UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRETA FULLER, *et al.*, **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA, *et al*.,** **Defendants.**	**Civil Action No. 18-872 (EGS)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT OF COLUMBIA'S MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs allege that the District of Columbia's (the District) economic and residential development policies favor housing for young and educated residents at the expense of older, less educated African-American families in violation of the Constitution and federal and local law. The District understands plaintiffs' concerns about the changing natures of their communities and the challenges they and others face in securing the homes and neighborhoods they desire. Indeed, the District has invested considerable time and effort to address such concerns for all its residents. Unfortunately, these issues are not properly before this Court.

Plaintiffs' claims are non-justiciable because plaintiffs lack standing to bring this lawsuit and because their claims fall under the political question doctrine. Even if plaintiffs' claims were justiciable, plaintiffs fail to state a claim upon which relief can be granted. Their due process and equal protection claims are not supported by their allegations, which fail to show the required deprivation of a liberty or property interest. Plaintiffs also fail to plausibly allege discrimination, let alone that that the District intentionally discriminated against them. And plaintiffs' claims under the Fair Housing Act (FHA) fail to show the requisite discriminatory intent and disproportionate effect, including the creation of improper barriers to housing. In addition, their claims under the D.C. Human Rights Act (DCHRA) misapply protections designed to address only specific acts of discrimination, none of which plaintiffs allege the District has committed. Finally, plaintiffs are not entitled to the relief they seek because 42 U.S.C. § 1983 (Section 1983) does not create an independent cause of action and there is no basis to enjoin the D.C. Zoning Commission. The Court should dismiss the Amended Complaint.

BACKGROUND

I. The District's Development Policies Provide High-Quality Housing and Economic Opportunity.

The demographics and economic prosperity of neighborhoods in the District of Columbia have changed over time because of market forces and changes in society.[1] Plaintiffs, however, ascribe these changes to the District's Creative Action Agenda, which plaintiffs assert has been carried out through the District's Creative Economy Strategy, the Creative Plan DC (2016),[2] the District's Five Year Consolidated Plan (the Consolidated Plan),[3] and New Communities Initiative—allegedly leading to housing segregation in the District. Am. Compl. [25] ¶¶ 21, 26-38, 64-68.

A. The District's Creative Action Agenda

The "District is in a risky economic situation similar to so many industrialized cities" because its "economy [has been historically] based heavily on a single economic driver, the federal government, making the city reliant on the budgeting of an increasingly divided Congress." Pls.' Ex. E at 0152 [4-3 at 53]. To counteract this dependency, the District launched a Creative Economy Initiative "aimed at leveraging the city's creative assets to create new jobs and attract new residents

[1] *See, e.g.*, Pls.' Ex. E at 0190 [4-4 at 15] ("market forces dictate the price of real estate"); Bell Clement, *The White Community's Dissent from "Bolling,"* WASHINGTON HIST. SOC. (Fall/Winter, 2004/2005), *available at* http://www.jstor.org/stable/40073399 (last accessed June 22, 2018); *The Old Southwest – Historic Resource Documentation and Preservation Plan* at 26, UNIV. OF MD HISTORIC PRESERVATION STUDIO (Fall 2005), *available at* https://www.swdc.org/wp-content/uploads/2015/08/University-of-Maryland-Old-SW-Report.pdf (last accessed June 22, 2018).

[2] Plaintiffs do not define "Creative Plan DC (2016)" and it is unclear to what it refers.

[3] The full version of the *Five Year Consolidated Plan for October 1, 2016 to September 31, 2021* is available at: https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/FY16%20-%20FY20%20Consolidated%20Plan%20for%20the%20District%20of%20Columbia.pdf (last accessed June 21, 2018).

and innovative companies to the District." Pls.' Ex. C at 0104 [4-3 at 6]; Creative Economy Strategy for the District of Columbia at 10 (Pls.' Ex. E at 0152 [4-3 at 53]). The Office of the Deputy Mayor for Planning and Economic Development (DMPED) explained that it intended to launch a Creative Action Agenda (Action Agenda)[4] to "lay out an action plan for strengthening the District's creative economy, expanding employment and business development opportunities and enhancing neighborhoods." Pls.' Ex. C at 0104 [4-3 at 6]; *see also* Am. Compl. ¶¶ 26, 29 and n.8.

The Action Agenda, released in 2010, contextualized the District's Creative Economy Strategy. *See id*. ¶ 32. It explained that "[t]he city's 'creative sector'—a phrase referring to enterprises in and for which creative content drives both economic and cultural value, including businesses, individuals, [and] organizations engaged in every stage of the creative process—acts as a local economic driver creating a significant number of jobs, income, and revenues for the city and its residents." Pls.' Ex. E at 419-98, 425 (Creative Action Agenda at 7) [5-1 at 37]. The Action Agenda provided a blueprint for, among other things: (1) "revitalization of underserved neighborhoods through arts and creative uses that generate new business creation, employment for residents, and income for communities"; and (2) "generation of new work opportunities for youth, entrepreneurs in the creative economy, and the underemployed …." *Id.* at 7-8 [37-38].

In 2014, the District issued the Creative Economy Strategy that "established an analytical framework that guided the strategic-planning process." Pls.' Ex. E at 0156 [4-3 at 57]; Am. Compl. ¶ 35. It built on the District's Five-Year Economic Development Strategy, released in December 2012, "by laying out a clear roadmap for sustained growth that leverages the District's creative

[4] Plaintiffs sometimes refer to the Action Agenda as the "Creative Class Agenda." *See*, *e.g.*, Am. Compl. ¶ 28.

industries." Pls.' Ex. E at 0156 [4-3 at 57]. The Creative Economy Strategy also reported that the last decade had seen a 12 percent increase in the District's private sector job growth. *Id.* at 0146 [47]. During the same period, wages increased 37 percent. *Id.* This led to "[s]truggling neighborhoods … becom[ing] centers of economic opportunity[,]" and "[t]he unemployed … finding purposeful work[.]" *Id.* at 0151 [52]. The unemployment rate in the District has fallen "from 11.3 percent in September 2011 to 7.5 percent in April 2014" to 5.9 percent in June 2018. *Id.*; *Unemployment in the Washington Area by County – June 2018*, BUREAU OF LABOR STATISTICS (August 14, 2018), *available at* https://www.bls.gov/regions/mid-atlantic/news-release/pdf/unemployment_washingtondc.pdf (last accessed Aug. 20, 2018).

B. The Consolidated Plan

The Department of Housing and Urban Development (HUD) requires each recipient jurisdiction to submit a consolidated plan showing its objectives and proposed means to provide housing, health, social services, employment, or education for its residents. 24 C.F.R. § 91.200. The District's Consolidated Plan's approach to housing includes the creation of "affordable housing that integrates neighborhoods racially, ethnically, and economically and [to] diversif[y] the District's affordable housing supply to include higher opportunity neighborhoods and Wards." Am. Compl. ¶ 58; District Ex. A, Excerpts of *Five Year Consolidated Plan for October 1, 2016 to September 31, 2021* at 138, DMPED (July 31, 2015). The District recognized that the "availability of housing does not currently meet the needs of the District's population" and "is committed to preserving affordable housing across the District." *Id.* at 81 (Market Analysis), 138. "The most significant barriers" to affordable housing, according to an independent review, include the "costs

to develop" new housing, but it described multiple District programs aimed at addressing those barriers. *Id.* at 185-92.[5]

C. The New Communities Initiative

The District's plans for enhancing neighborhoods include its New Communities Initiative, "a District program aimed at transforming select public and low-income housing developments into mixed-income, mixed-use communities[,]" *Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1219 n.6 (D.C. 2018), with four guiding principles:

- **One for One Replacement** to ensure that there is no net loss of affordable housing units in the neighborhood.
- **The Opportunity for Residents to Return/Stay in the Community** to ensure that current residents will have a priority for new replacement units in an effort to remain in their neighborhood.
- **Mixed-Income Housing** to end the concentration of low-income housing and poverty.
- **Build First**, which calls for the development of new housing to begin prior to the demolition of existing distressed housing to minimize displacement.

