

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANELL WINFIELD, TRACEY STEWART,
SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

-against-

15-CV-5236 (LTS) (KHP)

CITY OF NEW YORK,

Defendant.

-----X

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL THE DEPOSITION OF MAYOR BILL DE BLASIO**

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INTRODUCTION

Mayor de Blasio has unique and irreplaceable knowledge of and involvement with multiple issues central to plaintiffs' claims and defendant's justifications; neither his knowledge, rationales, nor motivations can be adequately determined without taking his deposition. Nonetheless, when plaintiffs noticed the Mayor's deposition, defendant reflexively resisted.¹

Mayor de Blasio has: (1) made decisions about the outsider-restriction policy (ORP) and offered public assertions of its purported legality; (2) undercut defendant's false justification that the ORP is necessary to prevent displacement through statements reflecting his own perspective; (3) made clear that there is no factual basis for defendant's equally false justification that, without outsider-restriction, New York City Council Members (CMs) would, independent of the merits of a proposal, reject actions needed to facilitate affordable housing; (4) shown that he understands that defendant has critical interests that demand greater effort to counter housing segregation, but retains the ORP nonetheless; and (5) made statements and adopted policies reflecting his knowledge of both fear of and resistance to racial change, and evidencing defendant's overarching policy of accommodating those who have such fears or who manifest such resistance.

Case law, including this Court's prior ruling ordering the deposition of Deputy Mayor Glen, as well as the results of discovery taken to date, make clear that there is no substitute for the testimony of the Mayor. This would be true even absent Deputy Mayor Glen's admission that one cannot necessarily take Mayor de Blasio's public statements at face value. She had been shown an article describing the Mayor as "downplay[ing] the idea that some [CMs] have placed roadblocks to his affordable housing agenda," and quoting him as saying "[t]here's only been a couple of

¹ A "So Ordered" stipulation ([ECF 253](#)) resolved the question of proportionality. It stated that, in respect to ¶ (1)(e) deponents, of which the Mayor is one, "defendant hereby waives any objection to such deponents on the basis that the needs of the case do not warrant the number of deponents being deposed, or on the basis of cost or burden, and the Court shall not deny plaintiffs the right to conduct [such] depositions on either of those bases . . ." *Id.* at 3, ¶ 3.

times where there was actually a disagreement that didn't get resolved"² Glen explained that "if you are the mayor of the City of New York speaking to a reporter, you are probably going to shrug it off so it doesn't look like you are not being able to get your agenda through."³ Glen did not *know* why the Mayor took the posture he did, but believed "it was for political purposes because he was in the middle of an election campaign."⁴

POINT I
THE MAYOR'S PERSONAL KNOWLEDGE OF AND INVOLVEMENT
WITH THE KEY ISSUES MAKES HIS DEPOSITION INDISPENSABLE.

The Court considered the legal issues pertinent to this motion in determining that Glen's deposition was necessary, so plaintiffs will be brief in restating them. In [*Lederman v. N.Y.C. Dep't of Parks & Recreation*](#), 731 F.3d 199 (2d Cir. 2013), the plaintiffs did not contend that the proposed deponents (then-Mayor Bloomberg and a former deputy mayor) had "first-hand knowledge about the litigated claims" *Id.* at 203. On the other hand, Mayor Bloomberg's deposition was ordered in another case in view of statements he made suggesting "his direct involvement in the events at issue in the case." [*United States v. City of New York*](#) ("Bloomberg Case"), 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug. 5, 2009). In that case, the court explained that then-Mayor Bloomberg had expressed his belief that the firefighter tests being challenged as discriminatory were in fact job-related. *Id.* at *2. Of course, Mayor Bloomberg was not the only City official who believed that. But his involvement and his statement "raise[d] the question of the basis for the *Mayor's belief*" that the challenged exams were job-related. *Id.* at *3 (emphasis added). Accordingly, the deposition was ordered. *Id.*

² See tr. excerpts of Nov. 3, 2017 Alicia Glen deposition ("Glen Depo."), Ex. 1 to the July 9, 2018 declaration of Craig Gurian ("Gurian Decl."), at 24:3-26:8. The article referenced, Politico New York, "[De Blasio says Council opposition not an obstacle to affordable housing goals](#)," July 17, 2017, is Ex. 2 to Gurian Decl.

³ Glen Depo., at 27:2-10.

⁴ *Id.* at 27:17-21.

Likewise, this Court ordered the deposition of Deputy Mayor Glen, citing the [Bloomberg Case](#); concluding that Glen’s public statements about the ORP and affordable housing more generally, as well as her relevant responsibilities, suggested that she “has direct involvement” with the “issues implicated in this case”; and holding that the Deputy Mayor’s attempt to explain her statements through the vehicle of a declaration was inadequate because “plaintiffs are entitled to ask follow-up questions and seek clarifications based on these statements” and that “[n]o other witness could provide this information besides Glen herself.”⁵

And in [Pisani v. Westchester Cty. Health Care Corp.](#), 2007 WL 107747 (S.D.N.Y. Jan. 16, 2007), plaintiff had already taken the deposition of a party defendant who testified to conversations he had with the Westchester Deputy County Executive, a non-party. [Id.](#) at *1, *3. Nevertheless, the Court held that the Deputy County Executive’s personal involvement with the issue meant that information from him “cannot be gleaned from another source” [Id.](#) at 3.

