UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

-against- 15-CV-5236 (LTS) (KHP)

CITY OF NEW YORK,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUR-REPLY TO DEFENDANT'S REPLY BRIEF (SUPPORTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT)

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INTRODUCTION

Defendant's reply brief[1] warps the law and the facts related to its intentional discrimination; recycles arguments concerning disparate impacts and perpetuation of segregation, making crystal-clear that only issues of law (and only a few of them) need to be resolved; abandons its previous reliance on the Challenged 2020 HUD Rule,[2] leaving the 2013 HUD Rule, adopted by the Circuit in *MHANY Mgmt. Inc. v County of Nassau*, 819 F.3d 581, 617-19 (2d Cir. 2016), as controlling law in respect to FHA liability for disparate impact and perpetuation of segregation; once again retrenches and reshapes its ever-changing attempts at justification, all without providing evidentiary support to stand in the way of plaintiffs' being awarded summary judgment as to the absence of legally sufficient justifications; and, were there a need to reach the issue of less-discriminatory alternatives, has failed to meet its burden in order to have that set of issues resolved as a matter of law. Note, as well, that the DREP Brief does not contravene plaintiffs' presentation of applicable New York City Human Rights Law ("City HRL") provisions.

Finally, the DREP Brief – in its opening and woven throughout – suggests that defendant's 2020 "Where We Live" report can somehow remediate or otherwise counter defendant's record over the past years and decades in respect to its motivations for maintaining the outsider-restriction

[1] The brief, ECF 941 ("DREP Brief") says it is in part "in further opposition to Plaintiffs' partial motion for summary judgment" (*see* ECF header; *see also* cover page). In fact, the Court's scheduling orders limited this brief to being a reply to plaintiffs' opposition to defendant's cross-motion. *See, e.g.*, Jan. 3, 2021 Order, ECF 934 (granting extension of time for filing what defendant had described as its then-pending "reply to Plaintiffs' opposition to the City's cross-motion for summary judgment").

[2] In doing so, defendant states, "Contrary to Plaintiffs' assertions, the City did not argue that the new HUD rule is the applicable law." *See* DREP Brief, at 8. *See*, however, ECF 902 ("DOX Brief"), at 57 (trying to undercut existing requirement that a "legally sufficient justification must be supported by evidence and may not be hypothetical or speculative," 24 C.F.R. § 100.500(b)(2) (2013), defendant cited to the then-anticipated 2020 rule, arguing that HUD believed the 2013 Rule was inconsistent with Supreme Court case law and that the new rule "does not address the nature of the evidence"). In any event, the implementation of the Challenged 2020 Rule has been stayed, *see Mass. Fair Hous. Ctr. v. HUD*, 20 Civ. 11765, 2020 WL 6390143, at *8 (D. Mass. Oct. 25, 2020), and the Government, on behalf of HUD, has withdrawn its appeal from that ruling and the appeal has been dismissed. *See Mass. Fair Hous. Ctr.v. HUD*, Case No. 21-1003 (1st Cir.), Feb. 9, 2021 (Doc. No. 00117702914) and Feb. 18, 2021 (Doc. No. 00117707191), respectively.

policy, or somehow bear on the fact that the policy causes disparate impacts and stymies racial integration. Simply put, the report cannot undo history and the Court should not be diverted by the report. Plaintiffs will instead stay focused on evidence related to the purpose and effect of the challenged policy as it has been expanded and maintained by defendant.

POINT I

FACED WITH SUBSTANTIAL – INDEED, VOLUMINOUS – EVIDENCE OF INTENTIONAL DISCRIMINATION, DEFENDANT WANTS THE COURT TO PLAY THE ROLE OF JURY IN ASSESSING MOTIVATION AND CREDIBILITY; TO IGNORE EVIDENCE ALTOGETHER; TO IMPOSE A HEIGHTENED BURDEN OF PROOF; AND TO REFUSE TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS.

The short version of the point: there is extensive evidence already placed in the record by plaintiffs that can reasonably be construed by a jury as evidence of intentional discrimination. Defendant's efforts to rebut a limited portion of that evidence operate at most to create issues that a jury needs to weigh. Defendant's references to an absence of "findings" or plaintiffs not having "proven" something divert from a basic fact: findings come *after* a jury has deliberated, not as a prerequisite to permitting a case to go to a jury. The longer version of the point follows.

Please note first that defendant has no substantive response to plaintiffs' arguments that defendant cannot meet its burden if the case is viewed in the light of mixed-motive analysis.[3] For the purpose of this motion, therefore, the only question is whether the evidence is susceptible of the view that discrimination *played a role* in defendant's conduct. *See MHANY*, 819 F.3d at 616 (holding that under FHA, liability attaches if one of the motivating factors was unlawful unless defendant has succeeded on the affirmative defense that it would have taken the same course even absent the impermissible motive). *See also Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40

[3] *See* DREP Brief, at 24 n.28, providing no substantive response to plaintiffs' Nov. 5, 2020 reply and opposition brief, ECF 928 ("PRO Brief"), at 88-89.

(N.Y. App. Div. 1st Dept. 2011) (holding that for City HRL purposes, liability attaches when discrimination was a motivating factor); *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196, 200 n.1 (N.Y. App. Div. 1st Dept. 2015) (holding under City HRL, summary judgment not permitted where evidence can be viewed as showing that discrimination was a motivating factor).

A – The Need for a Searching Review of the Record

Defendant wants the Court to accept its articulated rationales for the policy as though they were established facts, and to treat anything shy of an explicit confession from defendant that it was responding to race-based opposition to neighborhood change as insufficient. This is precisely the approach that this Court, citing Circuit precedent, has properly rejected. *See Winfield v. City of New York*, 15 Civ. 5236, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016), *citing MHANY*, 819 F.3d at 606 ("Because discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"). This Court then cited another element of black-letter law: "'where there are allegations of discrimination supported by such circumstantial evidence, a defendant's intent and state of mind are placed in issue, [and] summary judgment is ordinarily inappropriate.'" *Id.* (*quoting Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991)).

B – The Appropriateness of Plaintiffs' Responses to Defendant's 56.1 Statement

Defendant asks the Court to ignore evidentiary facts plaintiffs set out *directly in response to defendant's Rule 56.1 Statement*, ECF 904 ("D56.1"). As the Court sees from plaintiffs' responses and objections,[4] defendant advanced a series of eight propositions related to intentional discrimination.[5] Using the legal characterizations "direct evidence," "circumstantial evidence,"

[4] Plaintiffs' Nov. 6, 2020 responses and objections to D56.1 (ECF 917, "D56.1PR").

[5] Statements 235-42. *See* D56.1PR, at 116-19.

and "knowingly responsive," defendant wanted the Court to accept as undisputed facts its contentions that there was *no evidence* of defendant's intention to discriminate or to perpetuate segregation, and *no evidence* of its knowing responsiveness to others who desire to perpetuate segregation or who have "racial animus" towards potential tenants of affordable housing projects.[6]

Plaintiffs were obliged to respond by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations … admissions, interrogatory answers, or other materials." FRCP 56(c)(1)(A); *see also* Local Rule 56.1. To defendant's dismay, there is an enormous amount of such record evidence, a subset of which was set out in the appendix (ECF 917-1) referenced in the responses to Statements 235-42.

The extensiveness of that evidence is not reflective of any impropriety on plaintiffs' part, but rather of the frivolous nature of defendant's motion. The appendix delineates *factual* record evidence. Defendant's complaint about the evidence, *see* DREP Brief, at 12, is unsupported by the cases it cites;[7] its real problem is that the arguments *already articulated in plaintiffs' PRO Brief* find further factual support in the evidence that plaintiffs provide in their response to defendant's 56.1 statement. <u>It is important for the Court to review this evidence, the overwhelmingly majority of which defendant has not even taken up – despite the opportunity to do so.</u>

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[6] *See id.*

[7] Unlike plaintiffs' responses to defendant's Statements 235-42, the court in *Vaughn v. Empire City Casino at Yonkers Raceway*, 14 Civ. 10297, 2017 WL 3017503, at *1 n.1 (S.D.N.Y. Jul. 14, 2017), was faced with a response that was "riddled with legal arguments." Unlike plaintiffs' responses here, the court in *Trs. of Local 8A-28A Welfare Fund v. Am. Grp. Adm'rs*, 14 Civ. 1088, 2017 WL 3700899, at *3-4 (E.D.N.Y. Aug. 25, 2017), addressed citations to case law in the counterstatement (which the Court disregarded). Note that the court did *not* disregard the factual evidence set forth in the counterstatements. *Id.* Finally, *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) deals with a supplemental statement, one where the court found some of the statements improper on multiple grounds, including for "marshal[ling] evidence in a manner perhaps appropriate for a legal brief." *Id.* at 186 n.3. Nevertheless, the court found "certain discrete statements related in [the supplemental statement] to be germane and factually supported," and relied on them. *Id.* Note that in plaintiffs' responses, the overwhelming preponderance of statements are simply a summary of record evidence; in the balance, the statement provides context so that the Court can readily perceive the type of evidence being discussed. It is ironic that defendant, having asked plaintiffs to characterize evidence as "direct" or "circumstantial," would be brazen enough to object to the labeling of some of the evidence as related to lack of credibility, or to pretext, etc.

C – There is no "Animus" Requirement

Note, first, that defendant does not dispute that, under the City HRL, "[a]n 'animus' requirement is not supported by statutory language or by legislative history."[8] The DREP Brief does, however, claim that the FHA incorporates an "animus" requirement.[9]

That racial animus was present and hence referenced in *MHANY* does not, contrary to defendant's argument,[10] mean "animus" is the only way to trigger an FHA violation. As defendant concedes,[11] *MHANY* itself notes that the "correct standard" is that *municipal officials have knowingly acquiesced to "race-based" citizen opposition*. *MHANY*, 819 F.3d at 612 (emphasis added).

Defendant finds no support in case law interpreting Title VII and Section 1981, and ignores FHA caselaw to the contrary.[12] Defendant's only claim as to *why* "animus" would not be required in actions under Section 1981 but would be under the FHA is that "Section 1981 does not prohibit discrimination, as does the FHA, but prohibits specific conduct."[13] This would perplex Congress, which, in 1991, amended Section 1981, titling the modifications "Prohibition Against All Racial *Discrimination* in the Making and Enforcement of Contracts," Civil Rights Act, Pub. L. No. 102-166, 105 Stat 1071 (1991) (amending Title I, Sec. 101); and created Section 1981(c) to make clear that the "rights protected by this section are protected against impairment by nongovernmental

[8] *See* PRO Brief, at 73 n.243, *quoting Cadet-Legros*, 135 A.D.3d at 204 n.5.

[9] *See* DREP Brief, at 11.

[10] *See id.*

[11] *See id.* at 13.

[12] *See* Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 10.2 (2020) (noting that the FHA prohibits discrimination on the basis of protected class "even if the defendant was not motivated by personal prejudice or racial animus").

