUD process to depart from the status quo, the misuse of power presents great risks. This is precisely why the District implemented such strict procedural requirements and public participation into the regulatory system. When the District fails to follow its own procedures, it nullifies the only procedural protections standing between vulnerable parties and the loss of valuable liberty and property interests. A faulty process that flouts the law is substantively dangerous and procedurally unfair. This is especially so because the District has power and responsibility to protect communities from private developers driven

solely by the profit motive to acquire large swaths of undervalued land. The District is the gatekeeper between the community and developers. When, as here, the District abdicates that role, the community loses.

Plaintiffs' Amended Complaint alleges Defendants engaged in a pattern of arbitrary denials of basic procedures that deprived them of valuable liberty and property interests. Defendants have implemented the Creative Class agenda through a documented pattern of using the complex inner machinery of the zoning process to make arbitrary decisions that violated Plaintiffs' procedural rights to notice and a meaningful hearing before stripping them of liberty and property. The Zoning Commission continually fails to make key findings of fact on materially contested issues, find substantial evidence on the record, or support their decisions beyond conclusory statements. To this day, the Zoning Commission ignores statutory requirements in favor of developers and members of the Creative Class, to the permanent detriment of longtime residents.

B. Defendants' Actions Implicate Several Liberty and Property Interests

The District has granted Plaintiffs a constitutionally protected property interest in participation in the zoning process. *See* 11-X D.C.M.R §§ 300-311. By creating a complex, and thorough set of procedures to ensure public participation in the zoning process, the District has created a unilateral expectation that residents affected by redevelopment in their neighborhoods have a statutory right to be heard. Most importantly, these procedures and processes are not optional, they are mandatory rules based on statutes and regulations that create substantive limits and directives for Zoning Commission members. Among other things, before making a decision, the Zoning Commission is *required* to: make findings of fact based on substantial evidence on the record, D.C. Code § 2-509(e), review an impact assessment related to the PUD application,

11-X D.C.M.R. § 308.4, and, the in case of Barry Farm, ensure that any proposed redevelopment "avoids dislocation and personal hardship." 10-A D.C.M.R. § 1813 Policy FSS-2.3.1(a) (Comprehensive Plan for the Barry New Farm Community).

Additionally, Plaintiffs have a constitutionally protected liberty interest in access to the basic processes of government. It is long established that the right to vote is a "fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). This is because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Harper*, 383 U.S. at 667. The Supreme Court chose to protect the right to vote because of the foundational role it plays in upholding *other* political and civil democratic rights for citizens. Access to the zoning process, an administrative system designed for public participation created by elected members of the District, is one example of the civil and political rights the right to vote protect. *See Obergefell*, 135 S. Ct. at 2598 (finding liberty interests are not set in stone, but a constantly evolving set of circumstances that "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."). Part of citizenship is civic participation, and a pattern and practice of denying proper process to Plaintiffs is a deprivation of a key liberty interest.

Another way the courts have framed this liberty interest is the right to access. In *Logan v. Zimmerman Brush*, the Illinois legislature passed a law barring employment discrimination on the basis of physical handicap. 455 U.S. 422, 422 (1982). The law granted a right to formal agency adjudicative process and judicial review if necessary. Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 852 (2016). The Supreme Court held that dismissal of the plaintiff's claim for failure to convene a hearing within the 120 days provided by the state statute violated the plaintiff's due process rights. *Id*. More specifically, the

Court found the cause of action and adjudicatory procedures provided in the statute granted an entitlement, and thus a property interest. *Logan*, 455 U.S. at 422 ("Appellant's right to use the FEPA's adjudicatory procedures is a species of property protected by the Due Process Clause."). Similarly, Plaintiffs have a statutory right to access the District's zoning proceedings. Denial of adjudicatory access prevents Plaintiffs from presenting facts and issues that directly affect their livelihoods. For example, arbitrarily denying Shanifinne Ball party status meant that she did not have the opportunity to present key testimony, experts, and cross-examine witnesses. Without party status, Ms. Ball could not inform the Zoning Commission of issues that directly affected her health, safety, and welfare as a neighborhood resident living two blocks from the proposed high-density development of over 500 units.

Plaintiffs also have a protected liberty interest in their social networks and community relationships. The constitution protects an individual's freedom of association, including the choice to maintain certain human relationships. *See Roberts*, 468 U.S. at 617-18. In *Roberts*, the court noted that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," which "foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 618-19. The Court also recognized that these relationships "reflect the realization that individuals draw much of their emotional enrichment from close ties with others" and are fundamental in the ability to "independently define one's identity that is central to any concept of liberty." *Id.* This applies to Plaintiffs. Repeated violation of basic of zoning requirements has irreparably harmed Plaintiffs' valuable social networks and bonds that have been built over decades. The community cultures of the neighborhoods in this case are an intrinsically valuable part of each Plaintiff's identity and existence. The reputations and professional good-will residents have spent a lifetime

building are devalued by government pattern and practice of ignoring laws to strong-arm unsuitable development that disrupts these relationships through widespread displacement. Neighbors, friends, families, and one's work define a person's life. These associations are a fundamental liberty interest.

C. Defendants' Pattern and Practice of Depriving Protected Property and Liberty Interests by Inadequate and Arbitrary Pre- and Post- Deprivation Zoning Procedures Is Unconstitutional

At a minimum, due process requires (1) proper notice of an impending deprivation of a property or liberty interest, and (2) a meaningful opportunity to be heard. *Zaidan*, 317 F. Supp. 3d at 28. To be constitutionally valid, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). More specifically, notice is only valid if it "reasonably [conveys] the required information" and it "afford[s] a *reasonable time* for those interested to make their appearance." *Id*. (emphasis added).

Notice—standing alone—is not constitutionally sufficient. The government must also provide a meaningful opportunity to be heard, which courts interpret as both a "meaningful time" and a "meaningful manner" to address the deprivation. *Zaidan*, 317 F. Supp. 3d at 27-28 (quoting *Mathews*, 424 U.S. at 333). To determine if the procedures involved in depriving a property or liberty interest were adequate, a "court must weigh (1) the importance of the private interest at stake, (2) the risk of an erroneous deprivation of the interest because the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest, including the cost of additional procedures." *English v. D.C.*, 717 F.3d 968, 972 (D.C. Cir. 2013) (citing *Mathews*, 424 U.S. at 335). The exact parameters of what qualifies as "due

process is flexible and calls for such procedural protections as the particular situation demands." *Zaidan*, 317 F. Supp. 3d. at 27 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

1. Barry Farm: Procedural Defects Violated Procedural Due Process

a. Property and Liberty Interests

Paulette Matthews and Michelle Hamilton both have a constitutionally protected property interests in their public housing at Barry Farms. It is well established "that certain government benefits give rise to property interests protected by the Due Process Clause." *NB ex rel. Peacock v. District of Columbia*, 794 F.3d 31, 41 (D.C. Cir. 2015). Courts in the District of Columbia and across the country have found that once an individual becomes a participant in a public housing assistance program, "the person maintains a property interest in continuing to receive assistance that is subject to constitutional due process protections." *Long v. D.C. Hous. Auth.*, 166 F. Supp. 3d 16, 32 (D.D.C. 2016); *see, e.g.*, *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 184 (6th Cir. 1984) ("[P]articipation in a public housing program is a property interest protected by due process."); *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981) (finding that tenants of a housing project had a valid property interest in continued housing assistance payments made by HUD); *cf. Robinson v. D.C. Hous. Auth.*, 660 F. Supp. 2d 6, 20 (D.D.C. 2009) ("There is no debate that the plaintiff's participation in the Section 8 program constitutes a property interest.").

Paulette Matthews and Michelle Hamilton are former and current Barry Farm residents.[4] Barry Farm is a public housing development receiving federal assistance, and as residents Paulette Matthews and Michelle Hamilton are the recipients of that federal assistance. Am.

[4] Michelle Hamilton moved out of Barry Farm public housing when the physical conditions inside her building became unbearable. She was not evicted and is still qualified for public housing. If DCHA had maintained habitable conditions, she would still be living at Barry Farm today. Accordingly, she continues to have a valid property interest, regardless of her status as a former Barry Farm resident.

Compl. ¶ 122-26, 132-37. A property interest in a home is a foundational property interest. A home is not something you merely desire, it is a necessary element of stability for any person or family. Paulette Matthews and Michelle Hamilton have an expectation and legitimate entitlement to continued residence in the Barry Farm housing project. Paulette Matthews and Michelle Hamilton have a clear property interest protected by the Due Process Clause, and therefore were deserving of notice and a hearing prior to a deprivation of that critical property interest.