These cases make clear that plaintiffs need not show that only the proposed deponent has information about an issue in question. The “uniqueness” element is satisfied by the unmatched perspective that the proposed deponent offers as to the *proposed deponent’s* own, specific views.

Case law also makes clear that neither public statements nor other document discovery is an adequate substitute for deposition on oral examination. As for public statements such as interviews, [Sherrod v. Breitbart](#), 304 F.R.D. 73 (D.D.C. 2014) is instructive. In that case, the United States sought to quash the deposition of the Secretary of Agriculture. The Secretary had issued a public statement and held two press conferences about a decision he had made, and the government proffered that the Secretary was ready to ratify these statements under penalty of perjury. [Id.](#) at 76. But this was not sufficient: “The press, which had very different motivations

⁵ See tr. excerpt of Sept. 14, 2017 Court Conference ([ECF 183](#)), Ex. 3 to Gurian Decl., at 13:21-15:21.

than do the parties to this case, did not ask the type of probing follow-up questions counsel expect to ask at this deposition regarding who he spoke to, what information he was presented with and considered, and how, if at all, different factors influenced his decision.” *Sherrod*, 304 F.R.D at 76. The court continued: “The public statements the Secretary *chose to make* cannot possibly substitute for the answers to questions specifically directed to his underlying reasoning.” *Id.* (emphasis added).⁶

POINT II

MAYOR DE BLASIO DIRECTLY PARTICIPATES IN DECISIONS ABOUT OUTSIDER-RESTRICTION AND HAS MADE STATEMENTS DEFENDING THE POLICY CONFIRMING HIS PERSONAL KNOWLEDGE OF KEY FACTS AND POLICY CONSIDERATIONS.

The Mayor has repeatedly spoken out on the outsider-restriction policy, and discovery has made clear his personal involvement in and responsibility for the ORP.

A. Defending the ORP

The Mayor has defended the ORP by saying “[w]e believe that’s a very fair approach because folks who have built up communities deserve a special opportunity to get affordable housing that’s created.”⁷ Exploring the bases for his view is important. First, the policy does not distinguish between “folks who have built up communities” and insiders of more recent vintage.⁸ So the Mayor’s justification does not fit the policy that exists. Also, his view does not take account of the “outsider” family who has long lived in a *non*-gentrified neighborhood with poor schools, an above-average crime rate, etc. Only via deposition can plaintiffs probe his rationale for

⁶ See also *Sherrod*, 304 F.R.D. at 76 (rejecting option of written questions because those “lack the flexibility of oral examination . . . which allows the questioner to adjust on the fly and confine his questions to the relevant ones while still satisfying himself and his client that a particular line of inquiry has been exhausted”).

⁷ See tr. excerpt of [“Mayor de Blasio, Queens Officials and the Arker Companies Break Ground on 154 New Affordable Homes for Low-Income Seniors.”](#) August 21, 2015, Ex. 4 to Gurian Decl., at 4 (PDF p. 2).

⁸ See tr. excerpts of Aug. 2, 2017 deposition of Vicki Been (“Been I”), Ex. 5 to Gurian Decl., at 19:16-23:7.

constricting that household's chances to be able to move into a neighborhood of opportunity.

Next, members of the Mayor's administration have rejected the notion that some New Yorkers "deserve" affordable housing more than others. "It's not the justification," former HPD Commissioner Vicki Been testified. The "reason why we have the community preference is not about [deserving]," she continued, adding that she did not "think that you can make those [kinds of] determinations."⁹ It is important to probe why the Mayor offered the dictionary definition of a pretext: a reason given in justification of a course of action that is not the real reason.

When, on another occasion, a reporter posited that the ORP "leads to less integration" because "there's less movement of people around the city," the Mayor incorrectly asserted that "Community Board districts are very diverse, in and of themselves."¹⁰ In fact, community districts are, in general, far more racially and ethnically homogenous than the city as a whole – facts well known to defendant.¹¹ The Mayor's statement needs to be explored. His attempt to pretend that outsider-restriction would not have disparate impact because of in-CD diversity is evidence of defendant's avoidance of the reality of residential racial segregation, and of consciousness of guilt.

The Mayor also asserted in 2016 that "[t]he law says that when we create affordable housing, we have the right to split it 50 percent for people from the surrounding community" and the rest citywide.¹² The assertion is uncannily similar to the statement that caused former Mayor Bloomberg's deposition to be ordered. See [Bloomberg Case](#), 2009 WL 2423307, at *2 ("I think

⁹ See Been I, at 31:6-34:9.

¹⁰ See tr. excerpt "[Mayor de Blasio Announces a Record-Breaking 20,325 Affordable Apartments and Homes Financed in Last Fiscal Year, Enough for 50,000 New Yorkers.](#)" July 13, 2015, Ex. 6 to Gurian Decl., at 9-10.

¹¹ See, e.g., Preliminary Guide to NYC's AFH Submission, Table 3, at 8, Ex. 7 to Gurian Decl. (showing consistently high levels of segregation in New York City based on the dissimilarity index as measured between Blacks and Whites). See also First Amended Complaint ([ECF 16](#)), at 8-10, 13, ¶¶ 42-60, 76 (documenting pervasive segregation at the CD level [using data that defendant's Planning Department has available online](#) – select the "Total" tab on the spreadsheet).