[13] *See* DREP Brief, at 11.

discrimination and impairment under color of state law." *Id.* (emphases added).[14]

But even a racial "animus" requirement, were one found to exist, would not connote a requirement that race-based opposition had to fit the colloquial notion of animus – meaning hatred or feelings of racial supremacy. Animus in ordinary English is defined, first, as "hostility or ill-feeling," and second, as "motivation to do something."[15] To the extent that residents (or their officials) are seeking to restrict the entry of racial or ethnic groups to a neighborhood, it simply is not possible to interpret that as anything other than a racial *motivation*, and equally not possible to ignore that the desire for restriction constitutes "ill-feeling" towards the presence of the group.[16]

D – Plaintiffs Have Produced Ample Evidence of "Knowing Responsiveness"

It is not disputed that the community preference policy has as an aim the defanging of opposition to affordable housing development. And now defendant, its knowledge of extensive antipathy to race-based neighborhood change well-documented in the record,[17] is taking the position that it "never denied that some opposition to the development of affordable housing may be race-based, but has disagreed about the extent of such opposition and whether specific instances

[14] *See also Bostock v. Clayton Cnty., Georgia,* 140 S. Ct. 1731 (2020). That case arose under Title VII, but deals with the term "discriminate," just as the FHA deals with "Discrimination" in the sale or rental of housing and other prohibited practices. *See* 42 U.S.C. § 3604. The Supreme Court did not import an "animus" requirement; instead it pointed out that the meaning of "discriminate" in 1964 is roughly what it is today: "'To make a difference in treatment or favor (of one as compared with others).'" *Bostock*, 140 S. Ct. at 1740 (citation omitted).

[15] *See New Oxford American Dictionary* (3d ed. 2010), at 62.

[16] That the word "animus" is sometimes simply used to connote motivation on the basis of protected-class status is illustrated in *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 286–87 (D. Conn. 2001) (referring to a showing of "animus" in describing plaintiffs' part of the mixed-motive test, the court made clear that plaintiffs "are not required to prove that the City officials were motivated by some purposeful, malicious desire to discriminate against them"). The Circuit affirmed in relevant part. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003) (holding that the District Court used the correct factors), *superseded by statute on other grounds*.

[17] *See* PRO Brief, at 75-78; *see also* D56.1PR, Appendix (ECF 917-1), at ¶¶ 1-2, 6, 10-14, 21-33, 36-39, and 42-43. This knowledge deals not only with housing, but with attitudes to the homeless, as well. *See id.*, at ¶ 62. The same attitudes are expressed with respect to education. *See* PRO Brief, at 77-78; *see also* D56.1PR, Appendix, at ¶¶ 64-65.

of opposition were in fact race-based."[18] (This type of admitted factual dispute is exactly what is not permitted to be resolved at summary judgment).[19]

Moreover, what defendant wants the Court to accept, *as a matter of law*, is that defendant kept its *knowledge* of the race-based motivations of those it sought to influence somehow *sequestered* from its decisions to expand and (since 2002) maintain the policy. It is as though defendant has said, "Yes, we were knowingly responsive to these constituencies who had race-based views, but believe us when we say that we were not responsive to them insofar as they were looking to minimize neighborhood racial change."

By definition, defendant's assertion that it somehow filtered out the malignant motivations of those to whom it was responsive is one that requires a jury determination of credibility. And it is an assertion that cannot stand in the summary judgment context, given the reasonable inferences that must be drawn in plaintiffs' favor based on the evidence in the record. For example, defendant

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[18] *See* DREP Brief at 12-13. In fact, defendant's witnesses, and defendant itself through, *inter alia*, its responses to Requests to Admit, have strove for years to understate the extent of antipathy to race-based neighborhood change – and to question even the scope of segregation. This brief will turn to the quintessential jury issues of credibility and consciousness of guilt in Section F of this point.

[19] The opinions of Professor Edward Goetz, one of defendant's experts, provide two illustrations. He conceded at his deposition that race plays a central role in the perception of new development and that fears of that development are interwoven with stereotyped assumptions stemming from the race of prospective newcomers. *See* D56.1PR, Appendix, at ¶ 15. In his latest declaration, he protests that, when those engaged in such racial stereotyping are Black, their conduct must be seen as benign. *See* Feb. 10, 2021 declaration of Professor Edward Goetz, ECF 940 ("EG 2021"), at 19-21, ¶¶ 36-39. The Fair Housing Act, of course, does not contain this sort of categorical definition of how members of a racial group all act. Indeed, it is troubling that anyone would come to this Court in 2021 with the proposition that Black Americans (or Black New Yorkers) can be understood as a single, undifferentiated mass that thinks or acts in one particular way. In any event, a jury would have to make an assessment of the competing views of the evidence.

Second, Professor Goetz attempts to rebut the connection between housing and education that Professor Orfield has made. *See* EG 2021, at 6-7, ¶ 14. But Professor Orfield's point, independent of the exact racial composition of schools, is that negative attitudes about the actual or prospective introduction of those of another race to schools is similar to, and indicative of, attitudes about the prospective introduction of those of another race to neighborhoods. And in terms of Professor Goetz seeking to opine on the relationship between housing and school segregation in this respect, the inappropriateness of his inserting his views is clear: "I'm not an expert in school segregation or desegregation, so I would not know the answer to that." *See* excerpt of July 31, 2019 deposition of Professor Edward Goetz, Ex 116 to March 8, 2021 declaration of Roger Maldonado ("MD 2021"), at 135:2-10.

tries to downplay the importance of political sensitivity about the prospect of desegregation;[20] but it is entirely reasonable for a jury to believe that a defendant who is sensitive to the political implications of prospective desegregation would *act* through the policy to temper fears of racial change (the policy is self-described as being responsive to local concerns).

Defendant's preliminary guides to the Assessment of Fair Housing – plaintiffs' use of which has nothing to do with deploying a "remedial" measure, but rather with factual assessments and the way defendant was thinking about issues of racial segregation[21] – are explicit in saying that political sensitivity would influence what was to be ultimately discussed. That is, the obligation to identify "high priority" determinants of segregation that were "relevan[t]" needed (in defendant's view) to be balanced with "practical feasibility."[22]

Likewise, defendant ignores (as it does with much of the evidence set forth in Point VI of the PRO Brief), the fact that one of its high-ranking HPD officials recognized that the broaching of the idea of desegregating neighborhoods is politically sensitive – especially, as he put it, voting against affordable housing projects.[23] In other words, the political concerns were not simply

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[20] *See* DREP Brief, at 17-18.

[21] Defendant's attempt to shoehorn these Assessments into the category of "remedial" measures is at odds with the fact that defendant calls them early "brainstorming" documents, *see* DREP Brief, at 17, and with the fact that defendant spent years and multiple motions attempting to protect the documents as reflecting deliberative process ("DPP"). Defendant interposed its objections in 2017 and was initially successful. *See* ECF 259, Feb. 1, 2018 (Magistrate grants defendant's motion for clawback on the basis of DPP). Thereafter, this Court reversed and remanded, *see* ECF 655, Dec. 12, 2018, and the Magistrate subsequently denied clawback. *See* ECF 687, Jan. 23, 2019. Substantively, the key is that observations were made by defendant, and that they were hardly off-the-cuff; on the contrary, the process was overseen by defendant's Assistant Commissioner for Strategic Planning at HPD, and he and his colleagues relied not only on "HUD guidebook guidance," but also on "kind of first-hand knowledge talking to different parts of the agency." *See* excerpt of transcript of the Jan. 16, 2020 deposition of Matthew Murphy ("Murphy II"), Ex 117 to MD 2021, at 98:23-99:24. If defendant wishes to dispute the weight to be accorded the Assessments, those are arguments for a jury. In the same vein, plaintiffs will argue that the Assessments provided a much less-guarded and less-filtered view of what defendant was actually thinking than the "Where We Live" document produced for public consumption.

[22] *See* PRO Brief, at 78 (quoting Sept. 2016 Preliminary AFFH Guide, Maldonado Nov. 5, 2020 declaration ("MD"), Ex. 30, at 21056). Defendant ignores this.

[23] *See* PRO Brief, at 78.

general concerns about the political explosiveness of prospective residential racial change or about the constraints of racial politics,[24] important as these concerns are. (Note that these are precisely the kinds of concerns that a jury must evaluate in terms of assessing what influence they had on defendant's decision to maintain its policy). This is acknowledged political sensitivity that has been defined by defendant's witness as *fears of racial change causing rejection of affordable housing development*.[25] It is no leap at all to conclude that defendant – whose avowed aim was to overcome resistance to affordable housing development – would try to placate the opponents who feared racial change with a community preference policy that *reduces* the residential racial change that would otherwise occur.[26] (This is one of the reasons that defendant's adverting to changes in the city's racial composition over the last 30 years is a *non sequitur*.[27] It is reasonable to infer that actual change, on top of feared change, would increase, not decrease, the desire of those who preferred the racial status quo to have policies that worked to limit such change.)

That defendant did not come out and say explicitly that "we are maintaining the policy to be responsive to those of you who resist racial integration" is hardly a surprise. First, there was

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[24] *See* PRO Brief, at 79 (reciting then-Commissioner Been's concern about the difficulty of having thoughtful discussions of the determinants of fair housing barriers against the backdrop of local politics). *See also* D56.1PR, Appendix, at ¶ 24 (showing Carl Weisbrod, who had been chairman of the City Planning Commission in the de Blasio administration after decades of local government service, acknowledged that racial politics continue to be at play in New York City, as they have been for 50 years, and advocacy in relation to housing policy is not immune from that).

[25] *See* PRO Brief, at 76, quoting Matthew Murphy, HPD's deputy commissioner for strategic planning at the time.

[26] Defendant would require a jury to believe that placating opponents of racial change with a policy covering 50 percent of units, which stymies integrative moves and causes racially disparate impacts, is of no moment because the policy could have been *even more discriminatory*. *See* DREP Brief, at 10 (failing to understand those opponents who wished to maintain the racial status quo could nevertheless be placated by a policy that has the effect of reducing the change that would result from an equal-access – no-preference – lottery system).