Moreover, Paulette Matthews, Tendani Mpulubusi-El, and Michelle Hamilton have been deprived several liberty interests. These procedural errors deprive the Plaintiffs of their liberty interest in accessing the basic processes of government. By refusing to follow proper procedures in zoning local redevelopment, Defendants interfered with Plaintiffs' right to exercise their democratic rights as citizens. Inability to participate in the zoning process directly affects Plaintiffs' physical health and ability to live in a safe environment, which is Defendants' responsibility as landlords and has been undermined by Defendants' complete failure to maintain the Barry Farm housing project. Additional problems resulting from Defendant's reckless failure to maintain Barry Farm include unfixed locks, broken lighting, and general lack of pest control. Plaintiffs also have a liberty interest in their social networks and bonds that provide a network of safety in their community. These are issues of fundamental dignity and autonomy, and constructive eviction for failure to maintain the building robs residents of the intimate choice of where they may live and who they may associate with. *See Obergefell*, 135 S. Ct. at 2597.

b. Private Interests at Stake

The private interests at stake are foundational to modern life itself, a home is the difference between a stable life and homelessness and its associated physical and mental illnesses. For example, Tendani Mpulubusi-El has spent his artistic career documenting the

history and culture of Barry Farm, and the destruction of the community has made it difficult to make a living or find consistent housing. The government-funded housing at Barry Farm represents Plaintiffs homes, community bonds, and their stability. "Undoubtedly, the residents' input is an important component in the development of an application for demolition and their comments assist the local housing authority in, for example, considering alternatives to demolition and assessing the impact demolition will have on residents." *Aponte-Rosario v. Acevedo-Vila*, 617 F.3d 1, 10 (1st Cir. 2010). Their inability to voice valid concerns about their health and safety, especially as those people with the most at stake in this redevelopment, gives the residents a feeling that they no longer control their own future and destiny.

c. Risk of Erroneous Deprivation

The PUD proceedings for redevelopment of Barry Farm leave Plaintiffs with a serious risk of erroneous deprivation of their valid property and liberty interests. The rules and purposes of the PUD process above recognize a need for wide community input in the PUD process. This inherently shows the District of Columbia made a decision that communities facing structural upheaval deserve a say in what happens in their neighborhoods. Unfortunately, the Zoning Commission has willfully violated the law by failing to follow their own procedures.

The Zoning Commission arbitrarily denied party status to the Barry Farm Tenants and Allies Association (BFTAA), the community organization Paulette Matthews and Michelle Hamilton are a part of. While any person may present written testimony, those granted party status before the commission have special privileges to cross-examine witnesses, bring expert testimony before the commission, and give testimony. 11-Z D.C.M.R. § 403.3. Denying party status to Plaintiffs deprives them of foundational elements of due process. Almost as bad, after filing a motion to reconsider the denial of party status at the first hearing, the Zoning

Commission gave grossly inadequate notice that they had been granted party status, informing them immediately before the next hearing began, leaving them with no time to prepare to use the considerable tools granted to those with party status.

The Zoning Commission also repeatedly told BFTAA that issues such as gentrification and displacement of residents were not in the Zoning Commission's adjudicatory purview, which amounts to an arbitrary judgment. The District's zoning regulations specifically state that all zoning maps are to be designed with the "[r]equirement that zoning shall not be inconsistent with the Comprehensive Plan for the National Capital." 11-A D.C.M.R. § 101.2(d). The Comprehensive Plan for the Barry Farm New Community further says that development at Barry Farm must be done in a way that "avoids dislocation or personal hardship," and PUD applications must be consistent with the Comprehensive Plan. 10-A D.C.M.R § 1813 Policy FSS-2.3.1; 11-X D.C.M.R. § 300.1.

Additionally, the Zoning Commission gave great weight to an ANC vote that was found to have been without quorum. D.C. Code § 1-309.11 ("The Commission may declare a quorum and take official action if a majority of single-member district Commissioners of the Commission is present."). ANCs are locally elected representatives whose job is to be the official voice in advising the District on issues affecting their neighborhoods.[5] The ANC vote to approve the Barry Farm redevelopment was done without a quorum, thus they were not authorized to act on behalf of the people that elected them. The Zoning Commission chose to give that vote "great weight" in its decision-making process anyway. Am. Compl. ¶¶ 77, 86.

[5] District of Columbia, *Advisory Neighborhood Commissions*, available at: https://anc.dc.gov/page/about-ancs (last visited Sept. 14, 2018).

The illegitimate denial of findings of fact on materially contested issues of this magnitude shows the clear risk of erroneous deprivation of their valid property and liberty interests.

d. The Government's Interest

The government's concerns with additional procedures are *de minimis* because the zoning process involves existing statutes and procedures already on the books. Defendants have repeatedly ignored their own laws and regulations to push through PUD applications at the expense of longtime residents. Compiling a more thorough administrative record when such important interests are at stake is a completely justified use of any additional city funds.

2. Buzzard Point: Failure to Make Findings on Contested Issues of Material Facts Regarding Gentrification, Displacement, and Detrimental Health Risks to Buzzard Point Residents Violated their Right to Be Heard on Issues Affecting Health, Safety, and Welfare

a. Property and Liberty Interests

Arbitrary application of the zoning process implicates several interests. NeRAC and individual residents of Buzzard Point have, a property interest in participation in the zoning process and a bundle of property rights associated with the homes they own. Plaintiffs also have a protected liberty interest in access to basic processes of government.

Health and safety regulations are designed to provide residents an environment that is livable and medically safe. Participation in the zoning process, which is a privilege of citizenship of the District, is an important procedural method to alleviate any possible negative effects of zoning decisions on their health and environmental safety. By soliciting neighborhood feedback from residents in the PUD zoning process, the District recognizes that residents have a property interest in the redevelopment of their neighborhood. Constructively diminishing neighborhood

participation effectively rescinds their right to access the zoning process and implicates their right to safe living conditions.

Additionally, Rhonda Hamilton has a liberty interest in her reputation. In *Wisconsin v. Constantineau*, the Court found that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. 433, 437 (1971). In *Paul v. Davis*, the court determined that reputation alone was not sufficient to find a liberty interest, and that some other tangible interest must be at issue. 424 U.S. 693, 701 (1976). The additional tangible interest here is Ms. Hamilton's deprivation of the powers of her position as an ANC.

Ms. Hamilton attempted to use her position as an ANC to represent her community in front of the Zoning Commission. By being unable to stop the harmful health effects to the people she represents, her standing and reputation in the community has suffered detrimentally. She also has experienced emotional distress and fear that she and her community are voiceless about the future of their neighborhood. Additionally, Sylvia Carroll and Geraldine McClain have a liberty interest in maintaining the social networks and bonds that are critical to their livelihoods. Both have been residents of Buzzard Point since the 1980s and redevelopment has caused grave health effects to their community and raised home values, forcing many other longtime residents to leave Sylvia Carroll and Geraldine McClain with a diminished social network.

b. Private Interests at Stake

Deprivation of the property and liberty interests of Buzzard Point residents has already harmed the basic health of residents and caused the loss of valuable social networks. Geraldine McClain's health has been negatively affected by the construction near her home. This construction constantly triggers her allergies, causing headaches and emotional stress at the lack

of control over her health. Frequent digging in the area has caused multiple instances of gas and power outages. In addition, construction caused her property to be harmed when her fence fell down. Sylvia Carroll has been forced to deal with harmful dust coating the surface of her house since the construction began. Rhonda Hamilton experiences similar environmental hazards coupled with the loss of her reputational standing in the community for being unable to stop harmful construction in her neighborhood. These issues affected all NeRAC members.

c. Risk of Erroneous Deprivation

The Zoning Commission violated numerous procedures in the process of passing ZC No. 16-02. Most importantly, it failed to make necessary findings of fact on material contested issues. Most egregious was the failure to make findings of fact related to the health risks posed to residents from PUD approval. NeRAC members and health experts testified as to the adverse impacts of toxic fugitive dust escaping the site and how airborne toxicity affects residents. Buzzard Point residents advocated for a soil remediation and baseline air pollution testing at the development site to understand the composition and level of toxicity in the air surrounding of the site. The Buzzard Point Community Health and Safety Study (CHASS) confirmed the exact composition of the toxins in the soil was unknown. This study also found accumulating dust was a danger to residents. The Department of the Environment and Energy provided a written report, but did not conduct any impact study. All of the questions and contested issues of material fact related to the cumulative impact of environmental pollutants and health risks brought up by residents and various experts and studies were summarily ignored by the Commission, which allowed construction to proceed.

The Committee is also required to make factual findings, and decisions based on the substantial record of factual findings, on the issues of dislocation and hardship according to the

Comprehensive Plan. They altogether failed to make findings. ZC No. 16-02. The Zoning Commission arbitrarily failed to address resident's concerns about displacement and gentrification, never consulted a written DHCD impact statement, and made conclusory statements that since the stadium site was empty and would not be directly displacing residents, there could not possibly be issues with these topics. *Id*.

The Zoning Commission has deprived residents of their liberty and property interests without proper procedures, and leaving residents at a high risk of erroneous deprivation.

d. The Government's Interest

It is in Defendants' interest to ensure the health, safety, and reputational welfare of its residents. Moreover, the zoning procedures are statutorily created rights Defendants are required to abide by as a matter of law. Following their own procedures and providing complete process would cost little and protect the welfare of its longtime residents.

3. Union Market: Arbitrary Denial of Party Status and Failure to Collect Impact Statements Violated Plaintiff's Right to Be Heard.

a. Property and Liberty Interests at Issue

Shanifinne Ball has plausibly alleged a property interest in her ability to participate in the zoning process and her right to access and enjoy housing. She also has a liberty interest in accessing the basic processes of government. The zoning commission is set up specifically to hear and address the concerns of local residents. Shanifinne Ball has a constitutionally protected interest in accessing the zoning process to have a say in the changing character of her neighborhood, which directly implicates her property interests. Improper zoning proceedings also deprive her of her liberty interest in maintaining her social networks and bonds that are the lifeblood of her community.

b. Private Interests at Stake

Zoning proceedings directly affect the several aspects of Ms. Ball's life. As we've seen in other neighborhoods, development creates a number of environmental and health risks to citizens living in those areas. In addition, Ms. Ball fears that construction of mixed-use luxury buildings will increase taxes and leave her unable to afford her home. Finally, the changing character of her neighborhood makes it likely local businesses and residents will be forced to depart and destroy her social network and community bonds.

c. Risk of Erroneous Deprivation

There is great risk of erroneous deprivation of her property and liberty interests. The zoning commission has consistently used arbitrary decisions in the party status application process to silence residents with a direct and concrete interest in the zoning of their neighborhoods. The Zoning Commission is required to grant party status to residents or groups that are uniquely affected in comparison with the general public. *See Tiber Island Coop. Homes v. D.C. Zoning Comm'n*, 975 A.2d 186, 190 (D.C. 2009) (asking plaintiff group to show how they are more uniquely affected than the general public in order to gain party status). Shanifinne Ball, a resident of the Union Market neighborhood living two blocks from ongoing multi-PUD development, was denied party status. This arbitrary denial, for a resident who is clearly more uniquely affected than the general public, stripped her of key procedural rights such as the ability to cross-examine witnesses and present expert testimony.