¹² See tr. excerpt of "[Mayor de Blasio Appears on NBC's Ask the Mayor.](#)" Apr. 18, 2016, Ex. 8 to Gurian Decl., at 5.

that in fact the tests were job related and were consistent with business necessity.”). Both statements involve the official holding the same position voluntarily inserting himself into the case by offering his own synthesis of the law and the facts. In addition, the Mayor’s belief and the basis for it is at the heart of defendant’s justification and must be explored.¹³

Earlier this year, the Mayor appeared on the *Inside City Hall* television program and was questioned about the ORP. He dismissed the fact that lottery rules allow someone to get preference regardless of how short a time that person has lived in the CD, and the fact that lottery rules keep an outsider at the back of the line even if that outsider “might be just as poor or in the same economic [straits],” as a “pretty rarified example,” claiming that the “vast majority of people who are applying have been in their neighborhood a long time.”¹⁴ Plaintiffs are entitled to question the Mayor as to the basis for his claims about the characteristics of the insider-applicant pool, not least of all in light of the finding in the Beveridge Report that **[Redacted]**

.¹⁵

During the same appearance, the Mayor let slip that he actually does understand that defendant can have an integrative impact *by having a lottery that proceeds citywide*. He stated that “50 percent [of the units] go to anyone and everyone in the whole city, reflecting the total diversity of the city *and that certainly has integrative impact*.”¹⁶ The corollary, of course, is that the preference part of the lottery does *not* reflect the total diversity of the city and thus has a

¹³ It is also a concrete example of a circumstance where a written interrogatory yielded no information because, by definition, interrogatories do not incorporate the ability to have follow-up. See Defendant’s Fifth Responses and Objections to Plaintiffs’ First Set of Interrogatories, June 11, 2018, Ex. 9 to Gurian Decl., at 10-11, Interrogatory No. 6 (noting that the Mayor “does not specifically recall his basis or bases for making this statement”).

¹⁴ See tr. excerpt of [“Mayor de Blasio Appears Live on Inside City Hall,”](#) Jan. 17, 2018, Ex. 10 to Gurian Decl., at 3.

¹⁵ See Beveridge Report, already in the possession of the Court, at 4, ¶¶ 10-11.

¹⁶ See tr. excerpt of [“Mayor de Blasio Appears Live on Inside City Hall,”](#) Jan. 17, 2018, at 3 (emphasis added).

segregation-perpetuating impact. Beyond impact, the Mayor’s personal knowledge is probative of defendant’s deliberate disregard of the consequences of its policy (one route to intent); it also goes to the question of punitive damages (reckless disregard of the risk of violating the law).¹⁷

The Mayor’s further statements – that those who want to stay “have some rights in the equation” and that “50-50 split speaks to both parts of the reality” (integration and the desire to stay)¹⁸ – raise more questions. First, affordable housing is a limited resource that defendant makes available only to a small percentage of those who need it. As such, defendant is not deciding *whether* to allocate the limited resource, but whether or not to do so in a way that maximizes desegregation. Second, to what extent does the Mayor define his responsibility to include an obligation to those many New Yorkers who are willing to move out of a neighborhood for affordable housing, including those New Yorkers who do not want to be disadvantaged in their chances to move to neighborhoods of opportunity? And, third, the Mayor’s facile 50-50 equation itself needs exploration: the number of people on each side of the equation makes a difference.¹⁹

B. Additional evidence of the Mayor’s direct and affirmative participation in the ORP

As Ms. Been has acknowledged, changes to ORP policy are traceable to discussions she had with the Mayor: “There was . . . an alternative that involved a series of what you might call tweaks to the Community Preference that I discussed with him and which we adopted. We did not

¹⁷ See, e.g., *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (quoting *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 529-30 (1999)) (holding the Fair Housing Act expressly allows for punitive damages in “cases in which the [defendant] has engaged in intentional discrimination and has done so with malice or reckless indifference to the federally protected rights of an aggrieved individual”).

¹⁸ See tr. excerpt of [“Mayor de Blasio Appears Live on Inside City Hall.”](#) Jan. 17, 2018, at 3.

¹⁹ The Mayor would not consider a “50-50 split” between the wealthiest 10 percent’s income and that of the remaining 90 percent as “balanced”; so it is peculiar (and probative of consciousness of guilt) that he has suggested a fair balance exists between insiders and outsiders when there are many fewer insiders per lottery than outsiders. See, e.g. Glen Depo., at 167:14-168:2 (the proposition that “there are a lot fewer people competing for the apartment from inside than there are competing for the other apartments from the outside” is “generally . . . mathematically correct”); see also Beveridge Report, at 2-3, ¶ 6 (finding [Redacted])

reject this.”²⁰ Ms. Been could not recall all of the “tweaks,” but one was the practice of “nesting.”²¹ In other words, the Mayor was directly involved in a decision to change the policy, and to reject other changes (Ms. Been specified that her discussions with the Mayor included a 30 percent preference “with various and assorted carve-outs.”).²²

The ultimate decision maker needs to be questioned. Why, for example, was a lowered community preference percentage rejected even though it was known that “there was less race-based impact as the Community Preference was lowered”?²³ It is the Mayor’s reasons – why and how *he* weighed various considerations in coming to his decision – that only he can answer.

