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)**

THE DISTRICT OF COLUMBIA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' opposition to the District of Columbia's (the District) motion to dismiss fails to address the deficiencies laid out in the District's motion. Instead, plaintiffs assume their claims are meritorious without citation to supporting authority, rely on non-legal arguments that cannot be sustained, and attempt to introduce arguments and allegations not found in the Amended Complaint.

First, plaintiffs fail to establish that their claims are justiciable. Plaintiffs have not rebutted the District's showings: (a) that they lack standing because they fail to plausibly allege sufficient injury caused by the District; and (b) that the problems plaintiffs allege should be resolved through the political process. Second, plaintiffs fail to support their due process claims by pointing to a concrete right—under local or federal law—that an alleged lack of process has infringed without due process. Third and Fourth, plaintiffs fail to demonstrate the Amended Complaint contains plausible allegations of the intentional discrimination or disparate treatment needed to support their equal protection and Fair Housing Act claims. Fifth, plaintiffs do not state a valid claim under the D.C. Human Rights Act because they fail to allege the policy decisions they challenge were motivated by animus. Sixth, plaintiffs have failed to undermine the District's showing that the Court should abstain from considering plaintiffs' requests for injunctive relief against the Zoning Commission. Finally, the Court should disregard the *amicus* briefs filed in this matter because they are irrelevant to the legal arguments raised in the motions to dismiss.

The issue before the Court is whether plaintiffs have adequately alleged that the District violated their rights under the Constitution, federal or local law by implementing economic and residential development policies to bolster and refurbish the District's housing stock. The answer is, "no." The Court should dismiss the Amended Complaint.

ARGUMENT

I. Plaintiffs' Claims are Non-Justiciable.

Plaintiffs fail to meet their burden of alleging the requisite injury-in-fact to establish standing, at most citing injuries the Amended Complaint does not allege, some of which are not even injuries. Dist. Mem. at 9. It is true that "violation of a [concrete] constitutional right confers standing," Opp'n at 5, but plaintiffs do not plausibly allege an injury stemming from the violation of a right established by the Constitution, federal, or local law. Dist. Mem. at 9-10; Opp'n at 34 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Even assuming the injuries they allege are sufficient, such injuries are not traceable to, or redressable by, the District. *Id.* And plaintiffs fail to show that their claims are not barred by the political question doctrine. *Id.* at 16.

A. Plaintiffs Do Not Allege an Injury-in-Fact Caused by the District.

1. There Is No Right to Party Status Before the Zoning Commission.

Plaintiffs maintain that they suffered harm when the District "shut[ ] current residents out of the redevelopment process." Opp'n at 6. But plaintiffs do not specify the nature or source of this right to participate. "For due process purposes, … it is not enough that one has 'an abstract need or desire' for the asserted property; to merit due process protection, '[h]e must … have a legitimate claim for entitlement to it." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 119 (D.C. Cir. 2010) (quoting *Roth*, 408 U.S. at 577).

To the extent plaintiffs contend they were wrongly denied party status, *see*, *e.g.*, Opp'n at 40, plaintiffs fail to plausibly allege they have any right to party status or satisfied the requirements. Of the four Zoning Commission cases they cite, only one application for party status was even denied. *Compare* Am. Compl. ¶¶ 195-259 *with Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1221 n.9 (D.C. 2018) (*BFTAA I*) (received party status); Z.C. Order No.

16-02 at Ex. 84 (NeRAC withdrew request); Z.C. Order No. 16-29 ¶¶ 20-21 (CARE's request "was untimely and did not meet the standard for party status."). Union Market Neighbors is not a party to this action—and Ms. Ball cannot assert injury on its behalf, *see Ryan, LLC v. Lew*, 934 F. Supp. 2d 159, 167 (D.D.C. 2013) (discussing third-party standing)—but the Zoning Commission considered and rejected its application because it "failed to satisfy the criteria for party status." Dist. Ex. D (Z.C. Order No. 15-28) ¶ 8. Plaintiffs appear to believe that mere proximity makes one "significantly, distinctively, or uniquely affected," *see*, *e.g.*, Opp'n at 40, but point to nothing in the applicable regulations to support that notion.

The reverse is true: the regulations explicitly look to the Advisory Neighborhood Commission (ANC) system, rather than to individual neighbors, to supply the opinion of the public living near proposed developments by automatically giving the ANC—not any one commissioner, let alone each neighbor—party status. *See* 11-Z D.C.M.R. §§ 404.1, 404.3, District Mem. at 24; *compare*, *e.g.*, Opp'n at 47 (describing "Ms. Hamilton['s] position as an ANC"), 38 and 50 (incorrectly claiming party status is mandatory and the burden of proof is on the Zoning Commission rather than the applicant), 53 (alleging "property interests in full participation in the zoning process"), 55-56. These regulations provide the "wide community input in the PUD process" plaintiffs demand. *Id.* at 44. *Compare* Dist. Mem. at 24.