[27] The attempt to introduce these data through Professor Goetz is impermissible. As the head of defendant's population division at the Planning Department acknowledged during his deposition as a fact witness (he was not proffered by defendant as an expert), expertise is needed to interpret demographic data. *See* excerpt of Nov. 27, 2018 deposition of Joseph Salvo ("Salvo Depo"), Ex 118 to MD 2021, at 8:6-13. Professor Goetz never claimed expertise as a demographer. And, as it happens, he overstates the changes. *See* March 4, 2020 declaration of Professor Andrew Beveridge, ECF 883 ("BD"), at 12-14, ¶ 36-41 and Table 1 (pointing out, *inter alia*, that New York City has made little progress in reducing its high levels of segregation, especially as compared with the changes in other large cities).

no need to reference the policy: there was an expectation built in on the part of elected officials and community boards that a 50 percent preference would always apply.[28] Second, discrimination rarely announces itself, and therefore "plaintiffs usually must rely on 'bits and pieces' of information" – a "mosaic" – to support an inference of discrimination. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015); *see also MHANY*, 819 F.3d at 610-11 (noting that the discriminator will almost never provide courts with direct evidence of discriminatory intent).[29]

Unusually, however, the jury in this case will also be able to include in its assessment of "knowing responsiveness" the fact that politics were central to where defendant was and was not building housing; that divisions between ethnic groups harm the housing prospects that the administration was prepared to pursue; that defendant was responsive to "political sensitivities," including those of the Staten Island borough president, by not "messag[ing] this as an affordable housing project"; and, yes, by stressing the community preference policy during leasing to show that "we keep the identity of the neighborhood intact."[30]

There is much additional evidence of this type. For example, defendant created bullet points that were reviewed by a variety of its high-ranking officials (including deputy mayors)

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[28] *See* excerpt of transcript of April 24, 2018 deposition of Holly Leicht, Ex. 119 to MD 2021, at 115:8-17.

[29] Defendant's reliance on *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona, NY,* 945 F.3d 83 (2d Cir. 2019) is misplaced. There, the Circuit was faced with the "mere facts that (1) the development was proposed by a Hasidic group and (2) Pomona opposed the development," and concluded those limited facts were "insufficient to support an inference of discriminatory intent." *Id.* at 118. Defendant wants this Court to read into this case the proposition that "awareness that some opposition to affordable housing may be race-based is not proof that the City intended to discriminate by adopting the CP policy." *See* DREP Brief, at 13. First, defendant ignores the fact that the expansion and subsequent maintenance of the policy are at issue. Second, the point of *Tartikov* is that, unlike here, there *was no* evidence of the opposition being protected-class based. Defendant, finally, fails to point this Court to the strong caution issued by the *Tartikov* court: "if discriminatory intent lurks within the background of a facially neutral decision, *courts are obliged to smoke it out*." *Id.* at 112-13 (emphasis added). Denying a jury the opportunity to hear the evidence is the opposite of that obligation.

[30] *See* D56.1PR, Appendix, at ¶¶ 35, 34, 38, and 20, respectively. Note that the last-cited statement was in response to an inquiry about neighborhood "racial breakdown" and "mass exodus." *See also id.* at ¶ 43 (describing report that White families were more likely to fill apartments in a Crown Heights lottery as "bombs" that had to be defused).

stating that, "We know we have a duty to *honor the culture and character* of every neighborhood in every borough."[31] *Cf. MHANY*, 819 F.3d at 610-11 (deeming statements regarding concerns about changes to municipality's "character" to be reasonably understood as code words indicative of race-based thinking), and at 609 n.5 (explaining that code-word interpretation is applicable both to defendant's statements and statements made by those to whom defendant is being responsive).[32]

Adding to the impossibility of defendant showing as a matter of law that it managed to disregard the race-based views of those to whom it was responsive are two factors. First, contrary to the attempts by defendant and its witnesses to downplay the scope of resistance to racial change, this resistance is a frequent and noted pattern.[33] A jury would be entitled to believe that it is less likely that defendant could sequester the impermissible motives of advocates from across the city than it would have been had the opposition been more isolated.

Second, defendant is well aware that words used to express concerns or fears often cover up race-based motivations. Talking points for a recent HPD commissioner refer to "enormous community opposition to affordable housing projects across the board" and note that opposition is "often couched as concerns about parking, infrastructure, density, public safety, but many of these

[31] *See* Jan. 2015 email chain shared with Deputy Mayor Glen and other officials in the Office of the Mayor, Ex 120 to MD 2021, Bates 155635, at 155641 (emphasis added).

[32] To take another illustration, defendant's Manhattan borough president, in announcing her own opposition to a project in Harlem, set out the community board's concern as to the perceived effect that the development would have on "the community district's demographic character." *See* excerpts of Dec. 16, 2019 Manhattan Borough President recommendation on zoning application, Ex 121 to MD 2021, at 6. The borough president concurred. *Id.* at 8.

[33] *See* Aug. 2016 Preliminary AFFH Guide, MD Ex 31, at 105039 (identifying community opposition as a high-difficulty contributing factor to segregation, specifically noting that securing "community buy-in" for fair housing is "very difficult" and that one source of that resistance to integration are those who believe in "ethnic solidarity"; and identifying large areas of New York City where opposition (except to senior housing) can be "high," specifically referencing higher-opportunity areas in Queens and Staten Island). *See also* D56.1PR, Appendix, at ¶¶ 1-2, 11, 14, 20, 22, 25-27, 30-33 (acknowledging concerns about racial or ethnic change either as a general phenomenon or in connection with opposition in Brooklyn, East Harlem, West Harlem, Maspeth, Sunnyside, Inwood, Queen CB 6, East New York, or the South Bronx).

are just code words for 'I don't want people in my neighborhood.'"[34] Likewise, an HPD deputy commissioner has been quoted publicly as saying that, although opposition to affordable housing is often "couched in a lot of things," the articulated concerns are really "code words for 'I don't want other people in my neighborhood.'"[35]

Yet defendant takes as a given that fears – including those expressed as fears of displacement – are not intertwined with fears of racial change (in other words, that fears somehow constitute an exception to the rule that statements must be scrutinized for their actual meaning). It does this despite the observations that Deputy Mayor Been had made early in the de Blasio administration,[36] observations that defendant chose to ignore in its DREP Brief. In the first instance, she said that "fear" can be the fear experienced by *people who stay* (those not being displaced) – fear that the look and feel of their neighborhood (including the racial demographics) might change.[37] Why must a jury accept that defendant is not responsive to these fears, even though the policy operates to reduce the change that animates the fear? Because defendant tells us this is so. "We didn't do it" is not enough to sustain a motion for summary judgment.

Beyond this, however, Deputy Mayor Been herself made a *direct link* between "fear of displacement" and race-based thinking by those with that fear. Specifically, she said: "And one of the reasons that they have a real and raw fear of displacement is that they see the neighborhood

[34] *See* D56.1PR, Appendix, at ¶ 28. It must be noted that these often-pretextual explanations, without any caveats, were presented to the Court by Deputy Mayor Been in her 2015 declaration as "legitimate concerns" (such as the noise and danger of construction, or strains on existing infrastructure like potential future traffic congestion and school crowding). *See* excerpts of Oct. 2, 2015 declaration of Vicki Been ("Been 2015 Dec"), MD Ex 19, at 3-4, ¶ 8. *See also* discussion of witness credibility in Section F of this Point I, *infra*, at 19-23.

[35] *See* D56.1PR, Appendix, at ¶ 29.

[36] *See* PRO Brief, at 76.

[37] *See id.*

is changing and the people in the neighborhood are changing."[38] In other words, even in the Deputy Mayor's telling, the race of newcomers and prospective incomers was *relevant and material* to those with fear, race being used as a *proxy* to identify a perceived threat. Independent of whether individual members of the unwanted racial group were actually different *financially* (*i.e.*, in terms of household income),[39] it was indeed race that was actuating fears.

A jury could conclude that the "fear" to which defendant asserts it is responding cannot have its race-based component scrubbed out. There is certainly no reason that a jury would be *obliged* to conclude that defendant took the fears of those to which it was admittedly responsive, somehow disentangled the different strands of those fears, and discarded all that was race-based.

E - *Arlington* Factors and Types of Evidence Cited as Probative by this Court

When it comes both to *Arlington* factors[40] and to other circumstantial evidence (some categories of which the Court has already spoken to in denying defendant's motion to dismiss),[41] the Court will note that defendant either raises an alternative interpretation of record evidence, ignores evidence, or fails to appreciate the purpose of the evidence.

First, the policy causes disparate impacts and stymies integrative moves (*see* Points II and III, *infra*). In addition, the *Arlington* factor of deviating from normal procedure or policy is clearly at issue; there are multiple ways in which defendant has done so. Defendant expanded the policy

[38] *See* excerpt of Aug. 2, 2017 deposition of Vicki Been ("Been I"), MD Ex. 7, at 149:5-10. She acknowledged these perceived changes include racial changes. *See id.* at 149:12-19.

[39] In terms of housing lottery winners, the household income that qualifies one for a particular apartment is a narrow band that is identical for insiders and outsiders.

[40] The *Arlington* factors are not intended to limit the scope of circumstantial evidence. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed."). *See also Tsombanidis*, 352 F.3d at 580 (holding *Arlington* factors are not exhaustive), *superseded by statute on other grounds*.

[41] *See Winfield*, 2016 WL 6208564, at *7.

without engaging in its normal process of collecting the facts and weighing the evidence before making a decision.[42] Defendant seeks to minimize the import of the op-ed that described the normal procedure,[43] but its response is misplaced. The letter represented the joint views of six former HPD commissioners, spanning the Giuliani, Bloomberg, and de Blasio administrations. One participant was Jerilyn Perine, the commissioner who raised from 30 to 50 percent the units covered by outsider-restriction.[44] Defendant's argument that it has not been established that defendant regularly performs segregation analyses, or has an obligation to do so,[45] misses the point.

The normal procedure described is one that is applicable to all kinds of policies; the specifics, therefore, would vary from policy to policy. But the keys are as described: collecting the facts and weighing the evidence and doing so before making a decision. Based on what former Commissioner Perine did and failed to do,[46] a jury could conclude that the decision to expand the percentage of units covered by the preference bore no resemblance to this norm whatsoever.

This was not the only time that defendant veered from the norm when dealing with the preference and its racial consequences. A 2016 HPD study looked at lottery data in detail from a variety of perspectives concerning applicants, results, and processes in order to inform itself and inform future policy – *but failed to look at the racial impact of the preference policy*.[47] A jury can reasonably view that failure to hold the preference policy up to the same standard of review of

[42] *See* PRO Brief, at 80; *see also* MD Ex. 39, at 3.

[43] *See* DREP Brief, at 18-19.

[44] *See* PRO Brief, at 80; *see also* MD Ex 39, at 7.

[45] *See* DREP Brief, at 19.

[46] *See* PRO Brief, at 80-81 (describing a complete failure of investigation or serious consideration).

[47] *See* D56.1PR, Appendix, at ¶ 49.

other elements of the lottery as reflecting a deviation from normal procedure.[48]

In terms of evidence that the Bloomberg Administration engaged in rezonings in a racially differentiated way, defendant argues both that this evidence is beyond the scope and that there has not been a "finding."[49] This is peculiar. Among the facts cited by this Court as legitimately part of the mosaic that could make out a claim of intentional discrimination was the allegation that:

> white and black neighborhoods were treated differently when it came to zoning: increases in density occurred most frequently in neighborhoods with disproportionately high African-American or Latino populations and decreases in density occurred most frequently in white neighborhoods.