Moreover, Ms. Been acknowledged the consideration and rejection of one option whereby preference would be shared between the CD where a development was being developed and another CD (not necessarily contiguous with the first) so as to create a combined preference area whose demographics more closely mirrored those of the city as a whole than did the single CD.²⁴ This alternative’s rejection occurred after the Mayor already knew that defendant, [Redacted]

²⁵ Plaintiffs need to ask the Mayor why applying the more racially balanced multi-district approach more generally was not acceptable to him. Plaintiffs should also be allowed

²⁰ See tr. excerpts of Apr. 10, 2018 deposition of Vicki Been (“Been II”), Ex. 11 to Gurian Decl., at 212:21-213:21.

²¹ See *id.* at 213:14-21. Nesting refers to the practice of counting for purposes of community preference a person who receives a disability set-aside apartment and who lives in the CD where the development is being built, as well as to the practice of counting for purposes of municipal employee preference those CD residents who also happen to be municipal employees. In other words, under the change, one household checks multiple preference or set-aside boxes.

²² See *id.* at 212:21-213:2.

²³ *Id.* at 189:11-190:4.

²⁴ See *id.* at 208:21-210:12.

²⁵ See Aug. 2014 emails between the Mayor and Ms. Been, Ex. 12 to Gurian Decl., at 53604-05.

to ask the Mayor – who said unequivocally

[Redacted]

²⁶ – whether he thinks he is capable of persuading New Yorkers that a split-district system would be fair in principle and objective in administration.

In addition, the Mayor, from the outset of this litigation,

[Redacted]

In all of the above, the parallels with case law and this Court’s prior ruling are clear. The need to probe the bases for *the Mayor’s* personal beliefs and knowledge justify the deposition.

POINT III

THE MAYOR’S TESTIMONY WILL SHED UNIQUE LIGHT ON THE FALSITY OF DEFENDANT’S JUSTIFICATION THAT OUTSIDER-RESTRICTION IS NECESSARY TO PREVENT DISPLACEMENT.

Defendant has proffered no evidence that the ORP prevents displacement. But make the counter-factual assumption for a moment that outsider-restriction *were* linked to some reduction in the amount of displacement that would otherwise occur. The policy would still not be legally justified if there were anti-displacement measures with lesser discriminatory impact that defendant failed to harness. One view on whether defendant has, over the years, availed itself of other strategies has been expressed by former HPD Commissioner Shaun Donovan, who served during a portion of former Mayor Bloomberg’s tenure. Mr. Donovan testified that he was “confident” that “we were doing a substantial amount in many different ways to try to prevent displacement.”²⁸

²⁶ See Aug. 2014 emails between the Mayor and Ms. Been, at 53604.

²⁷ See overlapping email chains involving the Mayor, Bates 93696-98, Ex. 13 to Gurian Decl., at 93696; see also *id.* at 93698 (stating “[Redacted]” [Redacted] *id.* at 93696 (“ [Redacted]” *id.* at 93696-98 (“ [Redacted]” [Redacted]

²⁸ See tr. excerpt of June 1, 2018 Shaun Donovan deposition, Ex. 14 to Gurian Decl., at 123:15-18.

Mayor de Blasio has a different perspective on how defendant historically responded to gentrification pressures: “[B]efore this administration came into office, the response of the city government was to do absolutely positively nothing.”²⁹ In other words, the Mayor was admitting inaction (and a failure to opt for a less-discriminatory approach) for almost all of the outsider-restriction era (including 2002 – the year preference was raised to 50 percent – and the ensuing 11 years). Plaintiffs are entitled to probe the factual bases of the Mayor’s statement and the question of whether he recognized that his administration’s establishment of concrete anti-displacement policies had a bearing on the claimed need for outsider-restriction as an anti-displacement measure.

The Mayor has also injected himself into the question of the validity of the anti-displacement justification for the ORP directly in connection with this lawsuit. Asked about the challenge to the ORP, he cast the prospect of eliminating the ORP as something that would say to long-term residents of an area – particularly one experiencing gentrification pressures – that “we have no way to give you a chance to stay in your own neighborhood.”³⁰ Unfortunately, this statement, too, is false and misleading. In the first instance, Matthew Murphy has confirmed that the ORP does not, and is not designed to, prevent a New Yorker from being displaced from his or her apartment.³¹ Second, defendant has not even quantified the scope of displacement, let alone provided any evidence that insider households awarded apartments were facing the prospect of displacement or that outsider households had any lower prospect of being displaced.³²

²⁹ See tr. excerpt of [“Mayor de Blasio Hosts Town Hall Meeting with Brooklyn Residents to Discuss Affordable Housing.”](#) Mar. 14, 2016, Ex. 15 Gurian Decl., at 25-26.

³⁰ See tr. excerpt of [“Mayor de Blasio Appears Live on Inside City Hall.”](#) Jan. 17, 2018, at 3.

³¹ See tr. excerpts of Mar. 16, 2018 deposition of Matthew Murphy (“Murphy Depo.”), Ex. 16 to Gurian Decl., at 168:20-24 and 169:19-170:4.