Even when a person is denied party status, the person is able to submit written testimony. Union Market Neighbors submitted concerns about gentrification, displacement, tax increases, and the environment, among others, which were ignored even though they were issues of

contested material fact. Moreover, the Commission also failed to collect a written impact assessment from the DHCD or any other agency besides DDOT.

d. The Government's Interest

The government has a strong interest in weighing the concerns of all residents that are directly affected by redevelopment. Creating a longer administrative record is a poor excuse when residents' homes and social networks are at stake. Thoroughly fulfilling all statutory obligations is the standard for the zoning commission, not the exception.

4. Poplar Point: Arbitrary Findings of Fact and Lack of Impact Assessment Violated Procedural Due Process.

a. Property and Liberty Interests at Issue

Members of CARE and Greta Fuller have all been deprived of their property and liberty interests. Plaintiffs have a protected property interest in participation in the zoning process. All have liberty interests in accessing the basic processes of government to combat improper decisions by the zoning commission. Plaintiffs also have liberty interests in their social networks, which are of critical importance to their well-being. Mr. Mpulubusi-El specifically has spent his artistic career documenting the history and culture of Barry Farm, and the destruction of the community has made it difficult to make a living and maintain crucial social capital, social support networks, reputation, and literally made it more difficult for him to survive. Greta Fuller has a liberty interest in her reputation.

b. Private Interests at Stake

CARE, an affordable housing advocacy organization representing citizens living east of the Anacostia of the river, has been forced to spend time and resources combatting the violation of their members' constitutional rights to be heard in the zoning process. Greta Fuller, in her

capacity as an ANC Commissioner for the area where the Poplar Point development is occurring, has experienced humiliation and stress resulting from her efforts to educate the Zoning Commission. Similar to other Plaintiffs, threatened are her ability to live in a healthy and medically safe environment, and ability to maintain her social networks.

c. Risk of Erroneous Deprivation

The denial of full participation in the zoning process by the Commission has already resulted in serious risk of erroneous deprivation of their property and liberty interests. CARE requested DHCD written impact assessment and the Commission ignored that request, despite that such impact assessments are mandatory whenever a hearing is scheduled for a PUD approval. CARE also submitted a letter from HUD saying a lack of comprehensive planning was re-segregating communities and leading to a loss of affordable housing, a concern dismissed out of hand.

At nearly every objection, the Commission made arbitrary findings or no findings at all on critical issues of contested material fact. The Commission failed to make findings on issues of displacement and effects of gentrification, arbitrarily concluding that concerns about displacement were unfounded, saying that the developer involved would help with displacement issues even though the entities the developer has partnered with to achieve that end displayed only knowledge of historic preservation of buildings and has no known history of assisting with displacement issues. The Zoning Commission also failed to make findings of fact on how redevelopment of Poplar Point would destabilize the local community. In addition, the commission erroneously found that submission of DHCD policy documents by CARE relating to development in black communities was invalid and that examining these types of papers was out of their purview.

The Zoning Commission's pattern and practice of denying basic procedural rights to interested residents shows a high risk of erroneous deprivation.

d. Government's Interest

The government should have a strong interest in adequately weighing the concerns of all residents that are directly affected by redevelopment. A concern with creating a longer administrative record is a poor excuse when residents' homes and social networks are at stake. Thoroughly fulfilling all statutory obligations is the standard for the zoning commission, not the exception.

D. Defendants Misstate the Law and Relevant Facts Regarding the Procedural Due Process Owed to Plaintiffs

Defendants claim there is no valid property interests. That is fundamentally untrue. Government-subsidized housing and housing assistance, which are products of statute, have long been considered constitutionally protected property interests under the Fifth Amendment, and thus the residents of Barry Farm have a clear property interest. *See Long*, 166 F. Supp. 3d at 32. Additionally, all Plaintiffs, as District residents and members of affected neighborhoods, have statutory rights to be heard under zoning laws. *See generally* 11-X D.C.M.R §§ 300-311. These procedures are part of Plaintiffs' property interests in full participation in the zoning process, which is essential to voice all concerns with the redevelopment of their neighborhoods and ensure a safe and environmentally secure home. Plaintiffs also maintain valid liberty interests in access to the processes of government and maintaining their social networks.

Defendants also inaccurately state that the procedural due process claims cannot survive a motion to dismiss because Plaintiffs claims are "essentially violations of state law," and that

even if Plaintiffs could bring these claims, Plaintiffs misinterpreted the reports required under zoning regulations. ECF 27-1 at 22.

In regards to the first claim, the Supreme Court has stated that procedural due process would be completely diminished if local governments were allowed to define what qualified as adequate procedures for the deprivation of property. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("The right to due process is 'conferred, not by legislative grace, but by constitutional guarantee.'"). Once a property interest is found, the answer to the question of how much process is due is found in the constitution, not in the statute conferring the property interest. *Id*. (explaining that once it is found the Due Process Clause applies, the question of what process is due is not found in the state statute). The District of Columbia does not get to decide what is considered adequate process; the constitution decides the answer to that question.

As to the second claim, Defendants once again attempt to hide the ball to avoid basic statutory construction issues in their argument. In their brief, the District incorrectly uses Subtitle Z of Title 11, titled "Zoning Commission Rules of Practice and Procedure," to argue that impact assessments of relevant agencies are optional, not mandatory. ECF 27-1 at 22 n.8. But, the correct subtitle for determining whether certain reports are mandatory is Subtitle X of Chapter 11, which is titled "Planned Unit Developments." Not only does this make logical sense as Subtitle X contains the provisions specifically involving PUD applications, but Subtitle Z even states that "[i]n any conflict between provisions of this subtitle and any other provisions of this title, the other provisions shall govern." 11-Z D.C.M.R. § 101.1.

With it now being clear that Subtitle X governs, the relevant zoning law states that "the Office of Planning shall coordinate review of the application and prepare an impact assessment of the project, which shall include reports in writing from relevant District of Columbia

departments and agencies, including, but not limited to, the Departments of Transportation and Housing and Community Development, and, if a historic district or historic landmark is involved, the Historic Preservation Office." 11-X D.C.M.R. § 308.4. The plain text of the statute says that all relevant agencies must prepare impact assessments. As demonstrated, this statute has been ignored in all of the above zoning proceedings in violation of the Plaintiffs' procedural due process rights. In fact, failing to ascertain written reports from DHCD as well as other relevant agencies is a custom and practice which continues today and has occurred in scores of PUD proceedings.

Defendants also claim that Plaintiffs have adequate procedures to ensure proper process. Plaintiffs' argument is not that adequate procedures do not exist, it is that Defendants *exercised* procedures in an illegal and discriminatory manner that denied Plaintiffs due process of law. One of the most invidious ways the Zoning Commission has denied process rights is by failing to grant party status to local residents, a fundamental procedural right. Defendants misleadingly use italics in a quest to show that party status should be presumptively denied, which is flatly false and leads to absurd results. To show this, they say:

> The Commission shall grant party status only if the person requesting party status has clearly demonstrated that the person's interests would likely be more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning action than those of other persons in the general public. 11-Z D.C.M.R. § 404.14

ECF 27-1 at 24. The defendant's use of italics misses the operative phrase in the rule. The phrase that should be italicized is: "*would likely be more significantly, distinctively, or uniquely affected*." The controlling standard is actually that a party must show that it would be more likely than not that the party is significantly, distinctively, or uniquely affected than the general public. The evidence must be clearly demonstrated of course, but nonetheless the bar is closer to 51% than 95% proof. Plaintiffs in this case are prime examples of Defendants' indefensible reasoning.

Shanifinne Ball was denied party status at a zoning hearing regarding a 500-plus unit, high-density redevelopment occurring *less than two blocks from her home*. If Shanifinne Ball does not have an interest that is uniquely affected in comparison to the general public, it's very difficult to imagine who does. BFTAA was also initially denied party status in relation to the redevelopment of Barry Farm, but the organization is made up of *Barry Farm residents*. If Barry Farm residents who are to lose their homes are not more "uniquely affected" than the general public, then who is in fact uniquely affected? Defendants post-hoc attempt to explain away their unconstitutional actions should not be rewarded.

V. EQUAL PROTECTION: PLAINTIFFS PLAUSIBLY ALLEGE DEFENDANTS INTENTIONALLY DISCRIMINATED ON THE BASIS OF RACE (COUNT 6)

Defendants intentionally discriminated against the District's longtime black residents using the cloaked vehicle of the Creative Class Agenda. The Creative Class Agenda has quickly attained its envisioned results: large swaths of black residents have been callously displaced from their neighborhoods as the millennial, white Creative Class population has boomed. This was no accident. Research and repeated warnings to the District illustrate that city officials were well aware of the effects their policy would have on vulnerable black residents in low-income communities. The District ignored these flashing red lights, and consciously implemented the Creative Class Agenda with the specific purpose of purging these neighborhoods of black residents in favor of the Creative Class.

To plead a viable equal protection claim, plaintiffs must allege that a decisionmaker undertook "a course of action because of, not merely in spite of, the action's adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (internal quotations omitted). Essentially, some

"[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1976).