About the New Communities Initiative, available at http://dcnewcommunities.org/about-nci/ (lasted assessed Aug. 27, 2018). It is designed to improve the quality of life for families and individuals living in four neighborhoods in Washington, D.C.: Northwest One (Ward 6), Barry Farm (Ward 8), Lincoln Heights/Richardson Dwellings (Ward 7), and Park Morton (Ward 1). *Id.*; Am. Compl. ¶ 65. "The New Communities Initiative will also provide the human services

[5] Plaintiffs mischaracterize the Federal Government's conclusions about these efforts. Am. Compl. ¶¶ 56-57. The letter they cite noted concerns that *documents*, not the District, had not explicitly addressed certain impediments identified in a prior administration's plan, although conceding that addressing them was not required. District Ex. E at 1, 6. (The Complaint cites to this letter as "App.Ex.E.p0412," Compl. [2] at 142-43, but plaintiffs' exhibits skip from page 0410 to 0419. *See* ECF No. 5-1 at 29-31.) HUD "recommend[ed] the District amend its Consolidated Plan and [Annual Action Plan]" "to provide assurances it will" act as indicated in those documents and states "the increasing integration is welcome," although it warns of a *potential* for "becoming re-segregated," which the District is fighting. *Compare id. with*, *e.g.*, Am. Compl. ¶ 227.

necessary to help prepare residents [to] take advantage of the new economic opportunities that are coming their way." *Park Morton - New Communities Initiative (NCI)*, DMPED, available at https://dmped.dc.gov/page/park-morton-new-communities-initiative-nci (last accessed Aug. 27, 2018). The independent review plaintiffs cite noted "success in many areas - notably in housing, capital investment and human capital" including the construction of hundreds of new housing units, the majority subsidized to increase affordability, with "80% of the replacement units hav[ing] been filled by returning residents." *Policy Advisor's Recommendations On The District Of Columbia's New Communities Initiative* (Quadel Report), QUADEL CONSULTING AND TRAINING LLC (Aug. 2014) at 28-31, available at http://dcnewcommunities.org/wp-content/uploads/2014/09/Policy-Advisors-Recommendations-on-the-NCI-Program.pdf (last accessed Aug. 23, 2018); *see also id.* at 6 ("however, a recent survey of Barry Farm residents suggested that a number of residents may wish to relocate to other neighborhoods, at least temporarily."); *compare* Am. Compl. ¶ 336.

II. Plaintiffs' Allegations

On April 14, 2018, plaintiffs filed suit against numerous District agencies, former and current District officials, and the D.C. Housing Authority (DCHA), alleging the District's policies: (1) violated the First and Fifth Amendments, including due process and equal protection claims; constituted age and source of income discrimination in violation of Title VI and the DCHRA; (2) would have a disparate impact in violation of the FHA and the DCHRA; (3) were motivated by racial animus; and (4) were part of a conspiracy. *See generally* Compl. [2]. The District Defendants and DCHA each moved to dismiss and, in response, plaintiffs sought leave to amend the Complaint. On July 5, 2018, the Court granted plaintiffs leave to amend their complaint.

The Amended Complaint, brought against only the District and DCHA, alleges violations of: (1) plaintiffs' Fifth Amendment procedural due process rights (Counts One-Five) and right to

equal protection under the law (Count Six); (2) the DCHRA (Counts Seven-Twelve); (3) the FHA (Counts Thirteen-Fourteen); (4) plaintiffs' Fifth Amendment right to substantive due process (Count Fifteen); and (5) Section 1983 (Count Sixteen). Am. Compl. ¶¶ 195-407.

STANDARDS OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), "[a] court must dismiss a case when it lacks subject matter jurisdiction." *Mykonos v. United States*, 59 F. Supp. 3d 100, 103 (D.D.C. 2014) (quoting *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 4 (D.D.C. 2007)). In resolving a motion to dismiss for lack of subject matter jurisdiction, "the factual allegations must be presumed true, and plaintiffs must be given every favorable inference that can be drawn from them." *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "The court need not, however, accept as true 'a legal conclusion couched as a factual allegation' or make inferences that are unsupported by the facts set out in the complaint." *Id.* (quoting *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006)) (other citation omitted). "[I]n deciding a 12(b)(1) motion, a court need not limit itself to the complaint; rather, it 'may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction in the case.'" *Toth v. Wells Fargo Bank, N.A.*, 82 F. Supp. 3d 373, 376 (D.D.C. 2015) (citations omitted).

II. Federal Rule of Civil Procedure 12(b)(6)

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 [a] reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "While legal conclusions can provide the framework of

a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). The Court "may consider … the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice," including administrative proceedings and court filings that are a matter of public record. *Equal Emp't Opportunity Council v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Laughlin v. Holder*, 923 F. Supp. 2d 204, 209 (D.D.C. 2013).

ARGUMENT

I. Plaintiffs' Claims are Non-Justiciable.

Plaintiffs' claims are non-justiciable because they lack standing to bring this lawsuit and the issues fall under the political question doctrine. "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (citing Art. III, § 2). Those words "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). They also "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Id*. at 95. "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." *Id*. *Accord Hollingsworth*, 570 U.S. at 704. Claims are not justiciable where plaintiffs lack standing to sue and seek adjudication of a political question. *Flast*, 392 U.S. at 95.

A. Plaintiffs Lack Standing to Sue.

To establish standing, the party invoking federal jurisdiction bears the burden of demonstrating three "irreducible constitutional minimum" requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hollingsworth*, 570 U.S. at 704. A plaintiff must have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent" and it must be "fairly … traceable to the challenged action of the defendant" and "likely … the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. These basic requirements—injury-in-fact, causation, and redressability—must be proven separately as to each request for relief. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought"); *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996) ("standing is not dispensed in gross").

In *Warth v. Seldin*, 422 U.S. 490 (1975), the plaintiffs alleged a town's zoning ordinance "effectively excluded persons of low and moderate income from living in the town, in contravention of [the plaintiffs' constitutional] rights …." *Id.* at 493. The Supreme Court held the 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*. *Id.* at 502-508. That the plaintiffs "share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights." *Id.* at 502. *Accord Galveston Open Gov't Project v. United States HUD*, 17 F. Supp. 3d 599, 604, 613 (S.D. Tex. 2014) (individual and organizational plaintiffs alleging discrimination in state and local governments' development of public housing insufficiently "actual or imminent" to convey standing).

Here, even if plaintiffs were prevented from opposing proposed planned unit developments (PUD) or other zoning changes before the D.C. Zoning Commission, *see*, *e.g.*, Am. Compl. ¶¶ 74, 84, 93—they were not, as discussed in Section III.B below—the Supreme Court has held that denial of the "ability to file comments" is not a sufficient injury to satisfy Article III standing requirements. *Id.* ¶ 74; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-973 (2009) (citing *Lujan*, 504 U.S. at 572 n.7). Thus, as explained below, plaintiffs have not alleged any "actual or imminent" injury caused by the District.

1. Plaintiffs Do Not Allege an Injury-in-Fact.

a. The Organizational Plaintiffs

Plaintiffs allege Near Buzzard Point Resilient Action Committee (NeRAC) and Current Area Residents East of the River (CARE) are organizations with standing. Am. Compl. ¶¶ 5-6. A member organization can seek standing on behalf of its members or for itself. To sue for its members, an organization must show, among other things: (1) it has a member with standing; (2) that member's interests "are germane to [the association's] purpose"; and "(3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (quotation omitted). Organizational standing, when the organization seeks to assert its own rights, "requires it, 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. United States Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quotation and citation omitted).

"To allege an injury to its interest, an organization must allege … defendants' conduct causes an inhibition of the organization's daily operations." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quotations and citation omitted). An organization's "use of

resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient …." *Id*. (citation omitted). Instead, there must be a "direct conflict between the defendant's conduct and the organization's *mission* …." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (emphasis in original). "If the challenged conduct affects an organization's activities, but is neutral with respect to its substantive mission, … it [is] entirely speculative whether the challenged conduct will actually impair the organization's activities." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (quotations and citation omitted).

Plaintiffs do not appear to allege associational standing, although several individual plaintiffs are members of the organizations. *See* Am. Compl. ¶¶ 122, 127, 132, 148. In describing the organizational plaintiffs, plaintiffs make no reference to a member's standing, interest, or need to participate. Rather, they allege each organization "has expended its resources in response to, and to counteract, the negative effects of defendants' actions" and of each organizational plaintiff "advanc[ing] its interest[s]" and those "interests having been thwarted." *Id.* ¶¶ 114-16, 120-21. This is insufficient to establish organizational standing for CARE or NeRAC.