If plaintiffs allege they have a right to be heard by the Zoning Commission, Opp'n at, *e.g.*, 38 and 46, plaintiffs concede they have been heard. *See*, *e.g.*, *id.* at 10 (describing "the testimony of CARE members at Zoning Commission hearings"), 11 (same for NeRAC), 12 (for both); 21 (for Ms. Fuller), 48 (NeRAC), 50 (for "Union Market Neighbors"); *see also* Dist. Mem. at 33. Every citizen is allowed to testify before the Zoning Commission as a witness, although not as a

party. This is how residents "access the District's zoning proceedings" and the right is not denied if the Zoning Commission is not swayed by the testimony. Opp'n at 40.

Plaintiffs contend they were denied "civic participation," but allege only that their participation was unsuccessful. *Id.* at 39. The inability of plaintiffs to convince the Zoning Commission, or of plaintiffs Hamilton and Fuller to convince their fellow ANC commissioners, to oppose a project is not an injury. *See*, *e.g.*, Opp'n at 14, 47. And the Zoning Commission's decision to approve an application is not evidence the commissioners did not consider the opponents' arguments. *See*, *e.g.*, *id.* at 10 ("The Zoning Commission Defendants repeatedly ignored CARE and its members"), 20 ("ignored CARE's attempts to raise these issues before the Zoning Commission."), 48 ("summarily ignored"), 50 ("were ignored"), 66 ("ignored them"). Plaintiffs may not believe the opposing arguments were sufficient but that does not establish an injury-in-fact. *Howell v. D.C. Zoning Comm'n*, 97 A.3d 579, 581 (D.C. 2014) ("We must affirm the Commission's decision so long as (1) it has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings.") (quotation and alteration omitted); *Foggy Bottom Ass'n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 71 (D.C. 2002) (quoting *Citizens Coal. v. D.C. Bd. of Zoning Adjustment*, 619 A.2d 940, 947 (D.C. 1993).

2. Plaintiffs Have Not Been Denied Access to the Political Process.

Plaintiffs also allege they were denied "meaningful access to the political process on the basis of their race." Opp'n at 28; *see also id.* at 26, 35, 39. But that phrase is inapposite to plaintiffs' contentions. It derives from cases brought under Section 2(a) of the Voting Rights Act of 1965, *now codified at* 52 U.S.C. § 10301, in which citizens were denied an effective vote in elections. *See*, *e.g.*, *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003), *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994), *Smith v. Winter*, 717 F.2d 191, 198 (5th Cir. 1983)

(citing *White v. Regester*, 412 U.S. 755, 766 (1973)). Plaintiffs have not alleged they were denied full access to the franchise.

Plaintiffs are not "discrete and insular minorities" suffering a unique prejudice "curtail[ing] the operation of those political processes." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). In fact, two of the plaintiffs are elected officials and all plaintiffs claim to represent the "once majority African-American population" that constitutes a significant plurality of the current population. *See* Am. Compl. at ¶¶ 153, 156; Opp'n at 71; Dist. Mot. to Dismiss Ex. F [27-8] at 12. Plaintiffs have not alleged that they are unable to elect representatives of their choice. Rather, they have been unsuccessful in the political process, unable to convince fellow voters or elected officials to adopt their view of how the District should provide housing. Plaintiffs now ask the Court to impose their view on all District residents. The Court should decline.

3. Policy Decisions Antagonistic to Plaintiffs Do Not Constitute Injuries.

The organizational plaintiffs allege that they have suffered an injury-in-fact by citing their failure to persuade the District or the D.C. Housing Authority (DCHA) to adopt their preferences. *See*, *e.g.*, Opp'n at 9. This misunderstands organizational standing. The District is not arguing, as plaintiffs suggest, that a policy's effect on an organization's advocacy *cannot* be an injury. Opp'n at 12 (*citing ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011)). The D.C. Circuit declined to decide in *ASPCA* "whether injury to an organization's advocacy supports *Havens* [*Realty Corp. v. Coleman*, 455 U.S. 363 (1982)] standing," 659 F.3d at 27, because, as the District explained, such an injury is "entirely speculative." Dist. Mem. at 11. Rather, the effect must be *to prevent the advocacy*, not merely the outcome for which a plaintiff is advocating, to be an injury. *See* Dist. Mem. at 10-12.

The mission of the organizational plaintiffs is to advocate for various positions. Am. Compl. ¶¶ 5-6. They are advocating, including before the Zoning Commission, and have not

alleged the District has taken any step to prevent their advocacy. *Compare* Opp'n at 9 ("NeRAC struggles to accomplish its mission.") *with* Dist. Mem. at 11.

4. Plaintiffs Allege Only Legal Conclusions to Support Their Disparate Treatment Claim.

Plaintiffs acknowledge they bear the burden of proving discriminatory intent to support their Fair Housing Act (FHA) claims, but fail to plausibly allege discriminatory intent in support of their disparate treatment (Count Thirteen) or disparate impact (Count Fourteen) claims. Opp'n at 64-65; Dist. Mem. at 28-32. Further, plaintiffs misapprehend the caselaw. *Compare*, *e.g.*, Opp'n at 64 (claiming "The *Sherman Avenue* court found … decision to only evict residents of buildings in Hispanic majority areas … sufficient to show discriminatory intent through disparate treatment.") *with 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 683-85 (D.C. Cir. 2006) (holding additional evidence of "deviat[ion] from its usual practice," "depart[ure] from its usual procedure," and "record evidence" of disparate treatment is essential but sufficient only to create a rebuttable presumption of disparate treatment).