Importantly, plaintiffs are not required "to prove that the challenged action rested *solely* on racially discriminatory purposes" since legislative decisions are often a balance of competing merits and considerations and rarely rest on a single "dominant" or "primary" concern. *Id*. Plaintiffs are only required to prove discrimination was a *motivating* factor, because "racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision" judicial deference to a law's neutrality is no longer justified. *Id*. at 265-66.

Determining whether racial discrimination was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266. There are a number of factors the court may look to in making this decision. First, the naked impact of the official action and whether it affects one race more heavily than another provides an important starting point. *Id*. ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))). The "historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id*. at 267 (citing *Griffin v. Sch. Bd.*, 377 U.S. 218 (1964). The "specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes." *Id*. (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967)). Additionally, the "legislative or administrative history may be highly relevant," especially statements by legislators and administrative officials. *Id*. at 268.

A. The Naked Impact and Historical Background of the Creative Class Agenda, Combined with Arbitrary and Capricious PUD Approvals, Shows an Intent to Discriminate against the District's Black Residents

The Creative Class Agenda was designed—by its very purpose—to favor younger, millennial white residents over longtime black residents of the District. Those are the people the District views as its economic future, and therefore its preferred customer. The Creative Class Agenda specifically expresses a preference for attracting and incentivizing relocation of millennial workers whose incomes derive from "innovative" and non-traditional jobs. OFFICE OF THE DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEVELOPMENT, CREATIVE ECONOMY STRATEGY FOR THE DISTRICT OF COLUMBIA 20 (2014) ("CREATIVE ECONOMY"). Black residents make up about 12% of the U.S. population, but only 8.5% of creative class jobs. White residents make up about 64% of the U.S. population, but comprise 73.8% of Creative Class jobs. Am. Compl. ¶ 48.

The District consciously implemented zoning plans to attract workers who, based on their age, profession, and income, clearly skewed white. For example, the Creative Economy Strategy, a policy document for implementation of the Creative Class Agenda, stated that "[B]y changing zoning regulations in industrial areas and allowing residential use, the District will increase affordable space for creative businesses. . . and creative uses, including make/live space." CREATIVE ECONOMY 50. This preference for Creative businesses and uses of space is an implicit preference for young, millennial white workers over traditional black residents of the district.

D.C had ample warning over the last decade that their agenda was segregating and displacing African-American residents. By 2014, Richard Florida, whose research was the basis for the creative class agenda, found that there was a direct correlation between segregation and

concentrations of the Creative Class. Am. Compl. ¶ 45.6 Florida also found that when the Creative Class clusters in neighborhoods, it perpetuates and worsens class segregation. Am. Compl. ¶ 46.7

Importantly, the District of Columbia observed in *its own planning documents* that the "extreme degree of segregation is the District's greatest fair housing challenge."[8] This same document acknowledged that areas that were once integrated had become, through gentrification, re-segregated with predominantly white residents, as opposed to historically black residents. *Id*. at 174. The document also identified many impediments to fair housing in the District, such as lending discrimination against African-American and Latino borrowers, overuse of exemptions in inclusionary zoning ordinances, and a high cost of housing leading to displacement of low to middle income residents, among many others. ECF 27-7 Ex. E, HUD letter to Muriel Bowser. After the District submitted their 2016 Consolidated Housing Plan to HUD, HUD wrote a letter to the District stating their Plan did not specifically address *any* of these impediments to fair housing, especially those that have lead to segregation and dislocation. *Id*. ("[S]ince 2000, there has been a loss of affordable housing . . . which has led to an increase in segregation and concentrations of poverty. However, the District's Consolidated Plan . . . identif[ies] no concrete actions, strategies, or timelines to address these issues.").

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[6] Richard Florida, *The Racial Divide in the Creative Economy*, CITYLAB (May 9, 2016), www.citylab.com/life/2016/05/creative-class-race-black-white-divide/481749/ (last accessed Sept. 18, 2018).

[7] *Id*. ("My previous research has found significant and sizable correlations between the creative class overall and both inequality and segregation.").

[8] D.C. DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, FAIR HOUSING ANALYSIS OF IMPEDIMENTS (2006-2011) 178, https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DC_AI_2012_-_FINAL.pdf (last accessed September 18, 2018).

Oddly, the District says HUD's letter was only concerned that the submitted *documents* had not addressed impediments, and somehow was not admonishing the District specifically for a lack of action. ECF 27-1 at 5 n.5. Not only is it impossible to separate the District from the Consolidated Plan *that they wrote and submitted*, but their footnote suggests the District views submissions of housing plans to HUD as *pro forma* documents of little connection to their housing activities. These are not merely "documents" or unfortunate obligations, they are a submission of actions the District is *committing* to take under federal housing law. HUD's letter states that all recipients of federal funds must "determine what impediments to fair housing choice exist within their jurisdictions, [and] *undertake actions to ameliorate those impediments*." ECF 27-1 at Ex. E (emphasis added) (citing 42 U.S.C. § 3608(d) & (e)(S); 24 CFR § 9I.225(a)(l); 24 CFR §9I.425(a)). The letter goes on to express a laundry list of concerns with the *District's* lack of serious action on impediments to affordable housing. *See, e.g.*, ECF 27-1 at Ex. E ("While the District has an Inclusive Zoning Ordinance, it too often permits exceptions to that ordinance. For example, … approximately twelve thousand units were exempted from the inclusive zoning ordinance."). The Consolidated Plan is intended to be a roadmap to affirmatively furthering fair housing. Instead of running from responsibility, the District should listen to HUD and focus on its legal responsibility to advance fair housing. *Id*. ("[T]he District's presentation of activities … conveys a lack of focus on the need to address of minority concentration and low opportunity and prevent re-segregation of high opportunity areas.").

The results of the Creative Class Agenda are entirely predictable: a segregated city with diminished housing opportunities for longtime black residents. Since the implementation of the Creative Class Agenda, approximately 39,000 black residents left D.C. while 50,000 white residents have entered. Am. Compl. ¶ 48. Nearly 62% of white D.C. metro area workers are

Creative Class members, while 40.9% of black D.C. metro area workers are Creative Class members. *Id.* Between 2000 and 2014, the Creative Class population substantially increased from 38.8% to 44.6%. *Id.* Combining the Agenda and the manner in which Defendant's carried it out in the zoning process, with statements of key District officials, a clear pattern of discrimination emerges. It is a pattern the District has refused to address.

B. Plaintiffs Have Plausibly Alleged Discriminatory Intent

At the pleading stage, Plaintiffs are required to plausibly allege discriminatory intent. In addition to the numerous factual allegations outlined above, Plaintiffs plead a lengthy pattern and practice of arbitrary decision-making by the Zoning Commission in violation of its own regulations. Am. Compl. ¶ 73 ("Such arbitrary findings are evidence of racial animus, as it is not possible to explain the pattern of arbitrary decisions but for the existence of animus against a predominantly black community."), ¶ 94 ("These systematic and repeated violations of federal and D.C. law are evidence of racial animus, as it is not possible to explain the pattern of arbitrary decisions but for the existence of animus against a predominantly black community."), ¶ 263 ("Defendants have engaged in unlawful practices that would not otherwise occur but for, wholly or partially, discriminatory reasons, as illustrated in Defendants' lengthy pattern of arbitrary behavior that cannot be explained but for animus on the basis of race against black residents.")

In addition, the District has intentionally buried its head in the sand in a way that shows obvious racial discrimination. Despite the wealth of studies making the District aware of racially determinative inequality and the segregative effects of the Creative Class Agenda, and despite the warning flags from within the District government in its Consolidated Plan as to the adverse impacts on African-Americans and despite warning from the federal government as to the adverse impact of resegregation, the Commission has refused to fulfill its basic obligation to

collect mandatory impact assessment reports from relevant agencies—the only mechanism that can inform adequate planning when the Commission deviates from established zoning. This failure to collect planning documents, in light of studies, warnings and visible injuries to African-American communities in D.C., is evidence of animus toward African-Americans and an unconscionable disregard of their constitutional rights that shocks the conscience. The District could address it now, but instead they have doubled-down, forcing Plaintiffs into federal court.

Plaintiffs' allegations are consistent with the historical and empirical evidence above, as well as statements made by the original Creative Class author Richard Florida's theories and the Office of Planning's former Director Harriet Tregoning, who adopted Florida's theories. *See* Am. Compl. ¶¶ 39-44 (incorporating Tregoning's statements (1) describing the Agenda as seeking to design "cool neighborhoods" to "draw 18-34 year old 'high value' knowledge workers" and "affirm [their] identity as innovators." (2) bragging about placing a Whole Foods where a Murray's store was once located—a bulk item food store known for serving African-American communities when other grocery stores would not serve African-American neighborhoods, and (3) tracking Florida's theories that identify community structures characteristic of African-American communities in D.C. as inimical to Creative Class growth, thus showing a desire for deconstructing those communities and replace them with the Creative Class). As Plaintiffs need only allege race was a motivating factor, not the only motivating factor, these allegations are sufficient to plausibly allege an Equal Protection violation.

VI. FAIR HOUSING ACT: PLAINTIFFS ALLEGE A VALID CLAIM FOR DISPARATE TREATMENT BASED ON ALLEGATIONS THAT SUPPORT AN INFERENCE OF RACE DISCRIMINATION (COUNT 13)

Defendants have acted with discriminatory intent toward African-American residents in at least two ways: (1) adoption, as a matter of policy, of the objectives and assumptions of the

Creative Class Agenda and (2) a pattern and practice of decisions in pursuit of that Agenda. In both policy and practice, the District's actions violate the Fair Housing Act ("FHA").