Winfield, 2016 WL 6208564, at *7. Plaintiffs backed up their allegation with a study by the Furman Center that showed these results and *that was co-authored by Vicki Been*.[50] Defendant's argument about the lack of a "finding" confuses the posture of the case: plaintiffs have presented evidence based on which a jury *can* make a finding. Thus, summary judgment cannot be granted.

Another part of the evidentiary mosaic already spoken to by the Court as relevant to a finding of intentional discrimination is the allegation "that the City has implemented the Policy without studying policy questions relating to its impact on housing segregation or fair housing goals." *Winfield,* 2016 WL 6208564, at *7. As noted, *supra,* at 13-14, there was no analysis of the policy when it was expanded in 2002. As noted in the PRO Brief, at 81 and 81 n.267, the policy was maintained without segregation analysis at least through 2012 (with defendant refusing to answer in respect to 2014-18). A jury can reasonably conclude that a defendant that is, at best, indifferent to the racial consequences of its policy is a defendant that would be prepared to pander

[48] A jury can also contrast the targeted approach to deployment of anti-displacement tools that then-Commissioner Been sought with the across-the-board deployment of community preference. *See* D56.1PR, Appendix, at ¶ 61.

[49] *See* DREP Brief, at 19-21.

[50] *See* PRO Brief, at 82. Questioned about the report, Deputy Mayor Been confirmed the findings. *See* excerpt of April 10, 2018 deposition of Vicki Been ("Been II"), Ex 122 to MD 2021, at 75:4-78:22.

to those who wish to retain the racial status quo.[51]

A closely allied point is the "historical background" of the decisions to expand and then maintain the policy. *See Winfield*, 2016 WL 6208564, at *7. The decisions about the policy did not occur in a vacuum; on the contrary, they were part of a pattern of defendant's indifference to its fair housing obligations, including the absence of segregation-fighting goals and policies over the past two decades.[52] In responding to this uncontested fact by saying that it is "meaningless,"[53] defendant again mistakes an *evidentiary* point with a *cause of action*. Whether or not the absence of any policy (written or otherwise) or goals constitutes an independent violation of its obligations,[54] the fact of the city's failure to treat fair housing issues seriously is one from which a jury can infer a greater likelihood that defendant would be open to being responsive to those who wish to retain the residential status quo. (That defendant wants to counter with things it claims to have done virtuously[55] simply underlines the need to allow a jury to do that weighing.)

This Court has already mentioned other aspects of the historical background that it views as relevant to the issue of intent, citing these allegations:

> Plaintiffs allege that the City has had a history of enacting discriminatory zoning and housing policies, including restricting African-Americans to

[51] The absence of studying the policy as it relates to segregation and fair housing goals is especially notable since defendant had been warned by fair housing groups in 2005, 2006, 2008, and 2012 that the policy perpetuated segregation, *see* D56.1PR, Appendix, at ¶ 45; a court had found in connection with granting a preliminary injunction that an application of the policy perpetuated segregation, *see Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831, 837 (Sup. Ct. N.Y. Cnty. 2011) ("The community preference only serves to perpetuate segregation in the Broadway Triangle."); and defendant was warned internally in 2013 that the policy risked a disparate impact violation in light of HUD's affirmatively furthering fair housing rule, *see* D56.1PR, Appendix, at ¶ 47.

[52] For the specifics, *see* PRO Brief at 83, and *see also* D56.1PR, Appendix, at ¶ 3 (The HPD commissioner from 2009 to 2011 acknowledged, *inter alia*, that reducing residential segregation was not identified as a goal of the city).

[53] *See* DREP Brief, at 20-21 n.24.

[54] As it happens, defendant has long been under an obligation to affirmatively further fair housing ("AFFH") and has to certify this each year. The certification has included the requirement that defendant identify impediments to fair housing choice and take action to overcome them. *See* MD 2021 Ex 123 (containing 15 years of AFFH certifications).

[55] *See* DREP Brief, at 20-21 n.24.

> certain neighborhoods, concentrating public housing in minority neighborhoods, and racial steering in housing projects.

Winfield, 2016 WL 6208564, at *7. Here, again, notwithstanding defendant's claim that plaintiffs have not "proven" these facts,[56] plaintiffs have backed up their allegations with evidence.[57]

For example, the PRO Brief recites a letter in which it is admitted that HPD *as a matter of policy* generally develops "in areas of relatively higher racial/ethnic concentrations and lower-income households than can be found in areas of 'higher opportunity.'"[58] Plaintiffs also proffered defendant's acknowledgment that a high-difficulty contributing factor to segregation was the fact of defendant's mandatory inclusionary housing ("MIH") policy "targeting low-income neighborhoods."[59] Defendant does not respond in either case.

To the extent that defendant disputes the relevant mapping concerning concentration, *see* DREP Brief, at 20 n.23, we ask the Court to look at the map showing concentrations of City-assisted housing that defendant does accept, an exhibit to the October 2020 declaration of Professor Andrew Beveridge.[60] The map shows large areas of the city with very little such housing.[61] *See*

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[56] *See* DREP Brief, at 20, asserting no "finding" regarding defendant's housing siting policies. That is what the trial on the intentional discrimination claim will be for. Defendant also does not appreciate that evidence of a pattern-and-practice is probative of conduct consistent with the pattern, even if it is an individual case. *See Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 149 (2d Cir. 2012) (highlighting that even though pattern-and-practice method of proof (involving a shift in burden as to individual liability) is not applicable to individual cases, "To be sure, proof that an employer engaged in a pattern or practice of discrimination may be of substantial help in demonstrating an employer's liability in the individual case"). Lastly, defendant's view is directly contrary to the history that this Court has already ruled probative as to intentional discrimination.

[57] Again, defendant fails to appreciate that it is the existence of evidence from which a jury can make a determination in the future that is at issue, not whether a determination has somehow already been made.

[58] *See* PRO Brief, at 82.

[59] *See* D56.1PR, Appendix, at ¶ 56. Despite the story that the Where We Live report would like to tell, the MIH policy was not intended to have neighborhoods accept more racial and ethnic diversity. *See id.*, at ¶ 4.

[60] *See* October 29, 2020 declaration of Professor Andrew Beveridge ("BROD"), ECF 914, Ex. 39.

[61] *See also* D56.1PR, Appendix, at ¶¶ 54 (pointing to additional mapping showing little affordable housing in a variety of White areas) and 55 (citing defendant's study reporting a low percentage of affordable housing built in high-opportunity neighborhoods).

also a map of how concentrated New York City Housing Authority developments are.[62]

It is an odd dispute to be having at this point, in any event. Defendant itself noted in its preliminary Assessment of Fair Housing that it needs to justify affordable housing placement that may have perpetuated segregation.[63]

Defendant's historically discriminatory housing policies in response to opposition to racial change, including the concentration of Black residents into a limited number of neighborhoods and racial steering, are further elucidated in the declaration of Professor Maria Krysan.[64]

Finally, the Court found allegations that defendant characterized the policy in racial terms as probative of intent. *See Winfield,* 2016 WL 6208564, at *7. Such a statement, relating to what Blacks and Latinos "want" in respect to the policy, was in fact made.[65] And defendant continues to promote the policy on racial grounds, trying to gain favor by saying that the policy is helping "predominantly Black and Latinx New Yorkers."[66]

As shown by the foregoing and by plaintiffs' previous submissions, there is a vast amount of evidence of intentional discrimination that cannot be ignored and that requires the denial of defendant's motion. *Cf. MHANY,* 819 F.3d at 611 (holding the district court "was entitled to

[62] *See* MD 2021 Ex 124 (showing concentrations similar to those found in BROD Ex 33-38). NYCHA is effectively controlled by defendant, with all seven members of the NYCHA board being appointed by the Mayor. *See* excerpts of defendant's Oct. 2, 2019 amended responses to plaintiffs' requests to admit ("Def. amended responses to RTAs"), Ex 125 to MD 2021, at 100-101 (RTA 182 and response thereto).

[63] *See* D56.1PR, Appendix, at ¶ 53.

[64] *See* March 8, 2021 declaration of Maria Krysan ("MK"), at 2-5, ¶¶ 7-20.

[65] *See* D56.1PR, Appendix, at ¶ 18. *See also Winfield,* 2016 WL 6208564, at *7 (referencing this evidence).

[66] *See* Aug. 14, 2020 declaration of Vicki Been ("Been Aug. 2020 Dec"), ECF 899, at 7-8, ¶ 16. Defendant fails to note that there are far more outsider applications from apparently eligible Black or Latino New Yorkers than there are outsider applications from apparently eligible White New Yorkers. *See* BD Ex 10, Section 2a (identifying more than a million applications each from apparently eligible Blacks outsiders and from apparently eligible Latino outsiders, in comparison to fewer than 250,000 applications from apparently eligible White outsiders). In other words, the most numerous groups whose application choices defendant does not honor are Black and Latino New Yorkers.

conclude, based on the *Arlington Heights* factors, that something was amiss here"). We are constrained to point out, however, that the foregoing is just a subset of plaintiffs' evidence – this point has not yet treated pretext, credibility, or consciousness of guilt.

F – Pretext, Consciousness of Guilt, and Witness Credibility

In denying the motion to dismiss, this Court treated as relevant plaintiffs' allegations that:

> although the Community Preference Policy has a purported purpose of providing greater housing opportunities for long-term residents of City neighborhoods, preference under the Policy is given regardless of how long a person has lived in a district.

Winfield, 2016 WL 6208564, at *7. Defendant has admitted this, as well as the fact that the preference is not limited to those who have had to persevere through years of difficult conditions.[67] This alone would defeat summary judgment. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (holding that trier of fact may reasonably infer from falsity of explanation that the defendant is dissembling to cover up discriminatory purpose); *Bennett*, 92 A.D.3d at 43 (emphases added) (ruling under City HRL that "[o]nce there is *some* evidence that *at least one* of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play").

Here, defendant has provided a jury with more reasons to believe that it was not being honest. Faced with proof of the implausibility of the "persevering" justification, defendant has said that the "persevering" defense is no longer operative, the rationale having evolved "over the last thirty years."[68] But that evolution cannot, in light of defendant's submissions, be read as

[67] *See* Def. amended responses to RTAs, at 3 (RTA 1 and response thereto) (admitting policy is applicable to any insider, "and is not limited" to insiders who "have been long-term residents of the applicable community district(s)" or to those who "have had to persevere through years of difficult conditions"). *See also* defendant's objections and responses to plaintiffs' 56.1 statement ("P56.1DR"), ECF 901, at ¶ 111 (agreeing that neither the length of time an applicant resides in a CD nor an applicant's housing conditions affect eligibility for the preference).

[68] *See* DREP Brief, at 21.

having occurred during the pendency of this lawsuit. As such, when Deputy Mayor Been propounded that rationale in trying to get this case dismissed in 2015,[69] she was dissembling.