The only case that plaintiffs cite to support their disparate treatment claim—*Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 280 F. Supp. 3d 426 (S.D.N.Y. 2017)—does not command a different result. There, too, the court required evidence of "departures from the normal procedural sequence, substantive departures" plaintiffs here have not shown. Opp'n at 66. That court found a zoning ordinance violated the FHA only after the evidence established that: (1) the enactment was in response to a religious entity's desire to build an Orthodox yeshiva; (2) officials of the defendant "explicitly stated their intent to thwart [the plaintiff's development] plans"; and (3) the defendant had a "demonstrated history of opposing various" projects by the religious group. *Id*. at 434, 450-455. Plaintiffs have not plausibly alleged any such facts, only

baldly asserting the second and third conclusions; *see also* discussion of examples required in *2922 Sherman Ave. Tenants' Ass'n* at 6 above.

5. Plaintiffs Have Not Shown That District Policy Resulted in a Disparate Impact.

Plaintiffs' argument in support of their claim that they suffered a disparate impact (Count Fourteen) also fails. As an initial matter, plaintiffs incorrectly distinguish a "segregative effect[ ]" claim from a disparate impact claim, when the former is a type of the latter. *Compare* Opp'n at 68 *with*, *e.g.*, *Boykin v. Gray*, 986 F. Supp. 2d 14, 17 (D.D.C. 2013) (*Boykin I*) (discussing "two variants of disparate impact claim: 'disproportionate effect' and 'segregative effect.'"); *see also Greater New Orleans Fair Housing Action Ctr. v. U.S. Dept. of Housing & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011). Further, plaintiffs' allegation that development forces similarly situated residents out of their neighborhoods, Opp'n at 67, lacks the factual support they concede is required. *Id.* at 69 ("defendant's challenged practice must create, increase, reinforce, or perpetuate these segregated patterns.") (alterations omitted). Plaintiffs only appeal to "a common-sense interpretation" of the District's policies. *Id.* That is insufficient, particularly where the available facts contradict plaintiffs' conclusion. *See*, *e.g.*, Section IV below.[1]

It may be true that "[t]he entrenched dual housing market *within and around the District of Columbia* is responsible for the levels of housing segregation in both the District and the counties that surround it." *Analysis of Impediments* at 179-80 (emphasis added) (cited in Opp'n at, *e.g.*, 59, 66, 70). Housing prices in the region have increased, in large part, because jurisdictions

[1] *See also*, *e.g.*, Lance Freeman and Frank Braconi, *Gentrification and Displacement New York City in the 1990s*, JOURNAL OF THE AMER. PLANNING ASSOC., 70(1), 39–52, 51 (2004) ("rather than speeding up the departure of low-income residents through displacement, neighborhood gentrification in New York City was actually associated with a lower propensity of disadvantaged households to move."), *available at* https://sci-hub.tw/10.1080/01944360408976337 (last accessed Oct. 16, 2018).

in Maryland and Virginia built 170,000 fewer homes, "the equivalent of building an entire new Arlington *and* an entire new Alexandria," in recent years than in prior decades, "the sharpest slowdown in housing growth of any region in the country." Payton Chung, *(Not) long ago and (not) far away, jobs boomed but housing prices didn't,* GREATER GREATER WASHINGTON (Oct. 2, 2018), *available at* https://ggwash.org/view/69287/not-long-ago-and-not-far-away-jobs-boomed-but-housing-prices-didnt (last accessed Oct. 15, 2018) (emphasis original). Thus, even if increased housing costs were a sufficient injury, it would not be traceable to, or redressable by, the District.

6. "Loss of Social Networks and One's Neighborhood Ecosystem" is not a Sufficient Injury.

Plaintiffs have not provided sufficient support for their contention that "loss of social networks and one's neighborhood ecosystem" is an adequate injury-in-fact. Opp'n at 14. *Doe v. Chao*, 540 U.S. 614 (2004), affirmed a grant of summary judgment where the plaintiff failed to establish "actual damages" despite the government conceding it had violated federal law. *Id.* at 616-18. *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998), is inapposite; the Court "recogniz[ed] *probable economic* injury" to an organization, not abstract, psychological harm or the conjectural harm to Plaintiff Mpulubusi-El. (emphasis added). *FEC v. Akins*, 524 U.S. 11, 21 (1998), is about a plaintiff's "inability to obtain information" to which federal law entitled them. And in the case most similar to this one, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982), the Court found plaintiffs had not "alleged an *injury of any* kind, economic or otherwise, sufficient to confer standing," because "federal courts were simply not constituted as ombudsmen of the general welfare." *Id.* at 486-87 (emphasis original).[2] These cases

[2] *See also* Subsections II.A (Plaintiffs Have Not Alleged the Deprivation of a Property Interest.) and II.C (Plaintiffs Have Not Alleged the Deprivation of a Liberty Interest.) below.

bar plaintiffs' ability to maintain a civil action to protect their "social networks" and "neighborhood ecosystem."