A. Defendants' Inception and Enforcement of the Creative Class Agenda Permits an Inference of Discriminatory Intent

Defendants have violated the Fair Housing Act of 1968 ("FHA"). 42 U.S.C. § 3604 *et seq*. The FHA prohibits housing discrimination on the basis of race. *Id.* The FHA imposes a broad prohibition on private and public entities in the sale or rental of housing, making it illegal to refuse to sell, rent, negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling to any person on the basis of race. *Id.* § 3604(a); 24 C.F.R. § 100.60. Further, it is unlawful to discriminate "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); 24 C.F.R. § 100.60(b). Defendants, by and through the Creative Class Agenda, have violated these fundamental tenets of the FHA.

"An FHA claim can proceed under either a disparate-treatment or a disparate-impact theory of liability." *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 2018 WL 4344682, at *2 (4th Cir. 2018). Disparate treatment claims require the plaintiff to "establish that the defendant had a discriminatory intent or motive." *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (internal quotation marks omitted). There are several ways to show a facially neutral law was passed with racially discriminatory intent or purpose as a motivating factor, which is determined through "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *Arlington Heights*, 429 U.S. at 266. The naked impact of the official action and whether it affects one race more heavily than another provides an important starting point. *Id*. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears

neutral on its face." *Id*. (citation omitted). The "historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id*. at 267 (citing *Griffin v. School Board*, 377 U.S. 218 (1964)). "The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes." *Id*. (citation omitted).

Plaintiffs alleging disparate treatment need not show direct evidence of discriminatory intent at the pleading stage. Plaintiffs must "present sufficient evidence to permit an inference." *2922 Sherman Ave. Tenants' Ass'n v. D.C.*, 444 F.3d 673, 682 (D.C. Cir. 2006) (citing *Sanghvi v. City of Claremont*, 328 F.3d 532, 536–38 (9th Cir. 2003); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48–52 (2d Cir. 2002); *Kormoczy v. HUD*, 53 F.3d 821, 823-24 (7th Cir.1995) (all applying a prima facie framework that only required sufficient evidence to support an inference of discriminatory intent). The *Sherman Avenue* court found that the District's decision to only evict residents of buildings in Hispanic majority areas, out of an original list which included many buildings in non-Hispanic areas, was sufficient to show discriminatory intent through disparate treatment. The plaintiffs' claims for disparate treatment were able to survive even though they had not sufficiently alleged that Hispanic residents were disproportionately impacted. *Id.* at 682-83.

To prevail on a disparate treatment claim, a plaintiff need not prove that animus toward the protected group in question was the sole motivating factor behind the adverse treatment. *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 151 (D. Conn. 2001). Indeed, the protected trait need not be the "primar[y], or even predominant[]" motivating factor behind the defendant's actions or judgment. *Cmty. Hous. Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 225 (D.D.C. 2003) (quoting *Tsombanidis*, 129 F. Supp. 2d at 151).

Similarly, a disparate treatment showing does not require proof that the defendant harbored animus or malice toward individuals within the protected class. *Cmty. Hous. Trust*, F. Supp. 2d at 225 (citing *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995)). The burden falls on the plaintiff to prove that the protected characteristic "*played a role* in the defendant's decision to treat her differently." *Cmty. Hous. Trust*, 257 F. Supp. 2d 225 (citing *Arlington Heights*, 429 U.S. at 265 (emphasis added)). However, at this stage, Plaintiffs need only allege plausible facts that, if assumed, state a claim for disparate treatment. *Iqbal*, 556 U.S. at 678.

B. Defendants' Disregard for the History of Displacement Under the Creative Class Agenda Suggests the Agenda is Motivated Wholly or Partially by a Racially Discriminatory Intent

In this Circuit, disparate treatment analysis under the FHA is guided by the burden-shifting framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*. *See Sherman Ave. Tenants' Assoc.*, 444 F.3d at 682 (citing *McDonnell*, 411 U.S. 792, 802–04). At the pleading stage, the plaintiff need only allege sufficient evidence to support an inference of discrimination. *Sherman Ave.*, 444 F.3d at 682. This framework presents a forgiving evidentiary burden. "At the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002) (holding that an employment discrimination plaintiff need not plead a prima facie case of discrimination)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, meaning that the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Boykin v. Gray*, 895 F. Supp. 2d 199, 208

(D.D.C. 2012) (quoting *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010) (internal quotation marks omitted).

As previously stated in the Equal Protection analysis, African-American residents make up a disproportionately low percentage of Creative Class jobs, while White residents are significantly overrepresented. This racial imbalance is not any surprise to Defendants. In fact, Defendants' own planning documents reveal a comprehensive understanding of the problem of racial segregation in the District's housing.[9] Rather than take steps to remedy the "extreme degree of segregation," Defendants stayed the course. Am. Compl. ¶ 53.

"Relevant considerations for discerning a racially discriminatory intent include the historical background of the decision particularly if it reveals a series of official actions taken for invidious purposes, departures from the normal procedural sequence, substantive departures, and the legislative or administrative history." *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426, 491–92 (S.D.N.Y. 2017)." Such deviations from normal administrative procedure are plainly evident here. When members of the targeted communities attempted to voice their concerns with the Agenda, Defendants silenced them. Am. Compl. ¶ 26. Further, when community organizations challenging the Agenda came forward with adverse evidence, Defendants ignored them, prohibited them from presenting witnesses, and failed to make finding of facts on their evidence. Am. Compl. ¶ 216. Defendants even ignored their statutory responsibilities to conduct a report on the impact the targeted neighborhoods would face, as the conclusions of such a report would be obvious, they would lead to the gentrification and displacement. Am. Compl. ¶¶ 216, 31. Defendants' actions are irreconcilable with the FHA.

[9] District of Columbia Department of Housing and Community Development, Fair Housing Analysis of Impediments (2006-2011), at 178, https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DC_AI_2012_-_FINAL.pdf (last accessed Sept. 20, 2018)

In the instant case, Defendants' actions point to discriminatory intent toward low-income African-American residents living on undervalued parcels of land, for redevelopment to benefit the wealthier, white Creative Class. The District's targeting of African-American communities for demolition and redevelopment was meant to attract a white Creative Class through favorable funding and development deals to replace longtime African-American residents. At the very least, the question of whether the Creative Class Agenda constitutes disparate treatment is a factual question that cannot be settled at this stage of litigation.

VII. FAIR HOUSING ACT: PLAINTIFFS STATE A CLAIM FOR VIOLATION OF FEDERAL STATUTE BASED ON SEGREGATIVE EFFECT (COUNT 14)

The Fair Housing Act protects vulnerable communities from intentional discrimination as well as facially neutral policies with exclusionary effects. 42 U.S.C. § 3604 *et seq.* Defendants' housing policies perpetuate segregation through the replacement of low-income housing neighborhoods with housing intended to attract a higher income demographic that skews disproportionately white. Am. Compl. ¶ 48. Importantly, the manner in which Defendants allow PUD approval, and the PUDs as approved, have a history of flipping predominantly black neighborhoods into predominantly white ones, forcing African-Americans out of the district due to lack of housing (especially larger-unit housing). In other words, Defendants' policies do not integrate neighborhoods but further segregate them to the benefit of white millennials.

The Department of Housing and Urban Development has promulgated regulations in recognition of the pernicious trend in housing policies that displace long-time residents from their homes and neighborhoods through the cover of revitalization. 24 C.F.R. § 100.500(c). The regulations provide courts with an analytical framework for discriminatory effect claims. As

detailed below, Plaintiffs allege more than the requisite facts to show that the Creative Class Agenda perpetuates segregation in violation of the FHA.

A. Alleging Segregative Effect Requires a Less Comprehensive Statistical Analysis Than Alleging Disparate Impact

"There are two types of discriminatory effects which a facially neutral housing decision can have." *Boykin*, 895 F. Supp. 2d at 213 (quoting *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro. Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007)). One is what is conventionally considered "disparate impact." A second and distinct category is segregative effective, which measures the effect a policy "has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *see also* 24 C.F.R. § 100.500(a). Put simply, segregative effect claims arise from harms done to a community, not a class.

The HUD burden-shifting framework provides courts with a step-by-step guide through the segregative effect analysis. *See* 24 C.F.R. § 100.500(c). The plaintiff must first allege a prima facie case by showing "a challenged practice caused or predictably will cause a discriminatory effect." *Id*. § 100.500(c)(1). "Segregative-effect claims focus on the harm done to the local community." Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. Legis. & Pub. Pol'y 709 (2017) (citing Effects Standard, 78 Fed. Reg. at 11,469). These harms may be proven through a simple examination of census data of the effected neighborhood. *Id.* at 738-39.

B. The Creative Class Agenda Perpetuates Racial Segregation in Housing

A prima facie claim of segregative effect is comprised of two elements: "(1) there must be 'segregated housing patterns because of race' in the relevant community; and (2) the defendant's challenged practice must 'create[ ], increase[ ], reinforce[ ], or perpetuate[ ]' these segregated patterns." *Id.* (quoting 24 C.F.R. § 100.500(a)). Both elements are proven through simple statistical analysis. The first is proven through census data providing statistical evidence of communities divided along racial lines. *See, e.g.*, *Arlington Heights*, 558 F.2d at 1291; *Graoch*, 508 F.3d at 379 (stating that, at the motion to dismiss stage, plaintiff must provide "information about the racial makeup of the community" sufficient to "infer a segregative effect"); *see also Boykin*, 986 F. Supp. 2d at 24 ("the plaintiffs made this [segregative effect] claim without much evidentiary support, apart from demographic information about the racial composition of the District's various neighborhoods… these factual allegations were sufficient to withstand a motion to dismiss"); *In re Malone*, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984) ("there is a significant underrepresentation of minorities in southern St. Louis County and the St. Louis area as a whole can accurately be characterized as racially segregated").