Neither organization is "the object of [the challenged] government action or inaction"; the allegedly improper conduct is not about—and has not constrained—advocacy, organizing, or testifying. *Summers*, 555 U.S. at 493; Am. Compl. ¶¶ 112, 114, 117, 119. The alleged injuries do "not require or forbid any action of Plaintiffs …." *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 186 (D.D.C. 2015) (citation omitted), *aff'd* 808 F.3d 905 (D.C. Cir. 2015). Plaintiffs assert no interruption in the services the organizations are allegedly providing. Am. Compl. ¶¶ 116, 121. And "an organization's abstract interest in a problem is insufficient to establish standing, 'no matter how longstanding the interest and no matter how qualified the organization is in evaluating

the problem.'" *Feld*, 659 F.3d at 24 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); *compare* Am. Compl. ¶¶ 115, 121. "[T]he fact that" the organizational plaintiffs may have "had to redirect some of [their] resources from one legislative agenda to another is insufficient to give [them] standing. [They] cannot convert an ordinary program cost—advocating for and educating about [their] interests—into an injury in fact." *Elec. Privacy Info. Ctr. v. United States Dep't of Educ.*, 968 F. Supp. 2d 243, 266 (D.D.C. 2013) (citation omitted). "[T]he resources [they] expended on advocacy and education … were expended by choice because such activities are at the core of [their] mission[s]." *Id.* at 267. *Accord Int'l Acad. of Oral Med. & Toxicology v. United States FDA*, 195 F. Supp. 3d 243, 262 (D.D.C. 2016) ("expending resources to challenge a regulation constitutes self-inflicted harm that does not constitute injury in fact") (quotation omitted, alteration adopted) (quoting *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 469 F.3d 129, 133-34 (D.C. Cir. 2006)). Thus, plaintiffs have not alleged an injury-in-fact to either NeRAC or CARE.

b. The Individual Plaintiffs

None of the individual plaintiffs have alleged that they were personally discriminated against in attempting to secure housing or that they were actually injured in any other way. *See* Am. Compl. ¶¶ 112-70.

Plaintiff Matthews discusses her "desires to continue living" in Barry Farm "during redevelopment." Am. Compl. ¶ 123. Mr. Mpulubusi El, an artist and member of the Creative Class, once lived in Barry Farm but no longer does. *Id.* ¶¶ 127-28. He complains of "the breakdown of a vibrant community culture … undermining his social network and quality of life." *Id.* ¶¶ 129, 131. Ms. Hamilton left Barry Farm and now lives elsewhere. *Id.* ¶ 133. All three complain of "a loss of neighbors and friends … undermining [their] social network and quality of life." *Id.* ¶¶ 126, 129, 137.

Plaintiffs McClain, Carroll and Hamilton complain that their neighborhood has been undergoing "redevelopment construction since 2015," resulting in exhaust fumes and "dust," making it unpleasant to be outside. *Id.* ¶¶ 140-41, 146-47, 150. Ms. McClain adds that construction workers have wrongly interfered with her utilities. *Id.* ¶¶ 141-142. Ms. Hamilton alleges that the existence of "high-density luxury buildings" will somehow "require them to move out of their neighborhood or imminently undermine their social networks." *Id.* ¶ 152. Each of the three also complains of the "loss of social network" as her neighbors move. *Id.* ¶¶ 143, 147, 151.

Ms. Fuller alleges that she has expended time opposing development in her community as part of her job as an ANC Commissioner and that her failure to prevent it has brought on "humiliation and stress." *Id.* ¶¶ 156-57. Ms. Ball complains of "the changing character of her neighborhood," including construction, new residents, and new businesses, as well as the "break-up of her social network." *Id.* ¶ 161. The Wells plaintiffs complain of the shortage of "affordable multi-bedroom rental units available for low-income African-Americans in racially integrated neighborhoods." *Id.* ¶¶ 165, 170.

These allegations do not constitute an injury-in-fact under *Lujan*. 504 U.S. at 560-61. Plaintiffs have not asserted any specific liberty or property interest of which they are allegedly being deprived. They largely complain they cannot live in the neighborhood of their choice, a right not guaranteed by the Constitution. *See Galveston Open Gov't Project*, 17 F. Supp. 3d at 605, above at 14. "In effect, the plaintiffs … don't want the[ir neighborhood] area 'ruined' by the construction of [new developments]. Such a concern is understandable, and is not limited to home and land owners in the posture of these plaintiffs. However, such concern is not legally cognizable." *Ely v. Velde*, 321 F. Supp. 1088, 1095 (E.D. Va. 1971), *partly rev'd on other grounds* 451 F.2d 1130 (4th Cir. 1971). Plaintiffs' reliance on the fact they live or have lived near some

development projects, proposed or ongoing—*see*, *e.g.*, Am. Compl. ¶¶ 93, 161, 214—is also misguided. "[G]eographic proximity does not, in and of itself, confer standing on any entity under … any … statute. … [G]eographic proximity might be necessary to show [a sufficient injury-in-fact], but it is not sufficient." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002).

The individual plaintiffs essentially contend that the development policies result in high density development that might, some day, force them to leave their neighborhoods. But the "constitutional and statutory claims [plaintiffs] assert provide a right to be free of discrimination, not a right to have public housing in the neighborhood of their choice." *Galveston Open Gov't Project*, 17 F. Supp. 3d at 605 (citing *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1103 (6th Cir. 1985)). *Accord Strykers Bay Neighborhood Council, Inc. v. New York*, 695 F. Supp. 1531, 1541 (S.D.N.Y. 1988) ("[T]he Constitution does not guarantee access to dwellings of a particular quality, nor does it require a local government to approve public housing in a particular location.") (citations omitted); *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988, 995 (D. Mass. 1981) (same).

2. Plaintiffs Have Not Established Traceability or Redressability.

Plaintiffs' claims of environmental problems—for example, that a "uniform policy to transform industrially zoned neighborhoods" into residential ones "leads to reduced air quality," Am. Compl. ¶ 178—cannot establish standing. The District may have authorized construction but is not alleged to have authorized or directly caused any disturbance. To the extent plaintiffs have complaints about environmental or nuisance issues related to construction in their neighborhoods, they have brought them to the wrong forum, with the wrong defendants, and under the wrong claims. Any construction company failing to adhere to the District's requirements that it protect "the adjoining public and private property … from damage during construction" may be reported

to the Regulatory Enforcement Administration of the Department of Consumer and Regulatory Affairs. *See* 12-A D.C.M.R. § 3307.1.[6]

Plaintiffs also have not established any link between their concerns about increasing housing costs and the District's alleged actions. The Wells plaintiffs' claim, for example, is effectively that there is insufficient low-income housing in the District, which is not a cognizable claim. *See Sierotowicz v. N.Y.C. Hous. Auth.*, No. 04-CV-3148 (NGG) (LB), 2008 U.S. Dist. LEXIS 109493, at *44 (E.D.N.Y. Sept. 18, 2008) ("Although the Court is aware that low-income housing is scarce, there is simply no federal or constitutional right to housing."). Plaintiffs' difficulties might be "the consequence of the economics of the area housing market, rather than of [the District's] assertedly illegal acts." *Warth,* 422 U.S. at 506. In that case, the District's alleged actions would not have caused the injury and ordering them to stop would not redress it. The connections plaintiffs assert between various District decisions and housing costs are too speculative to establish standing.

As discussed above, the District has adopted multiple strategies aimed at increasing the supply and reducing the cost of housing, including funding affordable housing through development projects like those of which plaintiffs complain. To the extent plaintiffs contend the creation of additional housing supply makes it harder for them to secure housing, they ask the Court to reject the "rational economic assumptions," "routinely credited by courts in a variety of contexts," that "by increasing the volume of available housing in a defined market, both consumer demand and prices were likely to fall." *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993) (citing

[6] *Compare Zeppelin v. FHA*, 305 F. Supp. 3d 1189, 1199 (D. Colo. 2018) ("Congress can loosen the strictures of the redressability prong by granting a procedural right, such as the right to ensure that a government agency acts in an environmentally well-informed manner.") (quotation omitted). Plaintiffs have made no claims under a statute granting such a right.

cases) (cited with approval *Osborn v. Visa Inc.*, 797 F.3d 1057 (D.C. Cir. 2015)). *See also 2910 Ga. Ave. LLC v. District of Columbia*, 234 F. Supp. 3d 281, 287 (D.D.C. 2017) (upholding the District's Inclusionary Zoning Program that requires "8-10 percent of the gross floor area of new residential developments (or substantial additions to existing developments) [be set aside for] eligible low- and moderate-income households"). The Court should decline the invitation to prevent the creation of additional housing, particularly projects that include significant affordable housing, in a city lacking in housing supply.

The relative success of the District's efforts to make housing more affordable, and the costs, are a matter best left to the political process, not the courts. *FEC v. Akins*, 524 U.S. 11, 23 (1998) ("[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.").