³² For example, Elyzabeth Gaumer, HPD assistant commissioner of research and evaluation at the time of her deposition, acknowledged that there were limited data on the number of people being displaced and that the number was difficult to measure. See tr. excerpt of May 18, 2018 Elyzabeth Gaumer deposition, Ex. 17 to Gurian Decl., at

Third, Ms. Been testified that defendant's job is to prevent people from being displaced out of the city and from being displaced out of a neighborhood. But, she said, HPD did not look at which had greater relative priority; she did not discuss priority with the Mayor.³³

Plaintiffs are entitled to probe the Mayor's statement that the policy is the only way to give people a chance to stay in their own neighborhood, and to put it in context. How, for example, does *he* rank the importance of keeping an insider in the neighborhood versus accepting the fact that an outsider, deprived of a level playing field, may be driven out of the city altogether? It is the Mayor who ultimately decides which interests are given more weight.

The Mayor's deposition answers would provide evidence for plaintiffs' position that there is no valid anti-displacement justification for the ORP as a matter of the impact/perpetuation claim *and* plaintiffs' intentional discrimination claim with respect to pretext and consciousness of guilt.

POINT IV

THE MAYOR'S TESTIMONY WILL MAKE CLEAR DEFENDANT'S INABILITY TO PROVE THAT, WITHOUT OUTSIDER-RESTRICTION, COUNCIL MEMBERS WOULD REJECT ACTIONS NEEDED TO FACILITATE AFFORDABLE HOUSING DEVELOPMENT.

Defendant continues to pursue the defense that without outsider-restriction, CMs would, independent of a proposal's merits, reject actions needed to facilitate affordable housing development.³⁴ Mayor de Blasio's statements and conduct are highly relevant to this issue. He

217:9-24. *See also* tr. excerpt of Apr. 19, 2018 Purnima Kapur deposition, Ex. 18 to Gurian Decl., at 128:16-129:8 and 129:20-130:9 (Kapur, the City Planning executive director, testified that it is "difficult to discern" whether population movements are voluntary; that, at the neighborhood level, "it's very difficult to make those kinds . . . of statistical determinations in any meaningful way"; and "[w]hat we cannot discern is why people have moved.").

³³ *See* Been I, at 86:5-9 and at 86:25-87:10. She did later add that she agreed with the proposition that "having housing is – period – is more important than where the housing may be." *Id.* at 93:13-22.

³⁴ For example, Ms. Torres-Springer testified that several current CMs would take the view (whether using the precise wording described here) that: "I'm going to deny my constituents and other New York City residents desperately needed affordable housing because HPD is now using a lottery system that gives all New York City households an equal chance to compete in each affordable housing lottery they enter." *See* tr. excerpts of May 10, 2018 deposition of Maria Torres-Springer, Ex. 19 to Gurian Decl., at 199:22-201:23, 204:20-205:3, 205:8-23, and 206:15-208:14. But she was unable to quantify the risk that various of the CMs would take that view; didn't know which might instead

articulates a sense of how to navigate the local political terrain qualitatively different from other administration officials. For example, the Mayor did “downplay the idea that some CMs have placed roadblocks to his affordable housing agenda,” and said “[t]here’s only been a couple of times where there was actually a disagreement that didn’t get resolved.”³⁵

He has said “I was a legislator – there’s always a path to yes.”³⁶ And he has explained how he was able to overcome resistance to a new way of thinking about affordable housing, specifically the concept of mandatory inclusionary housing (MIH):

We were talking about thinking about our City in a whole new way And you’re never surprised, when you put a whole new way of thinking on the table, that there’s immediate resistance. It’s normal, it’s human I’m never 100 percent surprised when the community board disagrees with something emanating from City Hall. So, the early going was tough. But we rallied It was an example of a really broad coalition for change On that day we showed that things could really be done differently, and that we could marshal all our forces in the interest of working people and low-income New Yorkers and everyday New Yorkers who are just struggling to make ends meet – that we could actually change our policies profoundly and be on their side.³⁷

The Mayor’s perception that CM opposition is manageable and that most disagreements get resolved requires exploration. But his latter statements, and especially his recounting of the MIH process, are even more crucial. They reflect a philosophy that it is necessary *and* feasible to: (a) resist unwarranted opposition; (b) bring together a “really broad coalition”; (c) work in the interests of all New Yorkers; and (d) change minds and thus “change politics profoundly.”

say “I strongly regret that there is no more community preference policy, but now I’m going to try to get what other things I can from my constituents”; and did not ask *any* CMs how, if at all, their support for affordable housing would be affected if the ORP percentage were scaled back. *See id.* at 209:8-23, 214:17-215:2, and 121:8-124:8.

³⁵ *See* Politico New York, [“De Blasio says Council opposition not an obstacle to affordable housing goals,”](#) July 17, 2017, at 2.

³⁶ *See* excerpt of New York Times, [“No Deal, Just Blame, on Mayoral Control of New York City Schools,”](#) June 22, 2017, Ex. 20 to Gurian Decl., at 3.

³⁷ *See* tr. excerpt [“Mayor de Blasio Delivers Remarks at NYSFAFH Housing for all Conference,”](#) May 11, 2016, Ex. 21 to Gurian Decl., at 4-5.

The choice *not* to try to change CM minds *on the particular issue* of the importance of having an equal-access lottery with no disparate impact *when the Mayor has been prepared to take on other, initially difficult, fights* bears not only on question of the “necessity” of the ORP, but also on the availability of the less-discriminatory alternative of educating CMs to the harms of continuing a segregation-perpetuating lottery-system. Finally, it is probative of defendant’s unwillingness to fight against those who wish to maintain the residential racial status quo.