The D.C. Court of Appeals has not held otherwise. Rather, as plaintiffs' citations explain, regulations require the Zoning Commission to explain why such concerns are not dispositive. *Compare* Opp'n at 14, 22 *with Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1227 (D.C. 2018). *See also* Subsection II.C.1 (Plaintiffs Allege No District Interference with a Protected Liberty Interest in Their Social Networks and Community Relationships.).

7. Plaintiffs Hamilton and Fuller Do Not Have Standing Simply Because They are ANC Commissioners.

Plaintiffs rely too heavily on plaintiffs Hamilton's and Fuller's status as ANC Commissioners. The Commissions, let alone individual commissioners, do not have legal standing. *See* D.C. Code § 1-309.10(g) (an ANC cannot "initiate a legal action in the courts of the District of Columbia or in the federal courts"); *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1375 (D.C. 1977). As plaintiffs acknowledge, Opp'n at 47, "reputation alone is neither a liberty interest arising from the Constitution itself nor a liberty interest arising from state law …." *Mosrie v. Barry*, 718 F.2d 1151, 1159 (D.C. Cir. 1983). A plaintiff must allege an alteration in his or her legal status, in addition to reputational injury, to give rise to a due process claim, which is commonly referred to as a stigma-plus claim. *FCC v. Fox TV Stations*, *Inc*., 567 U.S. 239, 255-56 (2012) (citing *Paul v. Davis*, 424 U.S. 693, 708-09 (1976)) (an "'alteration of legal status … combined with the injury resulting from the defamation' justifies the invocation of procedural safeguards").

Plaintiffs have alleged no such alteration. An ANC Commissioner's "powers of her position" have not been changed merely because she could not secure her commission's, or the Zoning Commission's, support in opposing a project. *See* Opp'n at 14, 47. That is not an injury to

her reputation traceable to the District. The cases on which plaintiffs rely are inapposite as each involved publication of allegedly denigrating material; it is plaintiffs, not the District, who have highlighted these circumstances. *Id.* at 47. Similarly, the D.C. Circuit has found no liability where the defendant did not publicly single out the plaintiff for reproach. *McCormick v. District of Columbia*, 752 F.3d 980, 989 (D.C. Cir. 2014). Here, there is no allegation the District has done so. And, even if it had, "[a]n injury to reputation alone does not constitute a deprivation of a liberty interest." *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C. Cir. 1988) (citing *Paul*, 424 U.S. 693).

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

Plaintiffs cite inapposite caselaw that cannot refute the applicability of the political question doctrine. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840-41 (D.C. Cir. 2010) (*en banc*)—which dealt explicitly with foreign policy and concluded "governmental actions are beyond the reach of the courts" if even one of the *Baker v. Carr* factors "is present"—does not support plaintiffs' position. Opp'n at 27-29; *see also Ahmed Salem Bin Ali Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017) (the exclusion holds "however sympathetic the allegations"). Notably, plaintiffs fail to address the District's argument about the lack of "judicially discoverable and manageable standards for resolving this action." Dist. Mem. at 18-20; *see Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003) ("when a plaintiff files an opposition to a dispositive motion … a court may treat those arguments that the plaintiff failed to address as conceded"); *Hopkins v. Women's Div., General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd* 98 Fed. Appx. 8 (D.C. Cir. 2004). Instead, plaintiffs raise issues that are improperly before the Court.

For example, plaintiffs repeatedly ask the Court to opine on how many "affordable multi-bedroom rental units" are required in the District. Opp'n at 18, 22 n. 1; *see also id.* at 22, 78; Dist. Mem. at 19. Although such units may be of value to certain families, Am. Compl. ¶ 163, those

families constitute only one-fifth of households in the District of Columbia and most housing is, in fact, multi-bedroom. *See* Ex. G (Occupancy Characteristics for the District of Columbia (Census Bureau) and Ex. H (Selected Housing Characteristics). Plaintiffs offer the Court no way to determine if it is appropriate for "only 8% of [new] residential space [to] have affordable units with more than two bedrooms." Opp'n at 82. The political question doctrine exists because the Court should not have to make such decisions. Dist. Mem. at 19.

Plaintiffs' reliance on cases "concern[ing] the deprivation of constitutional rights" founders because plaintiffs have not established a violation of a constitutional right or discriminatory pattern. *See* Opp'n at 27-28; Dist. Mem. at 18-20; Subsection I.A (Plaintiffs Do Not Allege an Injury-in-Fact Caused by the District.) above. They mistakenly allege the doctrine is limited to an inclusive list of "six specific circumstances" although the Supreme Court was explicit that the six are not exhaustive and plaintiffs' claims trigger at least two. Opp'n at 27; *Baker v. Carr*, 369 U.S. 186, 217 (1962); Dist. Mem. at 16-20; *see also* Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I's Political Question Analysis?*, LAWFARE (May 19, 2016), *available at* https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis (last accessed Oct. 15, 2018).

Plaintiffs' assertion that the D.C. Court of Appeals is incapable of redressing their alleged grievances about the Zoning Commission, Opp'n at 28, is legally insufficient, *Burt v. Titlow*, 571 U.S. 12, 19 (2013) ("[r]ecognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong"), and contradicted by cases brought by plaintiffs in which the D.C. Court of Appeals reversed the same Zoning Commission decisions plaintiffs decry here. Am. Compl., *e.g.*, ¶¶ 90, 231 (citing *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027 (D.C. 2016)); Opp'n at 14 (same and citing *BFTAA I*, 182 A.3d 1214).