B. Plaintiffs' Claims Raise Political Questions Not Fit for Judicial Resolution.

Counts Six through Sixteen explicitly challenge policy frameworks like the "Creative Class Agenda" and "Creative Economy Strategy," but these documents are not subject to judicial review under the political question doctrine. *See*, *e.g.*, Am. Compl. ¶¶ 261, 267, 271, 295. Counts One through Five, while ostensibly targeting specific actions of the D.C. Zoning Commission, also target policies. *See*, *e.g.*, Am. Compl. ¶¶ 200, 229, 237(a). To the extent each claim asks the Court to overturn the District's development policies, particularly the policies that allegedly permit high-density housing developments with smaller units, s*ee*, *e.g.*, Am. Compl. ¶ 1, 23, 326, the claims are barred by the political question doctrine.

The Supreme Court described the "contours" of the doctrine in *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). Among other things, the Court explained that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to coordinate political department; or a lack of judicially discoverable

and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion …." *Id*. at 217.

1. Congress Explicitly Empowered the Political Branches of the District to Formulate the District's Housing Policy.

Under the District Clause of the Constitution, Congress possesses plenary authority over the District, including the power to delegate that authority. Art. I, sec. 8, cl. 17; *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953). Congress created the D.C. Zoning Commission in 1920 and gave it the authority and power "to protect the public health, secure the public safety, and to protect property in the District of Columbia." Zoning Act of 1920, Pub. L. 75-153, 41 Stat. 500. In 1973, Congress declared "[t]he Mayor [to] be the central planning agency for the District" and delegated legislative authority to the D.C. City Council. District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act), Pub. L. 93-198, Dec. 24, 1973, 87 Stat. 774 (now codified at D.C. Code §§ 1-204.23 and 204.04, respectively, of the D.C. Charter). "[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Warth*, 422 U.S. at 508 n.18.

Plaintiffs base their challenges on documents like the "'Creative Action Agenda' [adopted] in a series of statements, planning summits, and formal planning documents" "including the Creative Economy Strategy (2014) and the Creative Plan DC (2016)," and "the Comprehensive plan" [*sic*]. *See, e.g.*, Am. Compl. ¶¶ 26, 35, 75. But these documents are "broad framework[s] intended to guide the future land use planning decisions for the District." *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 161 (D.D.C. 2014) (quoting *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustments,* 550 A.2d 331, 336-37 (D.C. 1988)), *aff'd sub nom Kingman Park Civic Ass'n v. Bowser* (*Kingman Park II*) 815 F.3d 36, 42 (D.C. Cir. 2016).

They are "not self-executing" and "are not binding policy directives" subject to judicial review. *Id.* Although plaintiffs may challenge specific District actions they contend promote these frameworks—assuming they have standing—the Court should dismiss any challenge that is only to the frameworks.

2. This Case Lacks a Manageable Standard for Resolution Without the Kind of Initial Policy Determination Properly Left to the Political Branches of Government.

In addition, absent a policy determination about how to choose among housing development strategies, there is no way to determine whether plaintiffs are correct that the District has failed to satisfy its obligations. "[A]n initial policy determination of [this] kind [is] clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

Plaintiffs' claims are unusual, and few direct precedents exist. There are many parallels available, however, in the long history of Takings Clause jurisprudence in which individuals with unquestioned rights—because they owned land the government would seize by eminent domain—have challenged projects to improve their neighborhood or city. The precedents of such cases are clear and explain why plaintiffs' efforts to involve the Court in their grievances are misguided. The federal courts "do not sit to determine whether a particular housing project is or is not desirable." *Berman v. Parker*, 348 U.S. 26, 33 (1954). "The … adoption of an urban renewal plan is a legislative act which must be upheld if there is any public purpose underlying it …." *Oberndorf v. Denver*, 900 F.2d 1434, 1441 (10th Cir. 1990) (citing *Berman*, 348 U.S. at 33) (*separate portion abrogated by City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 382 (1991)) (discussing cases); *accord 2910 Ga. Ave. LLC v. District of Columbia*, 234 F. Supp. 3d 281, 300-01 (D.D.C. 2017) (because Inclusionary Zoning is "'a general regulation with a legitimate public purpose' … other than perhaps in extreme circumstances not present here" the Court defers to the political branches) (quoting *Dist. Intown Props. Ltd. Pshp. v. District of Columbia*, 198 F.3d 874, 883 (D.C.

Cir. 1999)). Plaintiffs may not like the public purpose, but that is a political determination rather than a judicial matter for the Court to resolve.

A court is not well positioned to weigh the competing "mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)" that go into setting housing policy. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015). "These factors contribute to a community's quality of life and are legitimate concerns for housing authorities." *Id.* "[W]hile a legislature may juggle many policy considerations in deciding whether to condemn private property, the task of a federal court reviewing the constitutionality of such a taking should be one of patrolling the borders of this decision, viewed objectively, not second-guessing every detail in search of some illicit improper motivation." *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (affirming dismissal of challenge to taking) (quotation omitted). "Judges are expected to be wise in their judicial dispensations and learned in the law, but it must be conceded that they are not hydrographers, reclamation engineers, meteorologists, or informed in the art of geodetics." *United States v. 2606.84 Acres of Land*, 432 F.2d 1286, 1291 (5th Cir. 1970), *cert. denied*, 402 U.S. 916 (1971). Judges also are not expected to be civil engineers, architects, or urban planners.

There is, for example, no statute declaring the proper ratio of studio and one-bedroom units to two- or three-bedroom units in a city, neighborhood, or development. *See* Am. Compl. ¶¶ 24, 93, 110, 165; *see also* Quadel Report, above at 6, at 6 (discussing stakeholder confusion); *Barry Farm Tenants & Allies Ass'n v. D.C. Hous. Auth.*, 2018 U.S. Dist. LEXIS 71559, *6-9 (discussing complexities of deciding "unit mix"). The Court cannot look to any law or regulation to decide whether increased density in one place will pay for greater services somewhere else, nor whether such a trade is appropriate. *See*, *e.g.*, Am. Compl. ¶¶ 68, 152; Pls.' Ex. E at 0155-56 [4-3 at 56-

57]. These are subjective questions of values and may require trade-offs based on uncertain conclusions. The elected branches of government exist to handle such issues. *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted).

Plaintiffs' complaints about the affordability of the housing units built across the city are equally unavailing. *See*, *e.g.*, Am. Compl. ¶¶ 123, 152, 162-71. As the Supreme Court held long ago in approving the District of Columbia Redevelopment Act of 1945, "the context of community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." *Berman*, 348 U.S. at 35. "Whether these units are sufficiently affordable may be an important political question, and if the citizens of [the District of Columbia] are unsatisfied with the answers, then elected officials and their political parties may pay the price at the polls." *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 287 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) (dismissing claim that taking of private property was for private rather than public use). Plaintiffs' political concerns are properly addressed in political fora, not in court.

II. Plaintiffs Have Not Established the District's Municipal Liability for their Constitutional or Federal Law Claims.

Plaintiffs bring nine claims against the District under the Constitution and federal law but have failed to establish that the District is liable. The first element of municipal liability is that "a suit under 42 U.S.C. § 1983 must state a claim for a predicate constitutional violation." *Robinson v. District of Columbia*, 686 F. App'x 1, 2 (D.C. Cir. 2017). After doing this, a plaintiff must show that injury was caused by: (1) express municipal policy; (2) actions of a final municipal

"policymaker"; (3) persistent conduct by non-policymakers (*i.e.*, "custom" with force of law); or (4) "deliberate indifference" to a risk of constitutional injury. *Baker v. District of Columbia*, 326 F.3d 1302, 1306-07 (D.C. Cir. 2003); *Blue v. District of Columbia*, 811 F.3d 14, 20 (D.C. Cir. 2015); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Under any theory, a plaintiff must allege an "affirmative link," such that the municipal policy "was the moving force behind the [violation]." *Baker*, 326 F.3d at 1306.

Plaintiffs have failed to satisfy any of these elements. As explained below, they have established no constitutional violation. They repeatedly concede the District's explicit policies are non-discriminatory. *See*, *e.g.*, Am. Compl. ¶¶ 53, 59, 271, 316. They point to no final policymaker or non-policymaker who has advocated for, or engaged in, discrimination. And they have not shown that the alleged policies, rather than other factors, have caused their alleged injuries.