Further questions have been raised by Council Speaker Corey Johnson’s May 2018 statements that, though he had supported the ORP in the past, “I’m willing to say when I’ve been wrong in the past, and this may be an instance where I’ve been wrong in the past.”³⁸ He continued: “[I]f we’re going to have a real conversation about school segregation and housing segregation and how they’re linked, we have to do a better job at integrating communities. And so I’m open to learning more about the data, to understanding what we need to do to fully integrate communities across New York City.”³⁹ The exchange proceeded further:

Speaker Johnson: And if that means us scaling back on the percentage that we allow for right now, I would be open to have that conversation.

Errol Louis: Okay, that’s interesting. I mean, it’s refreshing to hear that. And that there’s nothing magical about 50 percent. You know 40 percent, 30 percent, this percent, that percent

Speaker Johnson: [Interjecting] Twenty percent, twenty-five percent, you have to—yeah.

Errol Louis: Agreed, totally agreed.

Speaker Johnson: [Interjecting] There’s a greater good we have to look at.⁴⁰

The Mayor, defendant’s chief executive officer, has a unique relationship with a Council Speaker, defendant’s chief legislative officer, both in terms of knowing his counterpart and

³⁸ The [NY1 News interview, with Errol Louis](#), aired on May 3, 2018. Quoted material represents our best effort at an accurate transcription. The relevant portion of the interview commences at approximately the 1:25 mark.

³⁹ [Id.](#)

⁴⁰ [Id.](#)

negotiating with him. He needs to be asked to explain how the Speaker’s new view could lead to modification of the ORP without having a negative impact on affordable housing development. He also needs to be asked why it is that the Speaker has not previously been provided with the data – such as the Beveridge Report finding that “ [Redacted]

⁴¹ – that would enable the Speaker “to understand what we need to do to fully integrate communities across New York City.”

POINT V

THE MAYOR’S TESTIMONY IS NECESSARY TO UNDERSTAND DEFENDANT’S MOTIVATION FOR FAILING TO ADDRESS THE HOUSING SEGREGATION THE MAYOR KNOWS UNDERLIES THE CITY’S HIGH LEVEL OF SCHOOL SEGREGATION.

New York City continues to be plagued by deep residential segregation, or, as the Mayor puts it, “There are neighborhoods and school districts in this city that are overwhelmingly of one ethnic group or one racial group.”⁴² When a jury is asked to assess whether outsider-restriction is serving the interests of the city, it will necessarily have to look at those interests in context. One critically important consequence occurs in relation to the possibility of integration in schools: “Many of our school districts don’t afford us that opportunity at the elementary school level because you can have a huge geography that is overwhelmingly people of one particular background and that is the reality in New York City,” as the Mayor has explained.⁴³

According to the Mayor, “The schools didn’t create segregation. Segregation is based on economics and structural racism and then that plays out in employment *and in housing and then*

⁴¹ See Beveridge Report, at 3, ¶ 7.

⁴² See tr. excerpt of “[Mayor de Blasio Appears Live on WNYC](#),” June 9, 2017, Ex. 22 to Gurian Decl., at 2.

⁴³ See tr. excerpt of “[Mayor de Blasio Appears Live on Inside City Hall](#),” June 12, 2017, Ex. 23 to Gurian Decl., at 3.

*eventually all that affects who goes to school where. . . . to suggest the schools can solve this problem without first focusing on the root causes, I think it's a mistake. . . . We can't solve the problem to the degree I think a lot of people would like to if we don't go at all those other issues first*⁴⁴ But when it comes to a key root cause, the Mayor had previously, in answer to a question about school segregation, suggested that there was not much he could do. "We cannot change the basic reality of housing in New York City," he said.⁴⁵

It is important to be able to question the Mayor about how housing segregation undercuts the city's substantial interest in creating racially integrated schools; about the bases for his belief that "we cannot change the basic reality of housing in New York City"; and about why, when he and others in his administration recognize that a citywide lottery system is the way to maximize the lottery's integrative effect,⁴⁶ he will not take the modest step of an equal-access lottery to counteract what the Mayor describes as a history in the city going back "not just decades, but hundreds of years" involving, *inter alia*, "discrimination and segregation in housing."⁴⁷

POINT VI

THE MAYOR'S TESTIMONY IS HIGHLY RELEVANT TO THE ISSUE OF DEFENDANT'S KNOWLEDGE OF FEAR OF RACIAL CHANGE AND ITS UNWILLINGNESS TO STAND UP TO THOSE WHO SEEK TO MAINTAIN THE RACIAL STATUS QUO.

Defendant's witnesses have been loathe to acknowledge the phenomenon that, in today's

⁴⁴ See tr. excerpt of "[Mayor de Blasio Appears Live on the Brian Lehrer Show.](#)" May 11, 2018 (emphases added), Ex. 24 to Gurian Decl., at 7.

⁴⁵ See excerpt of New York Times, "[De Blasio, Expanding an Education Program, Dismisses Past Approaches.](#)" May 11, 2017, Ex. 25 to Gurian Decl., at 2.

⁴⁶ See tr. excerpt of "[Mayor de Blasio Appears Live on Inside City Hall.](#)" Jan. 17, 2018, at 3 (recognizing that it is the citywide portion of lotteries that reflect "the total diversity of the city and that certainly has [an] integrative impact"); see also *Been II*, at 113:9-22 (acknowledging that, if Ms. Been's only concern were reducing racial segregation to the maximum extent she could, she didn't think that she would retain a 50 percent preference).