Likewise, faced with the unsustainability of its Council Member ("CM") justification – CMs constituting *the part of defendant* that approves affordable housing developments and zoning changes needed for affordable housing development – defendant is now characterizing the overcoming of opposition to development from CMs as "only one small component" of its defense.[70] A jury, seeing these varying and shifting justifications, would be reasonably permitted to conclude that defendant is being misleading in order to cover up intentional discrimination.

Defendant is confused about the role of credibility evidence and consciousness of guilt evidence at this stage. Again, contrary to defendant's position,[71] there is no requirement that lack of credibility or consciousness of guilt already be proved; the question is whether evidence exists from which a jury can draw these conclusions. Both in the PRO Brief and in plaintiffs' response to defendant's 56.1 statement, plaintiffs present reams of this evidence.[72] One example: former HPD Commissioner Shaun Donovan's "yes" to the question of whether defendant "had turned with all the purpose at its command to try to reduce and ultimately eliminate racial segregation in housing" when he was commissioner is contravened, *inter alia*, by the facts that: (a) during his tenure there was not a policy specifically and explicitly targeted at reducing housing segregation;[73]

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[69] *See* PRO Brief, at 62 and 62 n.198. A jury is also entitled to consider the fact that defendant knew that various facially neutral complaints about the burdens of development could often reflect an underlying exclusionary motivation, but then-Commissioner Been presented those facially neutral concerns to the Court without qualification, ignoring the issue of underlying motivation (and, a jury could conclude, hoping that the Court would ignore that issue, too). *See, supra,* at 12 n.34.

[70] *See* DREP Brief, at 63.

[71] *See id.* at 21-24.

[72] *See* PRO Brief, at 83-87; D56.1PR, Appendix, at ¶¶ 4, 6-9, 69-73, 76-84.

[73] *See* PRO Brief, at 87.

(b) his predecessor, former Commissioner Perine, confirmed both lack of knowledge of any anti-segregation policy or anything that was done to tackle residential segregation during her tenure;[74] (c) his successor, former Commissioner Cestero, admitted that, to his knowledge, reducing residential segregation was not a goal of defendant;[75] and (d) he was extraordinarily vague about his recollections about what he claimed was a "focus."[76]

Defendant does not know (or pretends not to know) why defendant's attitude about segregation during the period of policy expansion and subsequent maintenance (including in the de Blasio administration)[77] is so central to the case.[78] As noted, however, a jury can infer that a defendant willing to ignore the problem of residential segregation is a defendant that is more likely to be amenable to maintaining a policy that perpetuates that segregation.

As such, the downplaying of the existence of segregation, of race-based resistance to residential change, and of defendant's inattention to segregation are all material elements of plaintiffs' circumstantial case. And these kinds of downplaying are permitted to be understood by a jury to reflect lack of credibility and/or consciousness of guilt. Take, for example, the response of Leila Bozorg – a chief of staff at HPD and, at the time of her deposition, defendant's Deputy Commissioner for Neighborhood Strategies at that agency – to a statement that appeared in the "community opposition" section of a document prepared during the Where We Live process.[79]

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[74] *See* excerpts of transcript of Oct. 26, 2017 deposition of Jerilyn Perine, Ex 126 to MD 2021, at 73:17-74:21 and 75:22-76:14.

[75] *See* D56.1PR, Appendix, at ¶ 3.

[76] *See id*, at ¶¶ 72(b), (d), (e), (f), and (g).

[77] *See* PRO Brief, at 83 (Deputy Mayor Glen was unaware of any plan for ending residential racial segregation).

[78] *See* DREP Brief, at 23-24.

[79] Bozorg oversaw significant elements of the "Where We Live" process of which defendant boasts. *See* excerpt of Jan. 10, 2019 deposition of Leila Bozorg, Ex 127 to MD 2021, at 8:2-9.

The statement was that, "Many parents support the status quo and NIMBYism does not allow *for the integration of schools and neighborhoods*."[80] Ms. Bozorg insisted that she did not read the statement specifically as concerning race-based opposition and that she read it to "not necessarily be about race."[81] A jury could reasonably conclude that Ms. Bozorg was not being candid.

The PRO Brief and the Appendix to D56.1PR contain many other examples of evasive, misleading, and incredible testimony from multiple of defendant's witnesses, including but not limited to the following: Ms. Bozorg's assertion that neighborhoods are more racially diverse between Blacks and Whites than data suggest; former-Commissioner Torres-Springer's refusals to confirm that an op-ed penned for her that referred to a "legacy of discrimination and segregation" was referencing a history of *housing* discrimination and segregation, as well as her claim not to be able to answer the question of whether buildings in need of rehabilitation are "randomly situated throughout the city or perhaps [are] more concentrated in some neighborhoods than in others"; and various positions of Deputy Mayor Been, including her characterization of some New Yorkers preferring no housing to affordable housing because of worries about change to the economics of a neighborhood (withholding from the Court the race-based element of those fears that she had previously identified in a speech).[82] *Cf. MHANY,* 819 F.3d at 610-11 (citation omitted) (citing evidence from which to question officials' credibility as part of the "cumulative weight of circumstantial evidence" on which a plaintiff is usually constrained to rely).

Two concluding observations. First, we underline not only the importance of observing the large volume of evidence set forth in the PRO Brief to which the DREP Brief does not respond,

[80] *See* D56.1PR, Appendix, at ¶ 7 (emphasis added).

[81] *See id.*

[82] For Bozorg, *see* D56.1PR, Appendix, at ¶¶ 6-9; for Torres-Springer, *see id.* at ¶ 77 (and *see also id.* at ¶ 76); for Been, *see* PRO Brief, at 84-86 and D56.1PR, Appendix, at ¶¶ 79-80, and 84.

but also the importance of recognizing that evidence put forward in contexts outside of intentional discrimination can also be probative of intentional discrimination. For example, plaintiffs referenced Deputy Mayor Been's striking idea of what constitutes "inherent notions of fairness" in the context of a discussion of less discriminatory alternatives.[83] Her idea that a 50/50 split of units accorded with inherent notions of fairness *even though the insider 50 percent was going to only 3.1 percent of the apparently eligible applicants*[84] can reasonably be viewed by a jury as an attempt to mislead – with or without the added fact that, as Professor Krysan observes, "[A] 50/50 split represents an *illusory* balance: the long history of the scale being overloaded on the side of segregation and lack of choice can only be remedied with a *counterbalance:* a heavy emphasis on the side of the scale that is pro-integration, pro-mobility, and pro- residential choice."[85]

Finally, an examination of credibility (or, rather, of what a jury could reasonably look to in terms of credibility of defendant's witnesses) is not complete without a review of the cited transcript materials for the *evasiveness* of those witnesses.[86]

Sometimes summary judgment must be denied because a plaintiff has just managed to meet the bar of there being some evidence, taken in the totality,[87] that would allow a jury to find intentional discrimination. Here there is vastly more evidence; defendant's invitation to ignore the evidence or to select an alternative interpretation of the evidence must be rejected.

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[83] *See* PRO Brief, at 65 n.209.

[84] *See id.*

[85] *See* MK, at 7, ¶ 27.

[86] *See, e.g., Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 229 (S.D.N.Y. 2019) ("Grounds for finding a witness incredible include, *inter alia,* evasive, inconsistent, contradictory or implausible testimony.").

[87] *Cf. Walsh v. NYCHA,* 828 F.3d 70, 76 (2d Cir. 2016) (noting error in the failure to view the evidence as a whole, the Circuit held that "[n]o one piece of evidence need be sufficient, standing alone, to permit a rational finder of fact to infer that defendant's employment decision was more likely than not motivated in part by discrimination. To use the apt metaphor . . . a plaintiff may satisfy her burden by building a wall out of individual evidentiary bricks").

POINT II

DEFENDANT'S REPLY AS TO DISPARATE IMPACT CONFIRMS THE APPROPRIATENESS OF GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS.

Defendant's Point II is largely a rehash of previously proffered diversions, so little reply is necessary. The parties agree that the Court has to determine as a matter of law whether to accept defendant's citywide, separate-but-equal approach, or to accept plaintiffs' analysis based on community-district ("CD") typologies.[88] Once one gets to the CD-typology analyses, the complaints are just smoke: in fact, there is never a question, regardless of whether it is Professor Beveridge's preferred method being used, or Professor Beveridge's application of Dr. Siskin's methods to the CD-typology level, that the results are always material.

Defendant's citywide approach conceals disparate impacts;[89] plaintiffs' CD-typology approach allows for such impacts as exist to emerge. Defendant's frustration with the results does not change the fact that plaintiffs' examination corresponded with the fact that CDs (a) do exist as the geographies at which *defendant has chosen* to apply the preference each time a lottery is conducted; and (b) do fall into one of the demographic typologies identified by plaintiffs (majority-White, plurality-Black, etc.). These groupings did not *have* to result in the finding of disparate impacts; that they did find impacts frequently just uncovers what *the policy* causes. As before, much of what defendant and Dr. Siskin write are based on the mistaken notion that citywide analysis is appropriate; in fact, all citywide analyses of disparate impact are immaterial and

[88] *See* Feb. 10, 2021 declaration of Dr. Bernard Siskin, ECF 939 ("SD 2021"), at 2-3, ¶ 4 (acknowledging that the arguments as to the existence of disparate impact "boil down to [this] single fundamental issue").

[89] *See, e.g.,* BROD, at 2-3, ¶¶ 6-9; *see also* Jan. 5, 2021 *amicus* brief of the Lawyers' Committee for Civil Rights Under Law ("LC Brief"), ECF 935, at 12-15 (underlining that accepting citywide defense would be "a tacit endorsement of the concept of 'separate but equal'") and at 2 ("[T]he positions urged on this Court by Defendant City of New York (the 'City') would not only deprive the Plaintiffs (and hundreds of thousands of other New York City households) of their fair housing rights, but would, if accepted, also deal devastating blows to the ability of anyone in the United States to vindicate the rights guaranteed them by the FHA.").

irrelevant to summary judgment.

Defendant is still insisting that units are "fungible," and thus still ignoring the fact that one cannot assume fungibility from the point of view of the applicant.[90] One does not apply to lotteries *en masse*; each project has a separate lottery and a separate application of the policy. The issue is that the policy precludes applicants from competing on equal terms wherever *they* choose to apply.

One telltale sign of the flaw in defendant's critique is its attempt to distinguish the circumstances in *Langlois,* which it described as having "separate towns, each with different types of data, and different dates they implemented the preference at issue," with defendant's system, which it describes as "a single set of records, single source of data, and a single policy at issue."[91] In fact, defendant's system has a different set of requirements, a different set of units, a different date for lottery entry, a different set of applicants, and a different enforcement of outsider-restriction *each time that there is a lottery*. What defendant calls one policy is a policy that is implemented or "operationalized" on a different applicant pool each time – Professor Beveridge did no more than organize the data to see, in each different CD typology, what the answers were to the critical questions, "who is benefitted by being designated an insider by the policy," and "who is harmed by being designated an outsider by the policy."[92] There were no "subgroups" used – the entire complement of each racial group that applied to lotteries in a typology was analyzed, and

[90] *See* PRO Brief, at 22 n.72.