III. Plaintiffs Fail to Allege a Due Process Violation (Counts One – Five)

A. Plaintiffs Have Not Alleged the Deprivation of a Liberty or Property Interest.

Plaintiffs assert five procedural due process claims against the District related to D.C. Zoning Commission hearings and decisions on PUD, chiefly related to such ancillary protocols as the Zoning Commission's denial of party status. Am. Compl. ¶¶ 195-220. To state a due process claim, a "plaintiff must show the Government deprived her of a 'liberty or property interest' to which she had a legitimate claim of entitlement, and that the procedures attendant upon that deprivation were constitutionally [in]sufficient." *Roberts v. United States*, 741 F.3d 152, 161 (D.C. Cir. 2014) (quotation omitted). "[P]roperty interests … are not created by the Constitution. Rather 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 understanding that secure certain benefits and that support claims of entitlement to those benefits." *Gen. Elec. v. Jackson*, 610 F.3d 110, 119 (D.C. Cir. 2010) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

Plaintiffs point to "no 'independent source such as state law,' … for [their] purported property interests." *Id.* Nor do plaintiffs identify a cognizable liberty interest. In fact, it is not entirely clear what interests plaintiffs allege they have lost. Although plaintiffs generally allege that the District's actions deprived them of "constitutionally or statutorily protected rights, including but not limited to their right to participate in proceedings that comply with D.C. law and their right to access and enjoy their housing[,]" Am. Compl. ¶¶ 197, 205, 217, 232,[7] such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678; *Haney v. Clinton Twp.*, Civil Action No. 11-1373, 2012 U.S. Dist. LEXIS 108203, at *23-25 (W.D. Penn. Aug. 2, 2012) (finding the plaintiff "failed to allege a property interest" because the plaintiff "asserts that his allegedly forced resignation violated the 'law,' but does not specify which law was violated.").

Counts One through Five essentially allege violations of state law. These claims are generally inaccurate—plaintiffs complain the Zoning Commission was required to await certain reports before acting, *see*, *e.g.*, Am. Compl. ¶¶ 82, 172-73, 204(c), 288, a misinterpretation of the Zoning Regulations[8]—but would be insufficient even if they were well-founded because "alleged errors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause." *Ramos v. Racette*, Civil Action No. 11-1412, 2012 U.S. Dist. LEXIS 889, at *36 (E.D.N.Y. Jan.

[7] *See also* Am. Compl. ¶ 243 ("District of Columbia residents have had their property, life, and liberty interests severely impacted").

[8] *Compare Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1038 (D.C. 2016) ("assessment … 'shall include reports in writing from all relevant District agencies and departments'" (quoting 11 DCMR §§ 2407.3, 2408.4, now codified as part of the Zoning Regulations of 1958 at 11-Y D.C.M.R § 2407.3) *with* the Zoning Regulations of 2016, 11-Z D.C.M.R. § 405.3 ("shall include *any* written reports *submitted* by all relevant public agencies") (emphasis added).

4, 2012) (quoting *DiGulielmo v. Smith*, 366 F.3d 130, 136 (2d Cir. 2004)); *see also Daniels v. Williams*, 372 U.S. 327, 332 (1986) ("We have previously rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"). "State courts remain 'the ultimate expositors of state law.'" *Ramos*, 2012 U.S. Dist. LEXIS 889, at *36 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

B. If Plaintiffs Had Been Deprived of Some Right, They Have Adequate Pre- and Post-Deprivation Remedies.

Even if plaintiffs had been deprived of some legally cognizable right, their Due Process Clause claims would still be deficient because plaintiffs have admitted that adequate remedies exist. "Due process may be satisfied by either pre-deprivation procedures or 'adequate post-deprivation remedies.'" *Black v. District of Columbia*, 134 F. Supp. 3d 255, 261 (D.D.C. 2015) (citing *Rason v. Nicholson*, 562 F. Supp. 2d 153, 155 (D.D.C. 2008) (quoting *Dickson v. Mattera*, 38 F. App'x 21, 22 (D.C. Cir. 2002) ("adequate post-deprivation remedies" include "judicial review of any adverse decision in D.C. Superior Court") (citing cases), *quoted in Cohen v. Bd. of Trs. of the Univ. of D.C.*, 2018 U.S. Dist. LEXIS 68789, *29 (D.C. Cir. Apr. 24, 2018).

To the extent a potential action by the Zoning Commission might deprive someone of an actual liberty or property interest, that person can appear before the Zoning Commission to oppose the action. In most of the Zoning Commission Orders plaintiffs cite, this was done. *Compare*, *e.g.*, Am. Compl. at 14 n.17 *with* Zoning Commission Cases 14-02, Exhibits 60-62; 16-13, Exhibit 24; 16-09, Exhibit 38; 15-24, Exhibit 27; and 16-02, Exhibits 73, 78, 84 (all exhibits in opposition available *via* https://app.dcoz.dc.gov/content/search/search.aspx).[9]

[9] The Court may consider these orders and other exhibits referenced in this memorandum in resolving the District's motion to dismiss because plaintiffs rely upon

The regulations governing requests for party status before the Zoning Commission establish a clear preference that the parties be limited to the applicant and the affected Advisory Neighborhood Commission (ANC), who are automatically granted party status. *See* 11-Z D.C.M.R. § 404.1. Any other individual or entity must request party status through codified Board of Zoning Adjustment procedures, which include a presumption of denial. *See id.* § 404.14, ("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.") (emphasis added). Such preferences are not unconstitutional. The Supreme Court has long recognized the importance of "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources" by ensuring the efficiency of government hearings. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). A zoning hearing, where the record may already be voluminous, is a particularly apt example of this importance. Further, party status is not required to participate. *See*, *e.g.*, District Ex. B (Zoning Commission Case 16-02, Exhibit 84, Email from plaintiff NeRAC) ("NeRAC is going to withdraw our party status at this time however, we still plan on testifying at the hearing as a group and with individuals.").

Moreover, there is an adequate post-deprivation remedy in the form of an appeal to the D.C. Court of Appeals. D.C. Code § 2-510. Plaintiffs have successfully used this process to challenge some of the same orders to which they cite here. *See*, *e.g.*, *BFTAA*, 182 A.3d 1214

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them in their Amended Complaint. See *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Alternatively, the Court may take judicial notice of the documents because they are public records. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004); Fed. R. Evid. 201.

(vacating and remanding Zoning Commission Order 14-02)[10]; *see also Current Area Residents EOTR, et al. v. D.C. Zoning Commission*, No. 18-AA-665 (D.C.) (challenging Zoning Commission Order 16-29)[10]; *Shanifinne Ball v. D.C. Zoning Commission*, No. 18-AA-0102 (D.C. 2018) (appeal of Zoning Commission Order 16-05); *Union Mkt. Neighbors v. DC Zoning Comm'n*, 176 A.3d 174 (D.C. 2017) (affirming Zoning Commission Order 15-22 and finding "ample public notice of the proceedings").[10] Because plaintiffs have such extensive pre- and post-deprivation remedies, they fail to state a due process violation.

IV. Plaintiffs' Equal Protection Claim (Count Six) Fails to Allege Intentional Discrimination.

Plaintiffs allege the District's "housing policies adopted in pursuit of the Creative Class Agenda … adversely affected African-Americans" in violation of the Equal Protection Clause of the Fifth Amendment and "that cannot be explained but for animus … against black residents." Am. Compl. ¶¶ 260-64. Such an Equal Protection Clause claim "require[s] a showing of *intentional* discrimination." *Smith v. Henderson*, 54 F. Supp. 3d 58, 68 (D.D.C. 2014) (*Smith III*) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)) (emphasis in original) (D.C. Cir. Aug. 19, 2015); *see also BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 34 (D.D.C. 2015) (dismissing Equal Protection and Title VI claims because lack of allegations "supporting its assertion of discriminatory intent ... makes the claim of discriminatory treatment less than plausible"). A plaintiff can prove intentional discrimination: (1) by "proffer[ing] a law or policy that explicitly classifies citizens on the basis of race"; (2) "claim[ing] that a facially neutral law or policy has been applied differently on the basis of race"; or (3) "show[ing] that a facially neutral law or policy that is applied evenhandedly is, in fact,

[10] Plaintiffs' counsel represented the petitioner before the D.C. Court of Appeals.

motivated by discriminatory intent and has a racially discriminatory impact." *Smith v. Henderson*, 982 F. Supp. 2d 32, 49-50 (D.D.C. 2013) (*Smith II*) (citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)), *appeal den.* No. 14-7120, 2015 U.S. App. LEXIS 16134.

Claim Six does not satisfy these requirements. Plaintiffs do not allege any law or policy explicitly classifies beneficiaries based on race. *See Smith II*, 982 F. Supp. at 50; *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 133 (3d Cir. 2002) ("land use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'") (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)).