II. Plaintiffs Fail to Allege A Procedural Due Process Violation in Counts One Through Five.

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

1. Plaintiffs Fail to Establish that the District Deprived Them of a Property Interest in their Public Housing at Barry Farms.

The Court should disregard plaintiffs' attempt to raise in their opposition a new claim, that plaintiffs Matthews and Hamilton were deprived of a protected property interest in public housing at Barry Farms, *compare* Opp'n at 42 *with* Am. Compl. ¶ 133. *See McManus v. District of Columbia*, 530 F. Supp. 2d 46, 74 n.25 (D.D.C. 2007). But even if this were properly raised, the new allegations could not support a due process claim against the District. Public housing residents' property interest is in housing; it is not a leasehold, and any lease, which plaintiffs have not alleged they have, would be with DCHA (not the District). *See* Dist. Mem. at 14; *Long v. v. D.C. Housing Auth.*, 166 F. Supp. 3d 16, 20 (D.D.C. 2016) (DCHA is responsible for administering the Housing Choice Voucher Program (Section 8) in the District of Columbia) (citing D.C. Code § 6-202(b); 14 D.C.M.R. § 4900); *compare* Opp'n at 42-43. The very cases on which plaintiffs rely confirm that point. In *Aponte-Rosario v. Acevedo-Vila*, 617 F.3d 1, 9 (1st Cir. 2010), Opp'n at 44, the First Circuit observed that plaintiffs had, at most, "a protected property interest in the form of an expectation to remain in their public housing units …." 617 F.3d at 9. "But the government also has a significant interest in preserving flexibility when evaluating whether demolition of a public housing building is appropriate." *Aponte-Rosario*, 617 F.3d at 10; *see* Dist. Mem. at 19 (discussing courts holding such weighing is properly left to the political branches).

2. Plaintiffs Fail to Establish the District Deprived Them of a Protected Property Interest in Their Homes, Their Access to and Enjoyment of Housing, or in the Redevelopment of Their Neighborhoods.

Plaintiffs fail to plausibly allege how the District caused any construction disturbance or interfered with any property right of NeRAC or the individual residents of Buzzard Point. *See*

Opp'n at 46-49. Plaintiffs have not alleged the District is *conducting* the allegedly improper construction. Nor do plaintiffs contend it lacks compliance with regulations governing how construction can be properly performed. *See* Dist. Mem. at 14-15. Thus, it is not that such allegations are "insufficient" because plaintiffs can "claim property damage against the city" but that they are not claims against the District or due process violations. Opp'n at 16.

Again, "property interests 'attain … constitutional status by virtue of the fact that they have been initially recognized and protected by state law.'" *See Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 315 (D.C. Cir. 2014) (quoting *Paul*, 424 U.S. at 710). Plaintiffs cite no law providing residents a property interest in redevelopment simply because the District solicited "neighborhood feedback from residents in the PUD zoning process." Opp'n at 46; Dist. Mem. at 22.

B. <u>The Alleged Failure to Follow Municipal Regulations Does Not Constitute a Due Process Violation.</u>

Even if the Zoning Commission had failed to follow certain procedures, that would not suffice to establish a violation of plaintiffs' due process rights where they failed to obtain party status. *Compare* Opp'n at 33, 38-39 *with* Dist. Mem. at 22; *see also River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994) ("the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution."); *Yale Auto Parts*, *Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985) ("even an outright violation of state law in the denial of a license will not necessarily provide the basis for a federal claim … at least when the applicant has a state law remedy"). Plaintiffs, however, have not even alleged "deviations from normal administrative procedure," Opp'n at 66, citing no case in which the Zoning Commission treated another applicant differently than plaintiffs. *Compare* discussion of examples required in *2922 Sherman Ave. Tenants' Ass'n* at 6 above; *States v. District of Columbia*, Civil Action No. 18-1652 (D.D.C.), ECF No. 5-1 (the

Board of Zoning Adjustment denied party status to a neighbor directly adjacent to the applicant's); *see also* Opp'n at 38 (alleging violations of "statutory requirements" without providing an example) and 61 (alleging without example "a clear pattern of discrimination").

Further, plaintiffs allege failures to follow procedures that are not, in fact, failures. For example, they claim "the Office of Planning *must* report on the suitability of the site for use as a PUD," Opp'n at 36 (plaintiffs' emphasis), but the actual regulation reads "shall report as appropriate," meaning the Office of Planning has discretion about which topics to address. 11-X D.C.M.R. § 308.5 (emphasis added); *compare also* Opp'n at 36 ("the Zoning Commission *must* conduct a comprehensive public review") *with* 11-X D.C.M.R. § 304 (no mention of review, let alone a "comprehensive public review") and 11-X DCMR § 308.2 ("An application may be denied without a hearing"); *see also* Dist. Mem. at 22 n.8.