[91] *See* DREP Brief, at 29.

[92] *See* relevant discussion in Mar. 8, 2021 declaration of Professor Andrew Beveridge ("BD 2021"), at 2-3, ¶¶ 5-9. Defendant's renewed objections to the lessons of *Langlois* and *Comer*, *see* DREP Brief, at 28-29, are nothing more than a continuation of its mistaken refusal to recognize that each CD in which a lottery is conducted has demographic characteristics; that these characteristics can reasonably be organized in majority-race and plurality-race typologies; that grouping like-with-like allows for analysis; and, finally, that pretending those demographically different lottery typologies are all indistinguishable parts of the same whole (when there is never a "citywide lottery") is a fiction.

this was done for all typologies – no one was left out.[93]

Defendant and Dr. Siskin are still failing to understand that it is not enough that the policy in respect to an outsider "does not mean that you are unable to compete for housing"; the policy-created lack of a level playing field is precisely what Dr. Siskin writes off as the policy "only [meaning] that you are less likely to get a unit."[94] Likewise, defendant's insistence that the question for disparate impact purposes of whether one can compete fairly can be isolated from the question of "where" the housing is[95] defies the fundamental principal of the right to a level playing field: you can only compete fairly if you can do so *wherever* you choose to apply.[96]

There are many pages under the bridge, but plaintiffs implore the Court to stay focused on a few basic, undisputed facts. The policy tilts the playing field, and that tilt is never undone.[97] Defendant does not want the Court to examine what the policy does to *entrants* on the premise that this is the "wrong stage"; but it does not address the fact that the law, as this Court has recognized, entitles *everyone* to compete on a level playing field, even those who will not ultimately get housing assistance.[98] Disparate impacts for entrants were found in all seven CD typologies.

Though defendant claims, remarkably, that the policy has "no impact" at the "apparently eligible" stage,[99] it is undisputed that: (a) the policy boosts the odds of apparently eligible insiders

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[93] *See* BD 2021, at 3, ¶ 10. The policy imposes injury on Blacks, Whites, Latinos, and Asians, depending on CD typology. These injuries are part-and-parcel of the same system that has injured plaintiffs (who are Black). Findings in respect to each racial group have been put forward since 2017 and defendant has had the opportunity to respond.

[94] *See* SD 2021, at 23, ¶ 54.

[95] *See id.* at 4, ¶ 8; *see also* DREP Brief, at 39.

[96] *See* PRO Brief, at 9; *see also* BD 2021, at 4, ¶ 14.

[97] *See* PRO Brief, at 8.

[98] *See, e.g.*, PRO Brief, at 14 n.35 (citing *Winfield*, 2016 WL 6208564, at *4, which in turn cites *Comer v. Cisneros,* 37 F.3d 775, 794 (2d Cir. 1994)).

[99] *See* DREP Brief, at 34.

to the detriment of apparent eligible outsiders; (b) the benefits and detriments are distributed in a way that causes material disparate impacts in six of seven CD typologies.[100]

The Court will notice that defendant's approach is ever shifting. During discovery, Dr. Siskin agreed that a "significantly higher percentage" of apparently eligible insider applicants is considered than the percentage of apparently eligible outsider applicants.[101] Then, it its response to plaintiffs' 56.1 statement, defendant refused to admit that a materially greater percentage of CP-beneficiary applicants and apparently eligible applicants – independent of qualifications – had their applications reached and considered by a developer than did outsider applicants.[102] Defendant's change in position obliged Professor Beveridge to reconfirm the point.[103]

Now, defendant says never mind – "There is no dispute that more CP beneficiaries are considered than non-CP beneficiaries" – but that breaking the data down into insiders and outsiders is "unnecessary."[104] This is just a plea for the Court to accept defendant's strategy of hiding impacts: (1) aggregating to the citywide level; and (2) failing to analyze who gets the benefits of insider status. Defendant had previously written that the consideration stage is "dispositive,"[105] and plaintiffs agree that who gets considered is an important function of the policy's sequencing

[100] *See, e.g.,* BD 2021, at 9-10, ¶¶ 30-32 (summarizing and citing findings). Dr. Siskin's new argument about individual applicants, by which he seeks to put the onus of the policy's decision to disfavor outsiders on individual applicants, *see* SD 2021, at 22, ¶ 53 n.18, is also unavailing. It is *the policy* that creates two queues, and that creates the circumstance that a lottery number that is "bad" for an outsider is entirely "good enough" for an insider. *See* BD 2021, at 9, ¶ 30 and ¶ 30 n.30, for a more detailed explanation.

[101] *See* PRO Brief at 15 and 15 n.41.

[102] *See* P56.1DR, at ¶ 51.

[103] Defendant has purported to catalog "new material" from Professor Beveridge's declarations. The court will be able to see for itself that there is a variety of new material in *Dr. Siskin's declarations,* including the current one. Fundamentally, though, both sides have long had access to, and have availed themselves of, the underlying data. No one is being prejudiced.

[104] *See* DREP Brief, at 40-41, *quoting* SD 2021, at 32, ¶ 77.

[105] *See* PRO Brief, at 16.

and allocation provisions: one cannot continue the competition process for an award if not considered.[106] As a higher consideration rate is a follow-on benefit of the insider status granted by the policy, the question, as always, is "who is advantaged and disadvantaged by the operation of the policy?" That analysis showed that the advantages and disadvantages of a higher rate of selection were distributed to cause multiple significant disparities in six of seven CD typologies.[107]

Defendant's other contentions fare no better:

(1) This action is not seeking compensatory damages for the harms associated with being excluded from particular CD typologies that offer greater opportunities. It simply deals with the fact that the right to a level playing field exists from the outset of the application process, regardless of whether an applicant makes a showing that she or he "really likes a neighborhood a lot." Contrary to defendant's assertions,[108] applicant "preference" has "nothing to do with what CD typologies an applicant 'prefers' beyond the applicant preferring (and having a right) to be able to compete equally at all times."[109]

(2) Defendant's arguments as to causation remain without merit. What happens to entrants and apparently eligible applicants is that the policy, and nothing but the policy, causes their

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[106] *See* PRO Brief, at 15.

[107] *See* PRO Brief at 15. As Professor Beveridge has pointed out: "These questions are actually already answered (both for entrants and for apparently eligible applicants) in my initial declaration: the important benefits of insider status flow disproportionately to the dominant racial group to the detriment of other racial groups." *See* BROD, at 8-9, ¶ 32 *see also* BD 2021 at 3-4, ¶ 11.

[108] *See* DREP Brief, at 26-27.

[109] *See* BD 2021, at 4, ¶ 14. That an individual outsider who is Black is disadvantaged in applying for housing located in a majority-Black CD changes neither the race-based statistical disparities that emerge from the analysis, nor the fact that discrimination law is not meant to address all injuries – only injuries based on race (or other protected class). As to the idea that it is "outrageous" that one can be part of a protected class in one lottery application and not in another, *see* DREP Brief, at 32, defendant misses a two-part point: (1) an injury that accrues when one is denied an equal opportunity to compete without regard to race in one CD typology cannot be "undone" by what happens in other CD typologies, *see* PRO Brief, at 10; and (2) plaintiffs' data analysis permitted all members of all racial groups to be viewed as protected class members in all lotteries – it was the data that determined which protected class groups were helped and hurt in which CD typologies. *See* BD 2021, at 12, ¶ 41.

chances and various follow-on consequences to vary (consideration, full and partial close-out, etc.). Literally nothing else has happened.

With awards, too, all the basic characteristics pre-exist the lottery.[110] The lottery just splits the pool in ways that help and hurt different racial groups in different CD typologies.[111] That an applicant can decide not to "follow through" due to a life change or become ineligible due to an income change,[112] is immaterial. As Professor Beveridge explains,

> To the extent these things happened, they represented changes that existed independent of the lottery process. Those changes, in other words, would have happened in an equal-access lottery.
>
> The difference the policy causes, however, is that, among those candidates who "follow through" and remain qualified, it is the policy and only the policy that disfavors the more racially diverse outsider pool *that would not even exist as a distinct sub-pool had the policy not separated it out*, both in placing that group of candidates at the back of the line and in putting a hard cap on the maximum percentage of awardees they can be.[113]

The bottom line is that this strand of defendant's argument is another diversion. As noted, Dr. Siskin has said that his simulations (which confirm the existence of disparate impacts) eliminate any "confounding" factor and provide "a very good estimate of the expected impact of the CP policy on the lottery results."[114]

(3) Defendant's complaints about statistical significance are also without merit.[115] First, the complaint does not and cannot apply to defendant's simulation, run 1,000 times. Second,

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[110] *See* PRO Brief, at 16-18. *See also* BROD, at 14, ¶¶ 47-50.

[111] The critical ones, for the purpose of awards, being majority typologies, even though materiality exists under most tests with the plurality-Black CD typology, as well. *See, e.g.*, PRO Brief, at 26 and Chart 5.

[112] *See* SD 2021, at 25-26, ¶ 60.

[113] *See* BD 2021, at 6, ¶¶ 20-21.

[114] *See* Siskin Aug. 13, 2020 declaration, ECF 897 ("SD"), at 53, ¶104 and ¶ 104 n.77; *see also* BD 2021, at 6, ¶ 21.

[115] *See* DREP Brief, at 36.

Professor Beveridge explains yet again that his procedure was correct, and notes that, despite having been provided with the documentation, Professor Siskin has never responded to that documentation or specified any deviation from that documentation.[116]

Moreover, this is another diversion seeking to hide the fact that there is no dispute about disparate impacts at the CD-typology level. Dr. Siskin accepts that Professor Beveridge's analysis of simulated awards accurately reflects typology-level disparities; those analyses showed material disparities within all majority-race CD typologies and the plurality-Black typology.[117] Dr. Siskin cannot dispute an alternate analysis Professor Beveridge performed on actual awards using Dr. Siskin's exact methods, an analysis that again found multiple disparities in the same typologies.[118]

(4) Defendant does not explain why 80 percent is not a useful proxy for practical impact (having previously acknowledged that the test is "a commonly used measure to define practical significance"[119]), beyond Dr. Siskin restating his belief that the single application for this rule-of-thumb is to "selection rates." But, as Professor Beveridge explains: (a) some of his awards and simulated awards analyses *are* selection rate analyses, as such analyses are classically understood; (b) other analyses, like the highest-insider-share method for entrants and apparently eligible applicants can be understood as "selection rates" for getting preference; and (c) consideration rates are "selection rates" for being considered.[120] More fundamentally, Dr. Siskin's selection-rate

[116] *See* BD 2021, at 10, ¶¶ 32-33.