Further, the Court "need not accept as true" plaintiffs' bald assertion that the District's policies or alleged unlawful practices are the result of "animus … against black residents" because the factual allegation "contradict[s] exhibits to the complaint." Am. Compl. ¶ 263; *BEG Invs., LLC*, 34 F. Supp. 3d at 85 (quoting *Iqbal*, 556 U.S. at 678); *United States ex rel. Tudbury v. Pacific Architects & Engineers, Inc.*, 270 F. Supp. 3d 146, 157 (D.D.C. 2017). The New Communities Initiative plaintiffs attack aims to create "vibrant mixed-income neighborhoods that address both the physical architecture and human capital needs, where residents have quality affordable housing options, economic opportunities and access to appropriate human services." *About the New Communities Initiative*, available at http://dcnewcommunities.org/about-nci/ (lasted assessed Aug. 27, 2018); *see also* Background Section I.B above; Am. Compl. ¶¶ 65-67. In other words, the policies plaintiffs attack demonstrate the District's clear commitment to preserving affordable housing across the District and for all residents.

Plaintiffs also fail to establish an equal protection claim because they have not "demonstrate[d] that [they were] treated differently than similarly situated individuals" or that, if

they were the District's "explanation does not satisfy the relevant level of scrutiny." *Settles v. United States Parole Comm'n*, 429 F.3d 1098, 1102 (D.C. Cir. 2005). Because "'the District as a whole is [almost half] African American' [equal protection] 'cannot be violated simply by the District'"[11] authorizing development plaintiffs disapprove in a "predominately African American [neighborhood] while not choosing to build a similar facility in a different part of the city' because otherwise 'virtually any decision by the District to build a facility of any kind in one quadrant, ward, or neighborhood could be challenged as discriminatory ….'" *Kingman Park I*, 27 F. Supp. 3d at 167 (quoting the District's brief); *accord Kingman Park II*, 815 F.3d at 42 ("The affected area is indeed predominantly African American. But so are many parts of the District.").

The challenged programs are explicitly designed to improve the lives of all District residents. "Social and economic legislation … carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). Furthermore, "[w]ell-settled case law instructs courts to presume that government officials will conduct themselves properly. … '[G]overnment officials are presumed to act in good faith [so a] plaintiff must present "well-nigh irrefragable proof" of bad faith or bias on the part of government officials in order to overcome this presumption.'" *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (quoting *China Trade Center, L.L.C. v. Washington Metro. Area Transit Auth.*, 34 F. Supp. 2d 67, 70-71 (D.D.C. 1999), *aff'd* Case No. 99-7029, 1999 U.S. App. LEXIS 19433 (D.C. Cir. 1999) (*per curiam*)). Plaintiffs have offered no such proof.

[11] *See* District Ex. F (2016 American Community Survey) at 12 of 13 (48.3 percent of Washingtonians described themselves as Black or African American; an additional 0.9 percent described themselves as Black or African American and another race).

V. Plaintiffs Fail to State a Violation of the FHA (Counts Thirteen and Fourteen).

Plaintiffs assert their claims for disparate treatment (Count Thirteen) and perpetuation of racial segregation (Count Fourteen) under Section 804(a) and (b) of the FHA, 42 U.S.C. § 3604(a) and (b). Am. Compl. ¶¶ 357-86. Section 804(a) makes it unlawful to "make unavailable or deny … a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Section 804(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b).

A. Plaintiffs' Disparate Treatment Claim (Count Thirteen).

1. Plaintiffs Have Not Alleged Intentional Discrimination.

A disparate treatment claim based on race requires a showing of discriminatory intent. *Inclusive Cmtys. Project*, *Inc.*, 135 S. Ct. at 2513; *Boykin v. Fenty (Boykin II)*, 650 Fed. Appx. 42, 44 (D.C. Cir. 2016). As explained in the discussion of plaintiffs' equal protection claim, *see* Section IV above, plaintiffs have failed to plausibly allege that the District acted with discriminatory intent in creating the Creative Action Agenda. Plaintiffs therefore cannot establish an FHA violation on a disparate treatment theory.

2. The District is Not Responsible for the Conditions of Public Housing.

Plaintiffs' allegations about the maintenance of Barry Farm cannot be brought against the District. *See* D.C. Code § 6-202(b) (D.C. Housing "Authority shall govern public housing and … shall be responsible for providing decent, safe, and sanitary dwellings, and related facilities, for persons and families of low-and moderate-income in the District."). The District could not have discriminated against plaintiffs.

B. Plaintiffs' Disparate Impact Theory of Liability (Count Fourteen)

Plaintiffs' perpetuation of racial segregation claim—essentially that the District's housing policies have a disparate impact on "longtime African-American residents in historic Anacostia neighborhoods," Am. Compl. ¶ 368—is similarly without merit. "[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2513. To allege such a claim, "a plaintiff must allege that a facially neutral practice or policy has a disproportionate impact on [a protected group]." *See Boykin II*, 650 Fed. Appx. at 44 (addressing an FHA claim). This is a "robust causality requirement" intended to "protect[ ] defendants from being held liable for racial disparities they did not create." *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523.[12] And "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a *prima facie* case of disparate impact." *Id.* Further, a plaintiff must plausibly allege that the challenged government policies create "artificial, arbitrary, and [create] unnecessary barriers" to housing. *Id.* at 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Plaintiffs fail to satisfy any of these requirements.

1. Plaintiffs Have Not Plausibly Alleged a Disproportionate Impact.

Although the D.C. Circuit has not opined on the matter, other circuits "hold that there are 'two types of discriminatory effects which a facially neutral housing decision can have.'" *Boykin I*, 895 F. Supp. 2d at 213 (quoting *Graoch Associates # 33, L.P. v. Louisville/Jefferson County*

[12] This Court's opinion in *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 76-77 (D.D.C. 2008), may have suggested a more limited pleading requirement under Section 804 and 805 of the FHA. That opinion does not appear to apply here, as plaintiffs challenge broad government action, rather than the specific mortgage policies questioned there.

Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007)). First, a neutral housing decision can have "'a greater adverse impact on one [protected] group than on another.'" *Id*. Second, a neutral housing decision can "perpetuate[] segregation and thereby prevent[] interracial association …." *Id*. (other citations omitted).

Plaintiffs offer no factual support for their assertion that the District's development policies disproportionately affect access to housing for residents who are African-American. *See Boykin II*, 650 Fed. Appx at 44 (affirming dismissal for failure to state a claim of a disparate impact claim based on disability where allegations do not show challenged action "had a disparate impact on persons with disabilities' access to housing as opposed to persons without disabilities' access to housing"). To the contrary, plaintiffs' allegations show generally positive effects of the District's policies. They point, for example, to the high-density development in Navy Yard as evidence of an adverse impact on African-Americans caused by the District's development policies but acknowledge "the population of black residents in Navy Yard has grown." Am. Compl. ¶¶ 376-77. Plaintiffs also allege, without support, that "[s]tudies show there is a strong correlation between a city having a significant black population, large Creative Class population, and segregation." *Id*. at 372. The research of urban planning theorist Richard Florida, upon which plaintiffs rely—*see*, *e.g.*, Am. Compl. ¶¶ 32-33, 45-46, 366—however, explicitly reminds the reader that "correlation does not equal causation" and concludes that the "correlations between the creative class overall and both inequality and segregation" are mostly limited to areas that, unlike the District, lack significant Black Creative Class members. Pls.' Ex. H (Richard Florida, *The Racial Divide in the*

Creative Economy, CITYLAB (May 9, 2016) at 694, 702 [5-3 at 42, 50].[13] *See also* p. 37 (discussing plaintiffs' inaccurate assertions about the District's demographics).

Instead of plausibly alleging the District's development policies perpetuate segregation, plaintiffs acknowledge the District is attempting to integrate neighborhoods, *see* Am. Compl. ¶¶ 65-67 (discussing the New Communities Initiative), the intended purpose of the FHA. *See Nat'l Cmty. Reinvestment Coal.*, 573 F. Supp. 2d at 76-77 (Sullivan, J.) ("the broad purpose of the FHA, … is to promote integrated housing patterns and to discourage discrimination in access to housing.") (quotation omitted).

Having alleged the District's development policies resulted from slavish following of Mr. Florida's work, plaintiffs allege his recent research shows this necessarily leading to "Creative class clusters perpetuated and worsened segregation patterns …." Am. Compl. ¶¶ 32-33, 45-46, 366. The reverse is true. Mr. Florida actually confirms that, although, the "Creative Class" suffers from the same discrimination as other groups, there are many successful Black members of the Creative Class in areas like the District. Pls. Ex. H at 693-702 (Florida, *The Racial Divide in the Creative Economy*) [5-3 at 41-50]. As a result, "efforts to boost the black creative class may help to combat inequality and segregation." *Id.* at 702 [5-3 at 50].