C. Plaintiffs Have Not Alleged the Deprivation of a Liberty Interest.

1. Plaintiffs Allege No District Interference with a Protected Liberty Interest in Their Social Networks and Community Relationships.

As noted above, plaintiffs assert a "protected liberty interest in their social networks and community relationships" that is unsupported by law. *Compare* Opp'n at 40, 47, 51 *with* Subsection I.A.6 ("Loss of Social Networks and One's Neighborhood Ecosystem" is not a Sufficient Injury.). The right to walk the streets and meet with friends may be protected by the Fifth Amendment. *Hutchins v. District of Columbia*, 188 F.3d 531, 561 (D.C. Cir. 1999); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989). But plaintiffs have not alleged they can no longer meet with members of their social networks or community to maintain those relationships. *See Scahill v. District of Columbia*, 271 F. Supp. 3d 216, 238 (2017). The liberty to choose one's family and friends described in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984), and in other cases, is not a right to maintain those networks or relationships at a particular public place.

2. Plaintiffs Fail to Establish the District Deprived Them of a Liberty Interest in Access to the Basic Processes of Government.

Plaintiffs' contention that the District has deprived them "of their liberty interest in accessing the basic processes of government," Opp'n at 43, 46, 49, and 51, fails for the same reasons as their claim that the District deprived them of a property interest in participating in zoning procedures. *See* Subsection I.A.1 (There Is No Right to Party Status Before the Zoning Commission.). Plaintiffs have failed to plausibly allege that they satisfied the requirements to participate in the zoning cases they now challenge with their procedural due process claims. *Id.*

D. <u>If Plaintiffs Had Been Deprived of Some Right, They Have Adequate Pre- and Post-Deprivation Remedies.</u>

Adequate post-deprivation remedies exist to remedy any alleged deprivation of plaintiffs' liberty and property interests. The District explained in its opening brief that there are adequate pre- and post-deprivation remedies, the former before the Zoning Commission and the latter in the form of an appeal from a Zoning Commission decision to the D.C. Court of Appeals. D.C. Code § 2-510; Dist. Mem. at 23-25. Plaintiffs agree that an adequate pre-deprivation remedy requires notice and do not deny the Zoning Commission provided notice of its hearings,[3] but contend they were denied "a meaningful opportunity to be heard." Opp'n at 41. The District explained above, however, that plaintiffs had such an opportunity because they could and often did testify as witnesses. *See* Subsection I.A.1 (There Is No Right to Party Status Before the Zoning Commission.). Plaintiffs do not dispute the District's position that judicial review of any adverse decision in D.C. Superior Court would constitute an adequate post-deprivation remedy. *Id.* at 23. *see also Dukore v. District of Columbia*, 970 F. Supp. 2d 23, 32 (D.D.C. 2013) ("Where adequate

[3] Plaintiffs decry as "grossly inadequate [the Zoning Commission's] notice that [BFTAA] had been granted party status" but concede that it came "before the next hearing began" and offer no authority suggesting this was inadequate. Opp'n at 45.

post-deprivation state remedies are available, no cognizable constitutional claim for procedural due process can be stated"). Because plaintiffs do not dispute that such post-deprivation remedies are available and adequate, *see* Opp'n at 53-56, the Court should treat the District's argument as conceded. *See Buggs*, 293 F. Supp. 2d at 141.

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

Plaintiffs' equal protection claim requires a showing of intentional discrimination and plaintiffs have not plausibly alleged that the District has engaged in such behavior. Dist. Mem. at 25-27. The two theories of intentional discrimination plaintiffs proffer in support of their equal protection claim disregard the allegations and documents incorporated by reference in the Amended Complaint.

First, plaintiffs attempt to show intentional discrimination by stating that the Amended Complaint establishes that a facially neutral policy—the Creative Class Agenda—is motivated by discriminatory intent and has a racially discriminatory impact. *See Smith v. Henderson*, 982 F. Supp. 2d 32, 49-50 (D.D.C. 2013) (*Smith II*) (a plaintiff can prove intentional discrimination by "show[ing] that a facially neutral law or policy that is applied evenhandedly is, in fact, motivated by discriminatory intent and has a racially discriminatory impact."). Plaintiffs only state that "[t]he Creative Class Agenda was designed—by its very purpose—to favor younger, millennial white residents over longtime black residents of the District" because it "specifically expresses a preference for attracting and incentivizing relocation of millennial workers whose incomes derive from 'innovative' and non-traditional jobs." Opp'n at 58; Am. Compl. ¶ 368; *but see* Dist. Mem. at 29. This falls short of plausibly showing discriminatory intent.

"'Discriminatory intent implies more than ['] intent as volition ['] or ['] intent as awareness of consequences.['] It implies that the decisionmaker … selected or reaffirmed a particular course

of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" *Smith v. Henderson*, 54 F. Supp. 3d 58, 69 (D.D.C. 2014) (*Smith III*) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Thus, "[p]laintiffs need to show 'a clear pattern' of discrimination, 'unexplainable on grounds other than race.'" *Id*. at 70 (quoting *Village of Arlington Heights*, 429 U.S. 252, 266 (1977)). Such allegations are not found in the Amended Complaint. The Creative Class Agenda seeks to make the District of Columbia welcoming to members of the Creative Class irrespective of race or any other protected class and not to make it unwelcoming to anyone. Dist. Mem. at 2-4. Plaintiffs have not alleged otherwise. They only assert slightly disproportionate percentages of the Creative Class are White or Black. Opp'n at 58 (citing each group's percentages in the overall and Creative Class national populations); *but see id.* at 61 (showing the regional percentages are utterly unlike national ones). This allegation is insufficient.