In this case, there is no dispute that D.C. is residentially segregated by race and that it has a long history of such segregation. *See, e.g.*, Am. Compl. ¶ 53-54, 59. Plaintiffs have undoubtedly satisfied the first element.[10]

The second element of a segregative effect claim requires only a common-sense interpretation of the effect that the policy has—or predictably will have—on segregation. *See*

[10] One common statistical measure is the dissimilarity index, which measures segregation on a scale of 0 to 100, where 0 reflects a natural state of integration absent discrimination and 100 reflects complete segregation. Washington D.C. had a 66.2 dissimilarity index rating based on 2000 Census Data. *See, e.g.*, CensusScope, available at www.censusscope.org/us/rank_dissimilarity_white_black.html.

Arlington Heights, 558 F.2d at 1291 (finding that the municipality's refusal to build new affordable housing units in an "overwhelmingly white" neighborhood thwarted what would have been "a significant step toward integrating the community"). Plaintiffs need only show that the challenged policy prevents interracial association or furthers current conditions of segregation. *U.S. v. City of Black Jack*, 508 F.2d 1179, 1184 (7th Cir. 1974) ("The discretion of local zoning officials … must be curbed where the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods") (internal quotation marks omitted).

As of 2012, the District of Columbia Department of Housing and Community Development ("DHCD") found that "the District of Columbia consists of hyper-segregated Black neighborhood clusters in which African Americans constitute 93 percent to over 98 percent of the population."[11] The racial composition of these "clusters" are estimated to be "more than 60 percentage points higher than would be expected in a free housing market without discrimination." *Id.* at 173. That same study warned that the ongoing gentrification of various low-income African-American neighborhoods across the city will simply push the current residents out and "resegregate these gentrifying neighborhoods as virtually all–white." *Id.* at 174. Despite its own warnings, the District moved forward with its Creative Class Agenda and, in doing so, has proven the DHCD study correct.

The District's historical and continuing perpetuation of segregation through the Creative Class Agenda is evidenced by the demographic shifts happening in city neighborhoods. The neighborhoods targeted for redevelopment have seen an explosion in population and the results are telling. They range from a disproportionate growth in the white population with a small

[11] District of Columbia Department of Housing and Community Development, Fair Housing Analysis of Impediments (2006-2011) at 178, available at https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DC_AI_2012_-_FINAL.pdf (last accessed Sept. 18, 2018).

increase in the African-American population, to an exponential growth in the white population while the African-American population shrinks. Am. Compl. ¶ 69. Neighborhoods like Bloomingdale and the U Street Corridor have seen thousands of new white residents brought in by redeveloped housing while the once majority African-American population dwindles. *Id.*

The problem is further illustrated by the demographic proportions. In Navy Yard, Bloomingdale, and U Street, all neighborhoods that were heavily redeveloped within the last ten years, African-American populations dropped at least ten percentage points while white populations skyrocketed. *Id.* In fact, the white population percentage in Navy Yard nearly tripled since redevelopment. *Id.* It is the logical conclusion that the continuation of a segregative policy into a new neighborhood will not usher in any integrated communities but will bring the same displacement of vulnerable people. *See* Am. Compl. ¶ 69. The trend is segregation. Though new white residents may be moving into these historically African-American neighborhoods, this is not "interracial association." The process of "revitalization" pushed by the Creative Class Agenda is better characterized as replacement.

Finally, the Court may consider the plausibility of Plaintiffs' theory, in the context of all the factual allegations in their Amended Complaint, in determining whether Defendants' actions have the effect—or predictably will have the effect—of deepening segregation. Am. Compl. ¶ 69; see also *id.* at ¶¶ 53-54, 59. Here, there is little doubt. Plaintiffs need not allege that Defendants' actions are the *only* cause of segregation, but merely that their policies perpetuate it, rather than reduce it, as is their FHA obligation as a recipient of federal funding. 42 U.S.C. § 3608; 25 C.F.R. § 5.150 *et seq.*

Plaintiffs' segregative-effect theory is that Defendants have aggressively pursued a Creative Class Agenda designed to bring in substantially more wealthy, white millennials at the

expense of low-income African-American residents, and in pursuit of that Agenda Defendants have carried out a pattern of arbitrary and discriminatory decisions to force wholesale development of traditionally African-American neighborhoods so developers can capitalize on the undervalued land, inherently flipping neighborhoods from nearly all-black to all-white, thereby displacing African-American residents and further segregating the District. This is sufficient to state a claim for FHA segregative effect.

VIII. PLAINTIFFS STATE A CLAIM FOR DISPARATE IMPACT UNDER THE D.C. HUMAN RIGHTS ACT BASED ON THE CREATIVE CLASS AGENDA'S DISPRORTIONATE EFFECT ON RACE (COUNT 12)

Plaintiffs state a claim for discrimination through disparate impact under the DCHRA. Disparate impact claims under the DCHRA are interpreted in accordance with similar claims under the FHA. *Nat'l Fair Hous. Alliance v. Travelers Indemnity Co.*, 261 F.Supp.3d 20, 35 (D.D.C. 2017); *Benefits Commc'n Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994). The Supreme Court has held in no uncertain terms that disparate impact claims are cognizable under the Fair Housing Act of 1968. *Inclusive Cmtys.*, 135 S. Ct. at 2521 ("Recognition of disparate-impact claims is consistent with the FHA's central purpose").

A. There is a Direct Link Between the Assumptions Driving the Creative Class Agenda and the Displacement of African-Americans

A HUD burden shifting framework guides disparate impact claims. *See Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d at 21 (citing *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *see also* 24 C.F.R. § 100.500(c). Step one, relevant to this stage of litigation, states "the plaintiff has 'the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect'" on a protected class. *See Borum*, 218 F. Supp. 3d at 21 (quoting

24 C.F.R. § 100.500(c)(1)). This is demonstrated through proof of a statistical disparity between the protected class and the broader population. *Inclusive Cmtys.*, 135 S. Ct at 2523. The Court emphasized a "robust causality requirement" so that defendants are not held responsible for racial disparities they did not create. *Id.*

The Court in *Inclusive Communities* emphasized a more exacting scrutiny regarding the causal link between a statistical disparity and the defendant's actions, however it did not offer guidance on what constitutes a statistical disparity. *See id*. Nevertheless, there is a long history of a case law that illustrates disparities sufficient to prove disparate impact. *See, e.g.*, *Borum*, 218 F. Supp. 3d at 22, 23 (finding a disparate impact under the FHA based on plaintiff's statistical analysis which showed a proposed redevelopment would disproportionately affect a protected class by a ratio of 3:1); *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 125-26 (D.R.I. 2015) (holding a report by plaintiff's expert which showed a three-fold impact on the protected was group sufficient to find disparate impact); *Gashi v. Grubb & Ellis Property Management Services, Inc.*, 801 F. Supp. 2d 12, 16 (D. Conn. 2011) (holding census data presented by plaintiff which showed a 30.76% effect on households with children and a 9.88% effect on households without children sufficient for disparate impact).[12]

The Creative Class Agenda has displaced low-income, African-American communities for years. Am. Compl. ¶¶ 68, 69, 88-93, 371-86. The District concedes that it targets the Creative Class for beneficial treatment. ECF 27-1 at 32. Readily available statistics establish that the Creative Class skews dramatically more white, both nationally and in D.C. Am. Compl. ¶ 48.

[12] While some of these cases were decided before the Supreme Court articulated the "robust causality requirement," this Court today can read *ICP*'s silence on the degree of statistical disparity to mean that these standards remain good law. *See, e.g.*, *Graul*, 120 F. Supp. 3d at 125-26 (relying on case law that predates *ICP* to determine the proper scope of disparity to state a prima facie case of disparate impact).

The District knew that luring the Creative Class into new areas of D.C. would have a disparate impact on the African-American community. Indeed, Plaintiffs allege the District was warned. Am. Compl. ¶¶ 56, 227, 380, 382; *see supra* Section V.A.

Plaintiffs' statistical allegations show that the Zoning Commission's decisions have an undeniable disproportionate impact on African-Americans, thereby violating the DCHRA. Am. Compl. ¶ 48. In *Boykin*, the plaintiffs' claim that the defendants had violated the DCHRA through disparate impact discrimination by targeting mostly African-American shelters for closure survived a motion to dismiss because the impacted class was disproportionately African-American. *See* 895 F. Supp. 2d at 212.

The implementation of the Creative Class Agenda has a similarly disproportionate impact on African-Americans because the affected communities are overwhelmingly African-American. Further, the displacement of African-American communities from their homes is due directly to policy choices made by the DCHA in furtherance of an agenda that will disproportionately benefit the Creative Class, who are disproportionately white. The DCHA's allegation that "Plaintiffs fail to allege a statistical disparity comparing the alleged displacement of black residents at Barry Farm as compared to white residents" misreads the case law and ignores the factual allegations of the Amended Complaint. As in *Boykin*, the vast majority of the impacted residents are African-American. Plaintiffs do not need to show that white residents (if there were any) of Barry Farm were treated differently because the impacted class was disproportionately African-American. The direct relationship between the policy and the removal of African-American residents from their homes satisfies the causality requirement.