⁴⁷ See tr. excerpt of "[A Year Ahead of Schedule, Mayor de Blasio Announces Opening of New Upper West Side School.](#)" Aug. 10, 2016, Ex. 26 to Gurian Decl., at 6.

New York, there are people in white neighborhoods and in neighborhoods dominated by other racial groups where racial change or the prospect of racial change makes them feel uncomfortable. However, Matthew Murphy, defendant's deputy commissioner for policy and strategy at HPD, after noting that he "can't speak for every resident," ultimately admitted that "I think it's likely and I think people correlate that change [neighborhood racial change] to development, new housing development. So *as a result they oppose housing development*, especially Affordable Housing Development."⁴⁸ When asked a follow-up question about whether there is anything politically sensitive about broaching the idea of desegregating neighborhoods that are currently segregated by race or ethnicity, Mr. Murphy went on to acknowledge there was, and specified a relevant consequence: "I believe so, yes, *especially voting against Affordable Housing Projects*."⁴⁹

The Mayor's own view on this question is key: he sets affordable housing policy (including, as noted, the ORP element of that policy). The Mayor has said there is "tremendous" fear of and "uncertainty" about development: "The fear is very real out there," adding that "I understand it."⁵⁰ The Mayor's testimony is crucial to understand the extent to which he understands the racialized component of fear, and as to his response to it in setting policy.

This questioning will not occur on a blank canvas. Despite the Mayor's recitation of a long history of housing discrimination and segregation, the city does not (to Deputy Mayor Glen's knowledge) have a plan to end residential racial segregation.⁵¹ Q: Why not, Mr. Mayor? Indeed, Ms. Glen, the deputy mayor for *housing* and economic development, did not "ever recall having a

⁴⁸ Murphy Depo., at 215:3-20 (emphasis added).

⁴⁹ *Id.* at 215:21- 216:5 (emphasis added).

⁵⁰ See excerpts of Mayor de Blasio op-ed, New York Daily News, "[Why our housing plan must pass: Mayor de Blasio urges the City Council and advocates to get behind his zoning reforms.](#)" Mar. 9, 2016, Ex. 27 to Gurian Decl. at 3, 6.

⁵¹ Glen Depo., at 262:18-24.

conversation with [the Mayor] about housing patterns in New York City” and what can be done about them: “That is not something we’ve talked about.”⁵² Q: Why not, Mr. Mayor? According to a published report: “One person who worked on the [Mayor’s] housing plan and would only speak on background said de Blasio was singularly focused on building more affordable housing and *integration did not factor into the strategy.*”⁵³ Q: Why not, Mr. Mayor?⁵⁴

These questions are central to putting together the mosaic of evidence needed to show that defendant is indeed unwilling to take on those who want to maintain the residential racial status quo: the Mayor knows that change is important, but is unwilling to make it.

That unwillingness is part of a pattern. On the school segregation side, public pressure is now causing some shift in policy; but, as has been widely pointed out, “Mayor de Blasio shied away from even using the word segregation for years”⁵⁵ (This observation is consistent with the admission from Ms. Been that administration policy was to intentionally downplay or avoid outright the language of fair housing or race.⁵⁶). The pattern continues in respect to the difficulties of siting shelters for the homeless or in placing homeless New Yorkers in housing. Department of

⁵² Glen Depo., at 264:4-265:9.

⁵³ See excerpts of Politico New York, [“50 years after Fair Housing Act, New York City still struggles with residential segregation.”](#) Apr. 23, 2018, Ex. 28 to Gurian Decl., at 10 (emphasis added).

⁵⁴ Note that CM Torres has criticized the Mayor’s silence on what the administration means by remaining “committed to the principles” of the Assessment of Fair Housing: “Mayor Bill de Blasio’s silence on this issue suggests that fair housing is not as much of a priority as his administration would like us to believe.” See Letter to the Editor, Crain’s New York Business, [“Mayor’s fair-housing pledge doesn’t inspire confidence,”](#) Ex. 29 to Gurian Decl.

⁵⁵ See, e.g., excerpt of New York Daily News, [“City Council may create office to fix racial segregation in schools.”](#) May 23, 2018, Ex. 30 to Gurian Decl., at 2.

⁵⁶ Ms. Been explained that disagreements about racism and racial biases are different from other public policy issues because “when you are talking about racism and racial biases, it’s a hard conversation. People don’t tend [to] do all that well in those conversations in my experience.” Been I, at 205:2-206:25. According to Ms. Been, “I think fair housing . . . shuts people down . . . in my experience, it doesn’t lead to the best of conversations. *When you invoke fair housing, it shuts people down.*” *Id.* at 207:24-208:6 (emphasis added). Defendant’s approach of not speaking in the language of fair housing or race as opposed to “diverse communities” was not random; on the contrary, Ms. Been acknowledged that the chosen path was “a tactic, a question of tactics.” *Id.* 210:17-211:12.