[117] *See id.* at 8, ¶ 26.

[118] *See id.* at 8, ¶ 27.

[119] *See* Dr. Siskin's Aug. 13, 2020 declaration, ECF 897 ("SD"), at 50 ¶ 100.

[120] *See* BD 2021, at 10-11, ¶¶ 34-37 and at 9, ¶ 30-31; *see also* BROD, Sections I and J, at 15-24, ¶¶ 51-76. Note, again, that defendant does not challenge the racial disparities caused to entrants and to apparently eligible applicants, arguing instead that the Court should ignore these parts of the lottery process where the policy's tilt is first applied. For rates of selection for consideration, *see id.* at 8, ¶ 31 and ¶ 31 n.15 (note that, in determining a racial group's consideration rate, Professor Beveridge used an equivalent method to the one Dr. Siskin used to determine actual

kerfuffle is another distraction for two reasons. First, "Housing cases simply provide different variations than do employment cases, and methods need to be attuned to measuring what the challenged policy is actually doing."[121] Second, none of the critiques give the Court any reason to question what the data make plain: there are clear and often massive impacts that the policy creates between racial groups in multiple CD typologies.

(5) Defendant is still arguing that its "with preference" versus "without preference" simulation does not "dilute" the impact of the policy,[122] but the new illustration that Dr. Siskin presents[123] only underlines the dilution point by showing how Dr. Siskin wrongly includes in the base for calculation non-preference units that would not be expected to have any impact.[124]

(6) Defendant now claims that its citywide analysis is not "based on 'offsetting' injuries."[125] The record says otherwise.[126]

(7) Defendant is stuck with the fact that Deputy Mayor Been, when HPD commissioner, presented the fair housing implications of the policy to HUD with information and proposals made

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award rates (taking the result of interest – consideration or actual awards – as a percentage of apparently eligible applicants from that group)).

[121] *See* BD 2021, at 10-11, ¶ 35 (quoting BROD, at 12 n.26).

[122] *See* DREP Brief, at 43.

[123] *See* SD 2021, at 38-39, ¶ 90 (including Illustration 1).

[124] *See* BD 2021, at 13, ¶¶ 43-44 (responding to illustration and summarizing BROD, at 16, ¶ 56 and ¶ 56 n.36, as follows: "even though all of the difference to be observed arises from the half of the units that are preference units versus an equivalent number of non-preference units, Dr. Siskin includes non-preference units that could not add to the difference but that do double the base as to which the difference is calculated. This artificially reduces the magnitude of the difference.").

[125] *See* DREP Brief, at 38.

[126] Asked whether there are disparate impact elements to the questions "Can someone compete for housing fairly in Location A," and "can someone compete for housing fairly in Location B," Dr. Siskin stated: "They have a disparate impact element *only to the extent that the ability to compete fairly in one area . . . doesn't offset* so that a group, a particular race, or protected class winds up getting . . . less apartments as the result of the preference. That's the only way in which it has an impact on disparate impact." *See* excerpt of Nov. 15, 2019 deposition of Dr. Bernard Siskin, MD Ex 2, at 13:6-22 (emphasis added). *See also* PRO Brief, at 8 n.18 (citing same).

on a CD-level basis; contravening the idea that analysis should proceed on a citywide basis.[127] Defendant complains that the document contains settlement negotiations. Aside from the fact that confidentiality was waived by voluntary disclosure (*see* this Court's order denying the motion to seal, ECF 926, at 2), and aside from the fact that it is a misnomer to label a routine HUD "compliance review" as a "dispute" or "imminent litigation" that would even trigger FRE 408, CD-level analysis of multiple disparate impacts was *not* an issue in dispute as between defendant and HUD; on the contrary, both sides understood that the CD-level was the appropriate focus.[128]

In any event, this is not the only document to confirm that Vicki Been viewed the question of impact at the CD level.[129] Defendant's substantive complaint – that these communications have nothing to do with how to conduct a disparate impact analysis – is also without merit. The documents show very clearly that defendant's idea of viewing impact citywide is indeed a *post hoc* rationalization – something that should be confirmatory of the unsound basis of a citywide analysis in these circumstances, as well as probative (for the purposes of the intentional discrimination claim) of lack of credibility.

(8) Plaintiffs have previously explained why *Smith v. Xerox Corp.*, 196 F.3d 358, 367-70 (2d Cir. 1999) and *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 203 (2d Cir. 1999) are inapposite to the multiple disparate impacts present in this case.[130] Defendant renews its

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[127] *See* PRO Brief, at 11.

[128] *See* Been letter to HUD, MD Ex 3, at 3-4. As reviewing at the CD level was not the matter in dispute, it was not a "statement . . . about the claim," FRE 408(a)(2). Likewise, the CDs proffered by Commissioner Been for reduced preference are not being used to establish disparate impact in those CDs, but again to reflect the undisputed understanding that the implications of the policy were properly examined at the CD-level rather than citywide. The letter is admissible on other grounds, as well. *See* plaintiffs' Nov. 20, 2020 letter to this Court, ECF 925 (non-redacted version submitted to Chambers), at 2-3; *see also* FRE 408(b) (permitting admission "for another purpose").

[129] *See*, *e.g.*, D56.1PR, Appendix, at ¶ 66 (speaking to a single project in "one of the least racially diverse" CDs and explaining that a failure to share the preference with adjoining CDs would "result in an immediate new lawsuit (which we would likely lose)").

[130] *See* PRO Brief, at 19-21.

assertions,[131] but to no greater effect. Each lottery falls into an entirely reasonable demographic classification based on defendant's decision to have a CD-level policy; each applicant in each typology is examined; and the effects on each of the racial groups – all of which have been the subject of reports and declarations for years – show disparate impacts depending on CD typology, not depending on any manipulation.

(9) As Professor Beveridge points out, Dr. Siskin is wrong about predictability, too:

> [Dr. Siskin] offers no reason why the patterns that emerged in 168 lotteries would change. The policy was and is designed to help insiders at the expense of outsiders, and the outsider pools are consistently more racially diverse than the insider pools. Saying that "maybe it will all be different in the future" completely undercuts the point of analyzing an ongoing policy that has produced decisive results.[132]

That the policy causes disparate impacts has been demonstrated as a matter of law, and plaintiffs are entitled to summary judgment on this issue.

POINT III

DEFENDANT'S REPLY AS TO PERPETUATION OF SEGREGATION CONFIRMS THE APPROPRIATENESS OF GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS.

The parties agree that the issues to be resolved by the Court to allow it to determine summary judgment are "very limited."[133] And despite the obfuscations interposed by defendant,

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[131] *See* DREP Brief, at 27-28. Defendant also returns to *Williams v. NYCHA*, 879 F. Supp. 2d 328 (E.D.N.Y. 2012), DREP Brief, at 27, but only to mistake the import of the case as explained in the PRO Brief, at 19 n.64. Defendant's new citation to *Wal-mart Stores v. Duke*, 564 U.S. 338 (2011) has nothing to do with this case. That class certification was denied "because each store's act of discretion in hiring women was unique," DREP Brief, at 27, is a fact apparently interposed to say again that the policy at issue here is a citywide policy. But, as Professor Beveridge points out, "universality of application does not change the fact that lotteries are operated one at a time, and the community preference is implemented one lottery at a time. And each time the preference is applied, it is being applied to a sub-pool of the lottery's applicants that have been generated from *within a community district that has particular demographic characteristics*, with the policy separating that sub-pool from the balance of applicants to that lottery who can come from anywhere in the city." *See* BD 2021, at 2, ¶ 5 (footnote omitted).

[132] *See* BD 2021, at 12-13, ¶ 42.

[133] *See* SD 2021, at 40, ¶ 94. Defendant has not disputed plaintiffs' explanation that the City HRL prohibits practices that perpetuate segregation pursuant to its basic fair housing provision, Admin. Code § 8-107(5)(a)(1)(a). *See, e.g.*, PRO Brief, at 31-32.

the data are clear that any legitimate analysis (that is, any other than one improperly attempting to use change in the dissimilarity index for the city's entire housing stock as the measure) shows significant perpetuation regardless of whether Professor Beveridge's preferred methods or Dr. Siskin's preferred methods are used.

By definition, the policy's stymieing of integrative moves forces there to be "more segregation for a longer period of time";[134] that is the definition of perpetuation of segregation. Defendant seeks to distinguish *MHANY*,[135] but fails to cite the relevant part of the district court decision – the part that made clear that defendant was arguing that a change in policy that *it* wanted to make "increased the housing for minorities." *MHANY Mgmt. v. Inc. Vill. Of Garden City*, 985 F. Supp. 2d 390, 427 (E.D.N.Y. 2013). The district court rejected the argument because an even more integrating alternative was available, and those two alternatives had to be compared. *Id.* That comparison – between plaintiffs' proposal and a defendant proposal that, *in relative terms*, stymied integrative moves, was what the Circuit affirmed as decreasing the availability of housing to minorities. *MHANY*, 819 F.3d at 619-620.[136]

The City HRL also requires the conclusion that stymieing of integration constitutes perpetuation.[137] Pursuant to Admin. Code § 8-130(c), the holdings and methods of analysis of *Albunio v. City of New York*, 16 N.Y.3d 472 (2011) and of *Williams v. NYCHA*, 61 A.D.3d 62

[134] *See* BD 2021, at 15, ¶ 53. *See also id.* at 15, ¶¶ 51-52.

[135] *See* DREP Brief, at 45-46.

[136] *See* discussion in PRO Brief, at 36.

[137] Defendant also misunderstands *Davis v. NYCHA*, 60 F. Supp. 2d 220 (S.D.N.Y. 1999), *aff'd in relevant part*, *Davis v. NYCHA*, 278 F.3d 64 (2d Cir. 2002). *See* DREP Brief, at 46. The point that the district court made and that the Circuit affirmed was that "perpetuate" meant "to extend in time" and that actions that *slow the pace* of desegregation can constitute perpetuation. *See* discussion in PRO Brief, at 36-37. The decisions hinged not on the posture of the case (enforcement of a consent decree), but rather on the meaning of the term "perpetuation."

(N.Y. App. Div. 1st Dept. 2009) were ratified.[138] *Albunio* requires the most plaintiff-friendly interpretation of statutory provisions that is reasonably possible. *Albunio*, 16 N.Y.3d at 477-78. Treating the stymieing of integration as perpetuation certainly constitutes an interpretation that is reasonably possible. Likewise, *Williams* holds, *inter alia*, that City-HRL interpretations of the City HRL be grounded in the Council's decision that discrimination must play *no* role. *Williams*, 61 A.D.3d at 76. Allowing the stymieing of integration would contravene that command.