IX. PLAINTIFFS STATE A CLAIM FOR RACE-BASED SUBTERFUGE UNDER THE D.C. HUMAN RIGHTS ACT BASED ON ALLEGATIONS THAT SUPPORT AN INFERENCE OF RACE DISCRIMINATION (COUNT 11)

A. The DCHRA Applies to Zoning Commission Decisions

As a preliminary matter, the Zoning Commission's actions constitute transactions in real property under the expansive and flexible standard of construction applied to the DCHRA. *See George Wash. Univ. v. D.C. Bd. of Adjustment*, 831 A.2d 921, 939-40 (D.C. 2003). First, the DCHRA forbids discrimination in transactions in real property. D.C. Code § 2-1402.21(a)(1)-(2). Second, it is a "broad remedial statute, and it is to be generously construed." *George Wash. Univ.*, 831 A.2d at 939 (D.C. 2003) (internal citations omitted). The D.C. Court of Appeals has described the DCHRA as a "flexible and far-reaching prohibition against discrimination of many kinds." *Exec. Sandwich Shoppe, Inc., v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (quoting *Dean v. District of Columbia*, 653 A.2d 307, 319 (D.C. 1995)). In *George Washington University*, the D.C. Court of Appeals rejected the D.C. Board of Zoning Adjustment's attempt to excluding zoning decisions from the scope of the DCHRA. 831 A.2d at 939. Third, the Court of Appeals held that zoning decisions are subject to the DCHRA even when there has not been "an identifiable individual victim of a . . . discriminatory rental or sales transaction." *Id*. at 940. Under this standard, the Zoning Commission's decisions can still be challenged under the DCHRA before the new developments are completed.

Courts also look to analogous federal statutes like the FHA in interpreting the DCHRA. *Travelers Indem. Co.*, 261 F. Supp. 3d at 20; *see also Feemster v. B.S.A Ltd.*, 548 F.3d 1063, 1070 (D.C. Cir. 2008). The FHA phrase, "Discrimination in residential real estate-related transactions" is analogous to the DCHRA, which prohibits discriminatory "transactions in real property." 42 U.S.C. § 3605; D.C. Code § 2-1402.21(a)(1)-(2). Courts have held that the FHA

applies to discriminatory zoning decisions. *See, e.g.*, *City of Black Jack*, 508 F.2d at 1183-84 (finding that the city's Zoning Commission's decisions discriminated against protected classes of individuals). As the D.C. Court of Appeals has explained, "[d]iscrimination in zoning amounts to discrimination in housing on a far larger scale, and it would be incongruous to suggest that the first is countenanced by the Human Rights Act while the second is unlawful." *George Wash. Univ.*, 831 A.2d at 940. Accordingly, zoning decisions constitute transactions in real estate under both the DCHRA and the FHA.

B. Plaintiffs State a Claim for Race-based Subterfuge

For the same reasons as those stated in section V (Equal Protection – Count 6) and section VI (FHA disparate treatment – Count 13), Plaintiffs state a claim for violation of the DCHRA. Plaintiffs allege a discriminatory pattern in zoning decisions that cannot be explained but for animus, a series of statements showing the discriminatory intention and assumptions underlying the Creative Class Agenda, and further allege that Defendants were well aware of the assumptions underlying and the foreseeable effects of their policies. This is sufficient to support an inference of race-based discrimination in real estate transactions in violation of the DCHRA.

X. PLAINTIFFS STATE CLAIMS FOR FOUR ADDITIONAL VIOLATIONS OF THE D.C. HUMAN RIGHTS ACT (COUNTS 7-10)

A. Preference for Millennials Who Derive Income from Creative Disputes Violates DCHRA's Prohibition on Age and Source of Income Discrimination, Section 2-1402.21(a)(2) (Count 7)

The District, in pursuit of the Creative Class, has adopted a policy that expresses a preference for allocating valuable public and private resources based on age (millennials, ages

18-34) and source of income (derived from creative, innovative, non-traditional jobs). These preferences violate the DCHRA.

Section 2-1402.21(a)(2) prohibits discrimination on the basis of age and source of income in terms or conditions of a transaction in real property. It applies to commercial and residential transactions. A transaction in real property is a negotiated agreement pertaining to any interest in real property or improvements thereon. The PUD progress is a multi-party negotiation between the District of Columbia government, private developers, and residents regarding an interest in real property—with specific focus on which improvements will be allowed on real property delimited by lot number and square. Am. Compl. ¶¶ 268-70. The methodology of the Creative Economy Strategy is to improve access to residential and commercial property through "changing zoning regulations in industrial areas and allowing residential use." *Id.* ¶ 274; *see also* ¶ 276 ("Upon information and belief, the Zoning Commission has implemented land use changes to industrial zones city-wide by following District of Columbia policy that has the intent of providing housing to millennials and people who earn their income within certain professions.")

At the pleading stage, plaintiffs alleging disparate treatment do not need to show direct evidence of discriminatory intent. Plaintiffs may use circumstantial evidence—such as disparate treatment—to permit the inference of discrimination. *See, e.g.*, *Brandywine Apts.*, 964 A.2d at 167-68. In *2922 Sherman Ave. Tenants' Association v. D.C.*, the court found that the District's decision to only close buildings in Hispanic majority areas out of an original list which included many buildings in non-Hispanic areas could indicate discriminatory intent through disparate treatment. 444 F.3d at 682-83. There, the plaintiffs' claims for disparate treatment survived even though they had not alleged that Hispanic residents were disproportionately impacted. *Id*. at 684.

By definition, the Creative Class Agenda expresses a preference for people based on age (millennials, ages 18-34) and source of income (derived from creative, innovative, non-traditional jobs). Beyond the preferences that define the Agenda itself, the District has carried out the Agenda in a discriminatory manner. In one case, the Zoning Commission required a developer to set aside at least 10 percent of a project's retail space for "maker" spaces, ZC Order No. 15-28, § 43(h)(iv), implementing the Office of Planning's recommendation that the developer commit part of the building for "maker or creative production uses as part of the PUD, as well as subsidies and other incentives to make this use viable." ZC Order No. 15-28, § 43(h)(iv), ZC No. 15-28, Mem. at 9 (June 10, 2016). *See* Am. Compl. ¶¶ 98-99, 237. This requirement discriminates against people who have a source of income in non-traditional industries. Since the proposed PUD in ZC Order No 15-28 is a mixed-use development, including residential space, the restriction effects the production of housing. This inevitably produces specific types of housing—primarily studio, one bedroom, and luxury—because other housing could not feasibly be built above the retail spaces designed for the ground floor commercial space because ground floor retail is typically supported by the housing above and immediately surrounding it. Required "maker-use" has the effect of limiting the potential for low-income family housing regardless of what any developer may want to build on the site because those residential tenants will not patronize a craft beer bar with artisanal jam offerings, thus adversely impacting "maker space" and project financial viability.

This decision is an example of PUDs implemented as part of the District's Creative Economy Strategy, which recommends that the District "[p]rovide incentives for developers to build make/live space for use by creative individuals and organizations" CREATIVE ECONOMY 16. The District's own documents make it clear that it wants to attract people like a "magnet" based

on their age and source of income. *Id.* at 17 (citing the city's goal of "Becom[ing] a magnet for creative corporations").

The Creative Economy Strategy "chang[es] zoning regulations in industrial areas and allow[s] residential use" in order to improve access to housing for Millennial professional and Creative Class members. Am. Compl. ¶¶ 273-74 (citing CREATIVE ECONOMY 50).

These preferences harm older residents, particularly those with traditional jobs. First, it affects people like Plaintiff Greta Fuller, who is a "non-Creative" industry business owner, subjecting her to disparate treatment on the basis of her source of income. Second, these preferences for Creative residents and commercial tenants' nearby transit options reduce access to public facilities. Greta Fuller may be priced out of the market and either unable to live near her "non-Creative" industry business, move it, or close it altogether. Additionally, it harms families like those of Tamiya or Arion Wells would not be able to access housing or facilities to the same degree because families are not a part of the Creative Class Agenda.[13]

Defendants' preference for Creative Class residential, commercial, and retail tenants in zoning transactions at the granular level, and policy documents at the sky level, subject Plaintiffs to disparate treatment. The District treats Plaintiffs differently on the basis of their age and source of income by making it more difficult for them to access housing, access public facilities, and live near their place of work.[14]

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[13] "Traditional notions of what it means to be a close, cohesive community and society tend to inhibit economic growth and innovation. Where strong ties among people were once important, weak ties are now more effective. Those social structures that historically embraced closeness may now appear restricting and invasive. These older communities are being exchanged for more inclusive and socially diverse arrangement." Richard Florida, *Cities and the Creative Class*, CITY & COMMUNITY, Vol. 2, Issue 1 at 5-6 (2003).

[14] While non-millennials could be Creative Class members, Creative Economy organizations rely on "digital infrastructure, especially new digital technologies" and "[f]lexible and disruptive business models." CREATIVE ECONOMY 10. Millennials are the "basis for the robust creative class

To the extent that Defendants argue that their motivations were purely economic, there is no affirmative defense or exception to the D.C. Human Rights Act for a business necessity. D.C. Code §2-1401.03. Ultimately, the assumptions of the Creative Class Agenda permits the inference of discriminatory intent.

B. The District's Preferences for Millennials with a Creative Source of Income Violates Section 2-1402.21(a)(5) (Count 8)

The District's stated preferences for Creative Class residents and businesses conveys a discriminatory message that the District wants young Creative Class members living in developments, not older people or those doing traditional work or from traditional backgrounds.