This tracks the District's findings that its policies are resulting in integration not, as plaintiffs claim, increased or returning segregation. *Compare* Am. Compl. ¶ 54 *with District of Columbia Analysis of Impediments to Fair Housing Choice 2006–2011*, DEP'T OF HOUS. AND CMTY. DEV. (Apr. 2012) at 174 ("A wave of Caucasian in–migration … is bringing racial and economic integration to what had been overwhelmingly minority neighborhoods in a city that has

[13] Also available at www.citylab.com/life/2016/05/creative-class-race-black-whitedivide/481749/ (last accessed Aug. 24, 2018).

long been intensely segregated and … is revitalizing neighborhoods and the District's economy."), available at https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DC_AI_2012_-_FINAL.pdf (last accessed Aug. 10, 2018).

To the extent the District targeted Creative Class Members to move to certain areas of the District, it would be targeting both Black and White Creative Class members. This would not perpetuate segregation; it would lead to integration.

2. Plaintiffs Have Not Plausibly Alleged Any Artificial Barriers to Housing.

Mr. Florida's recent research also establishes that the District's development policies are not "artificial, arbitrary, and unnecessary barriers" to housing. The chapter on "Gentrification and its Discontents" concludes:

> Rather than … resistance to change or attacks on new urbanites, the more appropriate response is to assist those who are most vulnerable. It makes little sense to discourage investment in cities and urban neighborhoods, especially in places that desperately need it. Indeed, the real task of urban policy is not to try to stop market forces that are leading to the economic revitalization of certain urban areas, but to improve the housing options, economic opportunities, and neighborhood conditions of those who are being left behind ….

District Ex. C, Excerpt of Richard Florida, *The New Urban Crisis, How Our Cities are Increasing Inequality, Deeping Segregation, and Failing the Middle Class—and What We Can Do About It*, at 78 (Basic Books 2017). As plaintiffs concede, the District's development policies are aimed at supporting residents in neighborhoods like Barry Farm. *See*, *e.g.*, Am. Compl. ¶¶ 58, 65, 88, 107. Plaintiffs demonstrate the District's efforts to overcome barriers to housing and to spread the benefits of prosperity among all its residents.

VI. Section 1983 Is Not an Independent Basis for a Claim Separate from the Constitution or Other Federal Law (Count Sixteen).

Count Sixteen reasserts the federal claims addressed above under Section 1983. Am. Compl. ¶ 407. "Section 1983 is not itself a source of substantive rights, but merely provides a

method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quotation omitted). "[Section] 1983 *already* serves as the statutory basis for [plaintiffs] constitutional claims" and Fair Housing Act claims, as plaintiffs note in referencing "the reasons stated in the preceding Counts." *Lewis v. Gov't of the D.C.*, 161 F. Supp. 3d 15, 31 (D.D.C. 2015); Am. Compl. ¶ 407. Thus, Count Sixteen "does not state a claim distinct from the [FHA and] constitutional ones discussed above" and should be dismissed because its allegations are "purely repetitive of the others." *Lewis*, 161 F. Supp. 3d at 31. The Court should also dismiss Count Sixteen because plaintiffs' constitutional and FHA claims fail to state a plausible claim for relief.

VII. Plaintiffs Fail to State a Claim Under the DCHRA.

Plaintiffs' DCHRA claims are basically unsupported allegations that nefarious intent lurks behind facially neutral Zoning Commission orders.[14] Although DCHRA "is a remedial civil rights statute that must be generously construed," plaintiffs take it too far. *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 887 (D.C. 2003). As Judge Friedman recently noted, plaintiffs' interpretation of the scope of the DCHRA would mean "virtually any decision by the District limiting or restricting services of any kind in one quadrant, ward, or neighborhood could be challenged as discriminatory under the DCHRA … which would subject an unimaginable number of routine policy decisions to litigation." *Boykin v. Gray (Boykin I)*, 895 F. Supp. 2d 199, 218 (D.D.C. 2013) (Friedman, J.) (quoted in *Bellinger v. Bowser*, 288 F. Supp. 3d 71, 87 (D.D.C. 2017) and *Kingman Park I*, 27 F. Supp. 3d at 167).

[14] Because the Court should dismiss all of plaintiffs' federal law claims, the Court need not exercise supplemental jurisdiction over the DCHRA claims. *Floyd v. PNC Mortg.*, 216 F. Supp. 3d 63, 68 (D.D.C. 2016) (quoting 28 U.S.C. § 1367).

Rather, "the language of Section 2-1402.73"—the portion of the DCHRA applying the Act to District agencies— "signals a focus on *the selective denial of benefits to certain persons*, based on their place of residence, while those benefits remain available to other persons." *Boykin I*, 895 F. Supp. 2d at 218 (emphasis added) (quoted in *Smith v. Henderson*, 944 F. Supp. 2d 89, 107 (D.D.C. 2013) (*Smith I*)). Plaintiffs have not alleged such selective denial or adequate facts to support any of their six claims under the DCHRA.

A. Plaintiffs Have Not Alleged an Explicitly Discriminatory Transaction (Count Seven).

Plaintiffs bring Count Seven under Section 221(a)(2) of the DCHRA, which prohibits the inclusion "in the terms or conditions of a transaction in real property, [of] any clause, condition or restriction" that discriminates against any of DCHRA's protected classes, citing the Creative Economy Strategy as the source of discrimination. Am. Compl. ¶¶ 266, 275; D.C. Code § 2-1402.21(a)(2).[15] The most obvious deficiency in Count Seven is that the Creative Economy Strategy—like the other framework documents—is not a "transaction in real property" and, thus, is not covered by this section.[16]

But even if it were, plaintiffs cite to no discriminatory clause, condition, or restriction. Instead, plaintiffs accuse the District of attempting to "improve access to space and affordable resources." *Id.* ¶ 271. This is certainly one of the District's aims. As the Creative Economy

[15] It is often unclear to what specific actions plaintiffs cite for each claim. To the extent plaintiffs bring this and other claims against "the Creative Economy Strategy (2014) and the Creative Plan DC (2016)" or "the Creative Class Agenda," they may be barred by DCHRA's two-year statute of limitations or even "the three-year limitations period applicable to suits brought under section 1983 …." D.C. Code § 2-1403.16(a); *Singletary v. District of Columbia*, 351 F.3d 519, 529 (D.C. Cir. 2003); *see*, *e.g.*, Am. Compl. ¶¶ 35, 312, 335.

[16] Plaintiffs discuss PUD generally but allege no discriminatory language in any specific PUD. Am. Compl. ¶¶ 269-70.

Strategy explains, "the need for more affordable space in the District" hampers all types of business. Pls.' Ex. E at 0190 [4-4 at 15]. And the Creative Economy Strategy proposes incentives to develop "residential uses above ground floor creative production uses." *Id.* at 192. But these facts do not show discrimination. "The District cannot expand outward and current zoning restricts it from growing upward, making the dearth of affordable space especially acute." *Id.* at 190. Sharing the limited real estate between residential and commercial space decreases the cost of both, increasing the availability of affordable housing for all Washingtonians. *Compare*, *e.g.*, Am. Compl. ¶¶ 274 (allowing additional residential use), 276, 303 (complaining of policies to convert "industrial zones city-wide" into housing); *see also* p. 15 above (discussing supply and demand). Intentionally providing housing to one group is not the same as denying it to another; the latter is what the DCHRA prohibits.

B. Plaintiffs Erroneously Suggest the Residents of a Mixed-Use Development are Required to be Employees of the Development's Business Tenants (Count Eight).

Count Eight's allegation that Zoning Commission Order 15-28 includes "an unlawful preference [ ] based on source of income" is unsupported. Am. Compl. ¶ 281. Zoning Commission Order 15-28 requires the development to "reserve 3,000 square feet of the Project's ['approximately 137,787 square feet of'] retail space for 'maker' uses." District Ex. D (Order 15-28) ¶¶ 8, 28, 43. Similarly, it requires "a minimum of eight percent of 329,509 square feet of residential gross floor area [reserved] as Inclusionary Zoning ("IZ") [housing] units for the life of the project." *Id.* ¶ 4(b). But it nowhere requires that any resident work in or for any of the commercial or retail tenants. Thus, it did not "indicate any preference, limitation, or discrimination" about residential tenants. D.C. Code § 2-1402.21(a)(5).

Plaintiffs' contention that "Creatives earn their livings in a peculiar way that is exclusive of those that earn their incomes based on working class and service class professions" need not be

credited but, regardless, the majority of the commercial zoning would be for businesses employing the very "working class and service class profession[al]s" plaintiffs allege would face discrimination. Am. Compl. ¶ 286. Even if plaintiffs were correct and the order required residents to work in the development's retail facilities, that, while otherwise questionable, would not violate § 2-1402.21(a)(5).