Social Services Commissioner Steve Banks could only identify a single circumstance while in office where he and the Mayor had any communication in any form about the role, if any, that race plays in those difficulties.⁵⁷

Defendant’s overarching policy of not fighting those who wish to retain the racial status quo is also reflected in the Mayor’s statements related to homeless policy. The Mayor has critiqued previous efforts to site homeless shelters by saying that government has made it harder because “we’ve sent people all over and there’s not a sense of the people who are being served are from my very own community – they are just like me – and that’s something we need to change.”⁵⁸ Mr. Banks, defending the Mayor’s position, asserted the importance of “people knowing that the folks inside those doors come from right around their own street, their own neighborhood, their own block.”⁵⁹ He acknowledged that there are a variety of dimensions on which homeless New Yorkers are demonized as being *not* like “you and me”; for example, “my neighborhood / not my neighborhood.”⁶⁰ Asked whether the demonization also comes from seeing people as “[m]y race/not my race,” Mr. Banks agreed that “the demonization may be based on that too in terms of my experience, yes.”⁶¹ The Mayor needs to answer questions related to why his policy in respect to homeless New Yorkers is responsive, *inter alia*, to race-based “just like me” views.⁶²

⁵⁷ See tr. excerpts of Nov. 29, 2017 deposition of Steve Banks (“Banks Depo.”), Ex. 31 to Gurian Decl., at 179:20-180:25. Mr. Banks, it should be pointed out, claims that he never during his time in city government heard any person or any group make an appeal to maintain the racial status quo of a neighborhood. *Id.* at 182:3-18.

⁵⁸ See tr. excerpts of [Mayor de Blasio’s speech on the City’s homelessness plan](#), Feb. 28, 2017 (“Homeless Policy Speech”), Ex. 32 to Gurian Decl., at 7.

⁵⁹ Banks Depo., at 170:11-171:3.

⁶⁰ *Id.* at 170:20-171:3

⁶¹ *Id.* at 171:4-171:8.

⁶² In pursuing this path, the Mayor is aware that shelter residents (disproportionately African-American) will be placed in starkly unequal geographic concentrations: “If [a CD] has 50 people in [the] shelter system, we want [them to] have

POINT VII

THERE IS NO SUBSTITUTE FOR THE MAYOR'S OWN TESTIMONY.

As is clear from the preceding points, only the Mayor can testify about his own knowledge, views, and decisions, all of which shape defendant's overarching policy of being responsive to those who want to retain the racial status, including the ORP.

The inadequacy of substitutes has previously directly been manifested. As explained, the single interrogatory posed to the Mayor got no substantive answer – and plaintiffs, given the nature of the device, could not follow up.

At the Glen deposition, plaintiffs asked the deputy mayor to confirm that the Mayor is “pretty dubious that much can be done about residential segregation”; her response: “You would have to ask him.”⁶³ And information on the Mayor's views as to racial politics in New York City – which the former City Planning Director acknowledged is still a force after 50 years, including in the housing context⁶⁴ – could not be obtained from Ms. Glen because she explained that, “[n]o, I don't think we've ever had a conversation like that.”⁶⁵

At the second session of the Been deposition, plaintiffs tried to learn about the Mayor's views concerning the existence of opposition to residential integration, but Ms. Been explained that, in the period from early 2014 to the time of the deposition in April 2018, she and the Mayor had never had a discussion on that issue.⁶⁶ She also previously claimed that she was unfamiliar

some kind of capacity like that. If they have thousands, we want them to have capacity for the people from their neighborhood, even if it means enough capacity for thousands of people.” See [Homeless Policy Speech](#), at 13.

⁶³ Glen Depo., at 262:25-263:6.

⁶⁴ See tr. excerpt of deposition of Carl Weisbrod, July 27, 2017, Ex. 33 to Gurian Decl., at 99:22-101:20 (stating “[o]ver 50 years of working in New York City, racial politics are always in the ether” as a “fact of life” and recognizing “[a]dvocacy in relation to housing policy is not immune from that”).

⁶⁵ Glen Depo., at 215:24-215:23.

⁶⁶ See Been II, at 15:15-23.

with the Mayor having said that, in previous administrations, defendant was not serious about anti-displacement efforts or serious about dealing with gentrification.⁶⁷

On the question of the Mayor's views as to whether it is difficult to get community support for fair housing, current HPD Commissioner Torres-Springer could not help because she did not recall having any conversations with the Mayor on that topic.⁶⁸ On the question of whether, as Deputy Mayor Glen suggested, the Mayor was downplaying for political reasons the idea of CMs placing roadblocks to his affordable housing agenda, Ms. Torres-Springer first declined to answer the question directly as to whether she knew what the Mayor meant; then said she did not know who would know what he meant; and, then, in response to the question as to whether the Mayor would know what he meant, she testified, "That would have to be a question posed to him."⁶⁹

In the end, only Mayor de Blasio can explain how *he* knits together the practical and political issues relating to how defendant responds to issues with a race-based salience.

CONCLUSION

For the reasons stated herein, plaintiffs' motion to compel should be granted.

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⁶⁷ *See* Been I, at 64:4-24.

⁶⁸ Torres-Springer Depo., at 143:18-144:6.

⁶⁹ *Id.* at 12:6-18:9. Likewise, it is the only the Mayor who could answer the question of whether Ms. Torres-Springer was accurately reflecting de Blasio administration views in answering the question, "In your mind is it pretty clear cut that African Americans, as a group, do not share equally in opportunity in New York City?" with "I don't think there is anything clear cut about that question actually." *Id.* at 59:21-60:4.