In response to the District's arguments, plaintiffs repeat three mischaracterizations they made in the Amended Complaint. *Compare* Opp'n at 58-60 *with* Dist. Mem. at 5 n.5, 30-32. As the District noted in its opening brief, Richard Florida actually warned against assuming the correlation between Creative Class populations and segregation was evidence of causation. *Id*. Similarly, the District recognizes the challenges of segregation and adopted the policies plaintiffs assail—*e.g.*, the Creative Action Agenda and New Communities Initiative—to address those challenges, and noted that it provided a comprehensive answer to questions by the U.S. Department of Housing and Urban Development (HUD), rather than a simple point-by-point discussion. *Id.* This is not evidence "the District views submissions of housing plans to HUD as *pro forma* documents of little connection to [its] housing activities." Opp'n at 58. Rather, it is evidence of how seriously the District takes its commitments "to achieve racial, ethnic, and economic diversity

in housing, and … to affirmatively further fair housing in all of its housing activities and programs ….” *Analysis of Impediments* at 1. Indeed, plaintiffs overlook the same document’s conclusion that the District “has been doing more to affirmatively further fair housing than any [other] jurisdiction we have studied.” *Id.* at 3. Plaintiffs’ conclusory allegations that the Creative Action Agenda was intended to discriminate, without any non-speculative supporting information, “stop[] short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 557 (2007)).

Plaintiffs’ second theory of intentional discrimination—that the Zoning Commission engaged in a pattern and practice of arbitrary decision-making in violation of its own regulations—suffers from the same flaws. Further, it misses the purpose of the Equal Protection Clause. That clause requires “that the government not treat *similarly situated* individuals differently [unless they satisfy the relevant level of scrutiny].” *Noble v. United States Parole Comm’n*, 194 F.3d 152, 154 (D.C. Cir. 1999) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)) (emphasis in original). The District explained in its opening brief that the Amended Complaint fails to allege similarly situated individuals were subject to different treatment. Dist. Mem. at 26-27; *see also* Subsection I.A.4 (Plaintiffs Allege Only Legal Conclusions to Support Their Disparate Treatment Claim.). Plaintiffs fail to oppose this argument as well, and the Court should treat it as conceded. *See Buggs*, 293 F. Supp. 2d at 141.

IV. Plaintiffs Fail to State a Violation of the Fair Housing Act (Counts Thirteen and Fourteen).

Plaintiffs have established no violation of the FHA because they have not plausibly alleged discriminatory intent in support of their disparate treatment (Count Thirteen) or disparate impact (Count Fourteen) claims. *See* Dist. Mem. at 28-32 and Subsections I.A.4 (Plaintiffs Allege Only

Legal Conclusions to Support Their Disparate Treatment Claim.) and I.A.5 (Plaintiffs Have Not Shown That District Policy Resulted in a Disparate Impact.) at 6-8 above.

Plaintiffs misunderstand their burden of proof. Contrary to their contention, "a statistical disparity" is *required* "at the pleading stage" and must be supported by evidence of causation. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2512, 2523-24; *compare* Opp'n at 73.[4] *See also* Dist. Mem. at 31 (discussing *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 76-77 (D.D.C. 2008)); Am. Compl. ¶¶ 65-67 (discussing the New Communities Initiative). And plaintiffs' statistics show increasing integration, not segregation. *See* Opp'n at 69-71; Dist. Mem. at 5 n.5, 31-32. They urge the Court to examine the "dissimilarity index" but cite to figures based on the 2000 Census. Opp'n at 69. Current Census data show the index falling more than 10% from 2010 to 2016. Ex. I (U.S. Bureau of the Census, *White to Non-White Racial Dissimilarity Index for District of Columbia*, retrieved from FRED, Federal Reserve Bank of St. Louis), *also available at* https://fred.stlouisfed.org/series/RACEDISPARITY011001 (last accessed Oct. 12, 2018).

Similarly, plaintiffs allege a "massive out-flow of African-Americans" and "a massive in-flow of white residents, particularly millennials," Opp'n at 23, without support. Census data show modest rather than "massive" emigration of African-American families, and not even from the neighborhoods plaintiffs cite. *See*, *e.g.*, Opp'n at 71, Dist. Mem. at 30, Dist. Mem. in Supp. of [First] Mot. to Dismiss [17-1] at 21-22 (Black families in Navy Yard more than doubled; the District of Columbia's Black population increased 4.4%). Similarly, plaintiffs fail to reckon with the facts that "Millennials [will soon] overtake Baby Boomers as America's largest generation"

[4] The Court should reject plaintiffs' attempt to discount "the robust causation requirement of *Inclusive Communities*." *Cty. of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 994 (N.D. Ill. 2018) (comparing cases); *compare* Opp'n at 73 n.12.