C. Plaintiffs Do Not Adequately Allege Subterfuge (Counts Nine, Eleven and Twelve).

Counts Nine, Eleven and Twelve each allege a violation of Section 221(b) of the DCHRA, which forbids the use of a pretext to cover discrimination in violation of Section 221(a). The prohibition, thus, "presupposes a discriminatory act which is alleged to have been committed by subterfuge," so a plaintiff's "claim under this heading necessarily fails upon the judgment against her on her claims for" underlying violations of Section 221(a). *Young v. Covington & Burling LLP*, 846 F. Supp. 2d 141, 170 (D.D.C. 2012) (alterations original) (quoting *McManus v. MCI Comms. Corp.*, 748 A.2d 949, 954 n.4 (D.C. 2000)). But, as discussed in Sections VII.A-B above and V above, plaintiffs have not plausibly alleged age, source of income, or disparate impact discrimination in violation of the Equal Protection Clause, FHA or the DCHRA, so Counts Nine, Eleven and Twelve should be dismissed. *See Whitebeck v. Vital Signs, Inc.*, 116 F.3d 588, 591 (D.C. Cir. 1997) ("District of Columbia courts interpreting the DCHRA 'have generally looked [for guidance] to cases from the federal courts' arising under federal civil rights statutes.") (quoting *Benefits Commc'ns Corp. v. Klieforth*, 642 A.2d 1299, 1301-02 (D.C. 1994)); *Nat'l Fair Hous. Alliance v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 35 (D.D.C. 2016) (assuming "without deciding that the FHA's pleading limitations for disparate-impact claims, as interpreted in *Inclusive Communities.*, apply to disparate-impact claims under [the] DCHRA").

Further, plaintiffs do not actually allege any pretext or other attempt at subterfuge. Indeed, the Amended Complaint insists the discrimination is overt. Am. Compl. ¶¶ 273, 320 ("The entirety of the Creative Economy Strategy makes plain who this … is meant for: millennials and creatives."). And Count Nine only restates Count Eight, except to the extent it excludes challenges unique to Zoning Commission Order 15-28. *Compare* Am. Compl. ¶¶ 280, 282-84, 291, 292 *with* ¶¶ 295, 298-300, 304-05, 307. The only factual allegations in Count Eleven appear to be that the D.C. Housing Authority has failed to adequately maintain Barry Farm. Am. Compl. ¶¶ 338, 341, 343; *but see* Section V.A.2 above. The remaining allegations are plaintiffs' legal conclusions and "threadbare recitals" of the language in Section 221(b). *See*, *e.g.*, *id.* ¶¶ 340, 344 (intent), 333, 346 (recital).

It is unclear why Count Twelve's disparate impact claim is brought under Section 221(b), but it is based on faulty premises about the District's population. Plaintiffs describe the Creative Economy Strategy as "assert[ing] how important attracting millennials are [*sic*] to the city's priorities." Am. Compl. ¶ 24. It actually describes *past* growth. *See id.* ¶¶ 49-52; Pls.' Ex. E 0154-55 [4-3 55-56] (Creative Economy Strategy) at 12-13 (citing Peter Tatian and Serena Lei, *Washington, D.C.: Our Changing City*, The Urban Inst. (2014) ch. 1: Demographics: Age ("From 2000 to 2010, the city's 18- to 34-year old population grew by roughly 37,000, and now makes up 35 percent of the population. (Millennials make up only 23 percent of the US population as a whole.)"), available at http://apps.urban.org/features/OurChangingCity/demographics/index.html#age (last accessed Aug. 15, 2018)). Plaintiffs posit a false conflict between "Creatives" and Millennials" on one side and Black residents on the other. *See*, *e.g.*, Am. Compl. at 12, ¶¶ 63, 73, 267-73. In reality, 40.9 percent of the District's members of the so-called "Creative Class" are Black, *see* Florida at 31 above, and more than 80,000 Black Washingtonians are between the ages

of 18 and 34—more than 100,000 between 18 and 44—so Black Millennials represent roughly 13-19% of the *entire* population.[17] They share plaintiffs' desire for "family units and affordable housing." Am. Compl. at 1, ¶ 110. As discussed in greater detail in Section V.B above, plaintiffs' dubious allegations and legal conclusions provide none of the elements required to establish disparate impact.

D. None of Plaintiffs' Factual Allegations Would Constitute Blockbusting or Steering (Count Ten).

Count Ten alleges the Creative Action Agenda is a practice of blockbusting and steering residential housing based on age and source of income to millennials and creatives. *See* Am. Compl. ¶¶ 308-329.[18] Blockbusting involves "exploiting fears of … change by directly perpetuating rumors" that a protected group will integrate a neighborhood and, thus, drive down property values as a mean of "soliciting sales" at reduced prices. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 110 n.23 (1979); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 416 (1971) (defendant allegedly "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes."); *Kreuzer v. George Wash. Univ.*, 896 A.2d 238, 245 n.4 (D.C. 2006) (blockbusting may not be limited to race). Steering involves "directing prospective home buyers

[17] "Millennials, or America's youth born between 1982 and 2000, now number 83.1 million and represent more than one quarter of the nation's population." U.S. Census Bureau, *Millennials Outnumber Baby Boomers and Are Far More Diverse, Census Bureau Reports* (June 25, 2015). The 2016 American Community Survey reports 320,554 Washingtonians who reported "Black or African American alone" as their sole race, 38.5 percent of whom were then between ages 18 and 44, roughly encompassing the "Millennial" demographic. District Ex. F (Census data) at 2 of 13. More than 32 percent of the District's *total* population are Millennials. *Compare id.* at 2 and 11 of 13 *with* Am. Compl. ¶¶ 350-51.

[18] Plaintiffs cite to Section 2-1402.23, prohibiting not blockbusting or steering but "discrimination by broker or salesperson," which, thus, would not cover the District. The District presumes, therefore, that plaintiffs meant to cite Section 2-1402.22.

interested in equivalent properties to different areas according to their" membership in a protected class. *Gladstone, Realtors.*, 441 U.S. at 94. *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982). Plaintiffs have not alleged the facts of either.

Plaintiffs allege no perpetuation of rumors about anyone, particularly any member of a protected group, moving into any specific neighborhood. Plaintiffs allege that the District "encourag[ed] others to allocate public and private resources" and supported development by "zoning changes and development incentives." Am. Compl. ¶¶ 310, 321, 323. To the extent plaintiffs suggest these actions were publicized to indicate the imminent arrival of "millennials" in various neighborhoods, that would constitute blockbusting only if it drove down property values. *See Gladstone, Realtors*, 441 U.S. at 110 n.23 (1979); *Keefe*, 402 U.S. at 416. But plaintiffs claim that the contested actions drove property values *up*. *See*, *e.g.*, *id.* ¶ 110 ("housing that requires incomes higher than the surrounding three census tracts").

Plaintiffs also make no allegation that the District steered any prospective homebuyer anywhere. The closest they come is conclusory statements that it was "plain" from facially non-discriminatory documents that some development was made for "millennials and creatives." *See*, *e.g.*, Am. Compl. ¶ 320. But such allegations cut against plaintiffs; they show the District publicizing the existence of these prospective developments to all prospective buyers, the precise opposite of steering. Further, plaintiffs have not alleged that any one of them has attempted to purchase property or been pressed to sell property because of any such rumor or District policy.

VIII. The Court Should Abstain from Considering Plaintiffs' Request for Injunctive Relief Against the Zoning Commission.

Finally, the Court should abstain from considering plaintiffs' request for "an immediate injunction against the Zoning Commission enjoining it from further activity regarding phase one PUD approval." Am. Compl. at 82 (Prayer for Relief at B). In *Younger v. Harris*, 401 U.S. 37

(1971), the Supreme Court "held that, except in extraordinary circumstances, a federal court should not enjoin a pending state proceeding (including an administrative proceeding) that is judicial in nature and involves important state interests." *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, Civil Action No. 05-858, 2005 U.S. Dist. LEXIS 8913, at *4 (D.D.C. May 6, 2005) (quoting *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1120 (D.C. Cir. 2004)). "*Younger* abstention is applicable to the District of Columbia, and specifically to zoning decisions within the local administrative and judicial system." *Id*. This Court, therefore, should conclude "that it has no authority to enjoin the ongoing zoning proceedings before the [Zoning Commission] … in this case." *Id*.

CONCLUSION

For the foregoing reasons, the Court should grant the District's motion to dismiss the Amended Complaint, with prejudice.

Dated: August 27, 2018.

Respectfully submitted,

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