Section 2-1402.21(a)(5) prohibits statements, notices, or advertisements that "unlawfully indicates or attempts to unlawfully indicate any preference, limitation, or discrimination based on . . . age [or] source of income." Using FHA interpretation as an analogue for similar provisions in the DCHRA, *see, e.g., Benefit Commc'n Corp. v. Klieforth*, 642 A.2d 1299, 1301-02 (D.C. 1994). Defendants' explicit preferences in retail, commercial, and residential tenants violate §2-1402.21(a)(5) because an ordinary listener would understand these preferences for Creative Class businesses as expressing a preference for Creative Class residents in the development. *See Rodriguez v. Vill. Green Realty Inc.*, 788 F.3d 31, 52 (2d Cir. 2015) (holding as the standard an ordinary listener's understanding that there is a preference against them).

Florida describes, one that supports the labor demands of the District's growing Creative Economy. *Id*. at 13. The District has stated that young workers coming to the District are desirable because they often have skills that creative organizations demand, like communications and coding, design, or marketing/social media strategy. *Id*. at 58. Older, low-income workers without formal education, like many of the plaintiffs, are less likely to have the high-tech skills of the Creative Class. Additionally, older people often face discrimination in creative or innovative industries. *See, e.g.*, Caroline Cakebread, *Tech Companies Have a Baby Boomer Problem*, BUSINESS INSIDER (Oct. 21, 2017), https://www.businessinsider.com/indeed-survey-highlights-ageism-in-the-tech-industry-2017-10.

This claim relies on the same factual allegations as Count 7. In short, the District seeks to attract as many millennial Creative Class members as possible. *See, e.g.,* CREATIVE ECONOMY 13-14. Its resulting PUDs reflect this priority.

Defendants argue that the preferences in the PUDs are not explicitly preferences for residential tenants of certain ages and sources of income. But the PUDs and Zoning Commission decisions must be interpreted in concert with the assumptions of the Agenda itself, which seeks to attract to the city a very specific population. This is sufficient to draw an inference of discriminatory intent. The case *Tyus v. Urban Search Management* illustrates the point. There, the Seventh Circuit held that testimony from sociology and psychology experts on the signaling impact of advertisements featuring only white people for an upscale apartment complex could be admissible to show that that advertising campaign designed to attract young affluent professionals violated an analogous FHA provision. 102 F.3d 256, 262, 264 (7th Cir. 1996). That advertising campaign did not contain any specific references to racial preferences for tenants. *See id.* at 260. Here, the District's planning documents state the express intention to create more live and work space for Creative Class members. D.C. OFFICE OF PLANNING, CREATIVE CAPITAL: THE CREATIVE DC ACTION AGENDA 12 (May 2010). Am. Compl. ¶¶ 312, 316. Plaintiffs state a claim under the DCHRA.

C. The District's Attempt to Preclude the Non-Creative Class Members Through Age and Source of Income Preferences Violates Section 2-1402.21(b) (Count 9)

DCHRA § 2-1402.21(b) prohibits conduct that discriminates on the basis of source of income or age in real property transactions, which would not have been asserted but for, wholly or partially, a discriminatory reason. As above, Defendants have discriminated on the basis of source of income and age by indicating a preference for tenants on the basis of age and source of

income. Am. Compl. ¶ 295-307. Defendants' preferences, which violate the DCHRA by expressing discriminatory preferences for residential tenants, would not happen without Defendants' desire to have more millennial, Creative tenants.

D. The District's Preference for Millennial Creative Class Tenants Violates Section 2-1402.23 Because it Has the Effect of Steering Residents on the Basis of Race, Income, and Age (Count 10)

An action that directs people to different residential neighborhoods because of their membership in a protected class constitutes steering, even when the action does not involve traditional steering or blockbusting tactics. *See George Washington Univ. v. D.C. Bd. of Adjustment*, 831 A.2d 921, 942 n.17 (D.C. 2003). In *George Washington University*, a zoning decision treated students differently because they were students by limiting where they could live in the neighborhood. *Id.* at 942.

In this case, Barry Farm residents were and are almost entirely African-American and Creative Class members are disproportionately white and millennial. Am. Compl. ¶ 48. The decision to let Barry Farm fall into gross disrepair while attempting to entice young Creative Class members with preferential funding and development deals was meant to push out low-income African-American residents and pull in millennial, white Creative Class members. *See* Am. Compl. ¶ 124. As explained above, the DCHA gave Creative Class members preferential treatment in commercial and retail real property transactions as part of a strategy to attract more Creative Class millennials to the District. The DCHA has approved PUD applications for projects that are meant to create a "distinctive, creative enclave," in which only 8% of the residential space will have affordable units with more than two bedrooms. ZC No. 15-28, Ex. 1, at 32-33. According to the District's own reports, the District has the highest rate of homelessness in the nation. D.C. Dep't of Housing and Community Dev., DISTRICT OF

COLUMBIA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 2006-2011 109 (2012). Defendants have constructively evicted low-income African-American residents while replacing affordable housing with luxury high-rises comprised of mostly studios and one-bedrooms, leaving low-income families with nowhere to go, all because they belong to a community that is inimical to growth of the Creative Class.[15] This disparate treatment permits the inference of discriminatory intent. *See Brandywine Apts.*, 964 A.2d at 167-68. Defendants' actions effectively steer in white residents and steers out African-Americans.

E. Plaintiffs' Intentional Discrimination Claims are Not Barred by the Statute of Limitations Because the Defendants' Pattern and Practice of Discrimination is a Continuing Violation

Although the DCHA has argued that all of the plaintiffs' claims began to accrue in 2006 when the District began to develop the Creative Class Agenda, that was well before any of Plaintiffs' claims began to accrue. The statute of limitations for DCHRA claims begin to run after a plaintiff gets unequivocal notice of an adverse decision. *Murphy v. Pricewaterhouse-Coopers, LLP*, 580 F. Supp. 2d 16, 25 (D.D.C. 2008). While the DCHA has noted that the Amended Complaint states that the city's gentrification plans began over 10 years before the plaintiffs filed a complaint, the discriminatory transactions were the decisions by the Zoning Commission. The Zoning Commission issued its final order approving the Union Market PUD application on December 23, 2016. ZC No. 15-28. It issued its final order approving the Buzzard Point PUD application on April 21, 2017. ZC No. 16-02. It issued its final order approving the Popular Point PUD on May 25, 2018. ZC No. 16-29. Because Plaintiffs filed their First Amended Complaint on August 1, 2018, well within the DCHRA statute of limitations.

[15] *See supra* n.13.

The Zoning Commission issued a final order for the Barry Farm PUD application on May 29, 2015. The original Complaint in *this* matter was filed April 13, 2018 and for statute of limitations purposes, tolling relates back to the original Complaint. *See* Fed. R. Civ. P. 15(c). Moreover, this decision was part of a continuing violation. ZC No. 14-02. When plaintiffs allege a pattern or practice of continuing discriminatory behavior, incidents that took place outside the statute of limitations should still be considered as part of a "continuing violation." *See Havens*, 455 U.S. at 381 (continuing pattern of racial steering in violation of the FHA). The DCHA's neglect of Barry Farms and its development of plans to gentrify the area were part of a larger pattern that subjected low-income African-American residents to worse conditions and unequal treatment in an attempt to replace them with more affluent millennial Creative Class white residents. The District's publication of planning documents stating preferences for Creative Class workers and the violations of zoning procedures during the earliest challenged PUD approval process are part of the same continuing pattern of discrimination and gentrification that has caused the DCHA to let Barry Farm fall into disrepair, constructively evicting residents.

XI. PLAINTIFFS STATE A CLAIM FOR A VIOLATION OF SUBSTANTIVE DUE PROCESS (COUNT 15)

Substantive due process prohibits the government from depriving persons of life, liberty, or property by "arbitrary action of government." *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Substantive due process expands the protections of the Constitution to secure the privileges and immunities thereof against the unreasonable actions of the State that infringe on them. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). An inquiry into substantive due process is concerned not with procedure by which the government's actions are carried out, but on the actions themselves and the liberties they implicate. *Collins v. Harker Heights*, 503 U.S.

115, 125 (1992) (substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them") (internal quotation marks omitted). The government of the District of Columbia's overt and covert policy was to erode the life, liberty, and property interests of black communities for the sake of economic gain. The Creative Class Zoning policy, in tandem with DCHA policy, constructively evicted the residents of Barry Farm. The policy and actions at issue were so fundamentally unfair that they rose to the level of violating Plaintiffs fundamental rights. *See* Am. Compl. ¶¶ 387-402.

XII. PLAINTIFFS' ALLEGE SECTION § 1983 VIOLATIONS (COUNT 16)

Finally, there is no dispute in this case that Plaintiffs are alleging 42 U.S.C. § 1983 remedies for all relevant claims. Count 16 is not pleaded as a separate claim but merely incorporating § 1983 allegations to all relevant claims in the Complaint on the basis that Defendants acted under color of state law in reckless and/or conscious disregard of Plaintiffs' rights, including their rights to procedural due process, substantive due process, and equal protection under the Fifth Amendment. Defendants' misconduct directly and proximately caused Plaintiffs to suffer harm, including but not limited to discriminatory treatment and loss of housing.

CONCLUSION

For the foregoing reasons, this Court must deny in full Defendants' motions to dismiss.

_____/s/_____
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FULLER, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants,	Civil Action No. 1:18-cv-872-EGS

[PROPOSED] ORDER DENYING MOTIONS TO DISMISS

Upon consideration of the Motions to Dismiss ("Motions") by Defendants District of Columbia and District of Columbia Housing Authority, the Memorandum of Points and Authorities in support thereof, Plaintiffs' Opposition thereto, and oral argument, if any, it is this ___ day of _____, 2019, hereby:

ORDERED, that the Motion be, and it hereby is, denied in its entirety.

_____

The Honorable Emmet G. Sullivan
United States District Judge