and are often African-American. Richard Fry, PEW RESEARCH CTR. (Mar. 1, 2018), *available at* http://www.pewresearch.org/fact-tank/2018/03/01/millennials-overtake-baby-boomers/ (last accessed Oct. 15, 2018); Dist. Mem. at 37-38; *see also* Opp'n at 61 ("40.9% of [B]lack D.C. metro area workers are Creative Class members."). Plaintiffs have drawn incorrect distinctions and ask the Court to force the District to favor one portion of its constituents (plaintiffs and their putative classes), over another, based on protected categories—such as age, race and familial status—in housing policy. Where such policy determinations are appropriate, they should be left to the political branches. Dist. Mem. at 16, 18-20; Subsection I.B (Plaintiffs' Claims Raise Political Questions Not Fit for Judicial Resolution.).

At bottom, plaintiffs admit they propound only a "theory," and it is made up of legal conclusions. Opp'n at 71-72. The law requires allegations of facts; without those, plaintiffs' FHA claim cannot survive.

V. Plaintiffs Fail to State a Claim Under the D.C. Human Rights Act, Citing Inapplicable Law and Failing to Adequately Allege the District's Actions Were Guided by Animus.

Plaintiffs mistakenly assume that because zoning decisions are subject to the D.C. Human Rights Act (DCHRA) they are "transactions in real estate" under the law and Claim Seven. Opp'n at 75-76; *but see* Dist. Mem. at 34-35. Similarly, plaintiffs cite D.C. Code § 2-1401.03 (a) to support Claim Seven, although it "is inapplicable to complaints of unlawful discrimination in residential real estate transactions." *Id.* at 79.

Plaintiffs also overread the decision in *Brandywine Apartments, LLC v. McCaster*, 964 A.2d 162, 168 (D.C. 2009). The D.C. Court of Appeals did not hold, as plaintiffs contend, that "circumstantial evidence" sufficed "to permit the inference of discrimination" except in rare circumstances. Opp'n at 77. Rather, "where the plaintiff has produced no direct or circumstantial evidence of discriminatory animus, a judgment in his favor cannot stand." 964 A.2d at 168.

Plaintiffs allege no evidence of animus, only presuming the animus is self-evident. *See*, *e.g.*, Opp'n at 61 (citing Am. Compl.) and 76 (repeating "cannot be explained but for animus"). But the District has suggested several possible alternative motives. *See* Dist. Mem. at 5-6 (discussing New Communities Initiative), 27, 30, above at 5. Given this lack of evidence of animus, the Court should dismiss plaintiffs' DCHRA claims. Dist. Mem. at 33-39.

VI. The Importance of the District's Interest in Housing Policy Supports Abstention from Plaintiffs' Request for Injunctive Relief Against the Zoning Commission.

Plaintiffs mistakenly claim the abstention doctrine laid out in *Younger v. Harris*, 401 U.S. 37 (1971), cannot apply because this case is not a "civil enforcement proceeding" sufficiently similar to a criminal action. Opp'n at 31-32. This, too, overreads the law. It is true "that *Younger* abstention does not extend to state civil proceedings *merely* because they implicate important state interests and provide an adequate opportunity to raise [federal] challenges," *In re Al-Nashiri*, 835 F.3d 110, 128 n.6 (D.C. Cir. 2016) (emphasis added; quotation omitted), but it does apply to civil actions that "implicate important state interests." *Belfer v. Marshall*, 2018 U.S. Dist. LEXIS 29788, *2 (D.D.C 2018) (citing *Ohio Civil Rights Comm'n v. Dayton Christian Sch, Inc.*, 477 U.S. 619, 627-28 (1986)); *see* Dist. Mem. at 16, 40. Plaintiffs' challenge to the District's entire housing development policy satisfies that criterion. Because plaintiffs failed to address the District's argument that the "extraordinary circumstances" warrant *Younger* abstention, Dist. Mem. at 39-40, the Court may treat it as conceded. *Buggs*, 293 F. Supp. 2d at 141.

VII. The *Amicus* Briefs Filed in This Case Should be Given No Weight.

Finally, the Court should give no weight to the *amicus* briefs [42, 45] filed by Mindy Fullilove and Empower DC because neither brief addresses how plaintiffs' allegations in the Amended Complaint establish plaintiffs have standing or state a claim upon which relief may be granted. "*Amicus* briefs which are unhelpful or fail to present unique information or which raise

issues not addressed by the parties may be disregarded." *Hazlin v. Botanical Labs., Inc.*, Case No. 13-cv-0618-KSC, 2015 U.S. Dist. LEXIS 189687, at *13 (S.D. Ca. May 20, 2015) (citing *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003)); *Neonatology Assocs. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.); *see also Recording Indus. Ass'n of Am. v. Verizon Internet Servs. (In re Verizon Internet Servs.)*, 240 F. Supp. 2d 24, 41-42 (D.D.C. 2003) (citing cases) ("an *amicus* brief … is normally not a method for injecting new issues …, at least in cases where the parties are competently represented by counsel.") (quoting *Universal City Studios v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001)).

CONCLUSION

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

Dated: October 17, 2018.

Respectfully submitted,

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