Though defendant belatedly acknowledges that FHA defendants have the chance to show a legally sufficient justification for a challenged policy, it still argues that municipalities should "not have to be vulnerable to claims of perpetuation" in the circumstance of a policy that, in relative terms, stymies integration.[139] Defendant is wrong conceptually and legally. There is no warrant to protect practices that keep more segregation in place for a longer period of time. And the Supreme Court in *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015) did not seek to protect the legitimate interests of a defendant in Stage 1 of impact and perpetuation cases, but rather was focused on allowing defendants an affirmative defense by which it was their burden *at Stage 2* to prove that their policy was necessary to achieve a valid interest. *Id.* at 541.

Finally, as observed by Professor Beveridge,[140] turning a blind eye to the stymieing of integration would allow any and every highly segregated jurisdiction whose "overall" zoning scheme allowed *some* construction to point to any resulting modest increase in integrative moves as insulating the jurisdiction from liability. Defendant's proposed rule would allow for exactly

[138] *See* Local Law 35 of 2016, Ex 7 to Oct. 29, 2020 declaration of Craig Gurian, ECF 915 ("Gurian LM Dec"). That local law, *inter alia*, added Admin. Code § 8-130(c) to the City HRL. *See also* discussion in plaintiffs' Mar. 6, 2020 brief, ECF 882 ("PI Brief"), at 42-44.

[139] *See* DREP Brief, at 48.

[140] *See* BD 2021, at 15-16, ¶ 54.

this *en masse* evasion of liability – even though shielding the exclusionary aspects of the jurisdiction's zoning would clearly stymie integration as compared with removing those barriers.

As for defendant's gambit of seeking to use the dissimilarity index,[141] a measure that is calculated on the basis of *all dwelling units in New York City* (as related to each racial pairing), we stand on the previous briefing (including that of *amicus curiae* Lawyers' Committee)[142] – except to ask the Court to note that neither the cases that defendant cites, nor any other with which we are aware, use change-in-dissimilarity-index to compare a challenged policy with its alternative.

Defendant's other arguments, relating to data methods, are also spurious. Professor Beveridge again explains the procedure ("RISK DIFF") that he correctly followed as to statistical significance (a procedure that Dr. Siskin still does not address); explains again why the 80-percent rule is a useful rule of thumb for practical significance; rebuts again the idea that the rule can only be used for "selection rates" (this is in the disparate impact portion of the declaration, but is equally relevant here); and explains again the importance of comparing the *rate* of net-integrative moves.[143]

Weirdly, defendant tries to pretend that "[o]nce an applicant is awarded a unit, their CP status is wholly irrelevant to whether their move will result in segregation or integration."[144] But, for analytical purposes, the relative contribution to integration of insider moves as compared with outsider moves *is exactly what the Court needs to know*. Does the policy make a difference? The answer, of course, is "yes," a significant difference. As Professor Beveridge illustrates in

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[141] *See* DREP Brief, at 49-51.

[142] *See* PRO Brief, at 34-36; *see also* LC Brief, at 20-21.

[143] *See* BD 2021 at 10, ¶ 33 and 21, ¶ 69 (discussing statistical significance); at 20-21, ¶¶ 67-68 and ¶ 68 n.67 (addressing the 80-percent test in perpetuation context); at 10-11, ¶¶ 34-35 (reiterating that 80-percent test need not be limited to selection rates); and at 17-18, ¶¶ 58-61 (underlining the importance of analyzing rates), respectively.

[144] *See* SD 2021, at 46, ¶ 106.

connection with the moves sought by apparently eligible applicants, insider net-integrative moves sought were *only 29.51 percent* of outsider net-integrative moves sought.[145]

Professor Beveridge exposes the diversionary aspect of defendant's complaints: "the policy is firmly on the impermissible side of the line regardless of which method is selected."[146] Thus, for example, defendant believes that one should not calculate relative rates of integration by comparing the percentage of each group (insiders or outsiders) that make or seek integrative moves on net; instead, it says, one should look at just the numbers.[147] But the numbers need to be compared. And if you proceed to compare insider net integrative actual moves to outsider net integrative actual moves by directly taking the former as a percentage of the latter (the "one-step method") the results are quite similar. We reproduce Professor Beveridge's Table 27 below.

Table 27
Different methods of comparing insider net-integration as percentage of outsider net-integration (actual awards)

Two-group pairing	Relative percentage	One-step method
W v AA	32.71%	28.09%
W v A	45.87%	50.00%
W v H	65.98%	62.81%
AA v H	12.84%	10.53%
AA v A	25.43%	19.94%
H v A	89.52%	79.48%

The Court will notice that in five of six race-group pairings (all except the H v A comparison[148]), the net-integrative actual moves yielded by insiders as a percentage of net-integrative actual moves

[145] *See* BD 2021, at 18, ¶ 61.

[146] *See id.* at 14, ¶ 48. This was also true, Professor Beveridge notes, as to disparate impact. *See id.*

[147] *See* SD 2021, at 49-50, ¶ 116.

[148] H v A actual moves (awards) is the one comparison out of 18 – six racial pairs, each measured in connection with actual moves, simulated moves, and moves sought by apparently eligible applicants – that plaintiffs never relied on.

yielded by outsiders is *far, far under 80 percent by both methods.*[149]

Similarly, Professor Beveridge has shown both that it is improper to try to import the moves of racial groups not being compared in a two-race pairing into the analysis,[150] and that the policy has a significant effect even if one does so.[151]

When it comes to the issue of the use of Dr. Siskin's simulations and why the method of comparing the results of the entire "with preference" simulation to the results of the entire "without preference" simulation understates the impact of the policy, the same infirmity exists here as with disparate impact: by including in the base for calculations the units not reserved for CP beneficiaries, Dr. Siskin has once again artificially made the policy's impact appear to be half of what it is.[152] More importantly, though, the point that Professor Beveridge had made in the last round of briefing was that *even if one proceeded as Dr. Siskin wished* and compared the entire "with preference" simulation to the entire "without preference" simulation, the results are still significant by the 80-percent test.[153]

There are too many distractions that defendant introduces to be able to address them all here, and plaintiffs respectfully refer the Court to the entirety of Professor Beveridge's declaration. We do, however, have to make two concluding observations. First, contrary to defendant's

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[149] For Table 27, *see* BD 2021, at 19. For the discussion, *see id*. at 17-19, ¶¶ 60-63.

[150] For the general point of impropriety, *see id.* at 16, ¶ 55. Professor Beveridge also makes clear that Dr. Siskin's assertion that to get "standardized ratios" one has to have a "common base" for each of the six two-race pairings is wrong: separate comparisons are being made, each independent of the others. *See id*. at 16, ¶ 56. He also uses actual awardee data to show the extent by which Dr. Siskin wants to pollute the proper pools of comparison (*i.e.*, the two racial groups at issue in each of the six pairs) with not-in-group movers (in most cases, by an amount greater than the combined total of "segregating," "integrating," and "no effect" moves for the two racial groups actually being compared). *See id* at 16-17, ¶ 57 and ¶ 57 n.55.

[151] *See* BROD, at 36-39, ¶¶ 131-36, and Tables 22-24.

[152] *See* discussion, *supra*, at 31 and 31 n.124; *see also* BD 2021, at 13, ¶¶ 43-44.

[153] *See* BROD, at 41-43, ¶¶ 142-46; *see also* BD 2021, at 14, ¶¶ 47-48.

assertions, the difference that the policy makes is large. Professor Beveridge illustrates:

> An illustration is found in the AA v H comparison across the 1,000 simulations with preference. The total number of simulated awards to members of this racial pair who were outsiders was quite similar to the total number of simulated awards to those who were insiders. Yet net integration across the 1,000 simulations was -530,630 for outsiders and only -68,976 for insiders.
>
> Whether you look at the simulations in the aggregate or scale them down to a single average simulation (-531 outsider; -69 insider), that is a significant difference in contribution to integration between outsiders and insiders.[154]

Finally, as with disparate impact, the policy's results are predictable: there is no reason to believe that the patterns that emerged in an examination of 145 lotteries[155] would change "given the fact that the policy was and is designed to help insiders at the expense of outsiders, even though outsiders are consistently more racially diverse."[156]

Plaintiffs have established as a matter of law that the policy perpetuates segregation.

POINT IV

DEFENDANT'S REPLY CONFIRMS THAT ITS JUSTIFICATIONS – EVER-SHIFTING AS THEY ARE – REFLECT ARBITRARY CHOICES AND SPECULATIVE RATIONALES; THESE JUSTIFICATIONS ARE NEITHER "NECESSARY" NOR "SIGNFICANTLY RELATED" TO ACHIEVING A "SUBSTANTIAL" OR "SIGNIFICANT" INTEREST.

Under the FHA, defendant has the burden of persuasion to prove that the policy is *necessary* to achieve one or more *substantial* interests of the defendant – not just in theory, but in practice. *See* 24 C.F.R. §100.500(c)(2);[157] *MHANY*, 819 F.3d at 618 (holding that *Inclusive Communities* implicitly adopted HUD's approach); and *Huntington Branch, N.A.A.C.P. v. Town*

[154] *See* BD 2021, at 19-20, ¶¶ 64-65 (footnotes omitted).

[155] The universe of lotteries was slightly smaller for perpetuation analyses than for disparate impact analyses.

[156] *See id.* at 21-22, ¶ 72.

[157] The "2013 HUD Rule," available as Ex 1 to Gurian LM Dec.

of Huntington, 844 F.2d 926, 936-39 (2d Cir. 1988) (requiring necessity be proved in practice).[158] Similarly, under the City HRL, defendant has the burden of persuasion to prove that the policy is *significantly related* to a *significant* interest of defendant. *See* Admin. Code § 8-107(17)(a)(2).[159] The applicable HUD regulation specifies that a legally sufficient defense "must be supported by evidence and may not be hypothetical or speculative." 24 C.F.R. § 100.500(b)(2) (2013).

We recapitulate the above because the DREP Brief avoids the question of defendant's burden of proof and the fact that the relationship between the policy and the articulated goal must be a necessary or significant one; it also tries to evade the requirement that the underlying interest must be substantial or significant. We do so also because the various modifiers – significant, significantly related, substantial, necessary – *cannot mean* either an inchoate amount or something that is merely helpful but *not* necessary or significantly related to the interests.

The DREP Brief urges the proposition that plaintiffs seek to impose some unfairly arduous evidentiary test.[160] In fact, a close review of the DREP Brief and of the latest declaration from Professor Goetz[161] show that the issue is not "precision," but the lack of either any measurement whatsoever of any purported link between the policy and the articulated interests, or of evidence of substantiality of interests (beyond conclusory assertions), as demonstrated below.

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[158] *See* discussion in PI Brief, at 45-46.

[159] *See* discussion in PI Brief, at 46-47. While this test is specifically articulated in connection with disparate impact claims brought per the cited section, the goals of the City HRL are achieved by using the same standard in respect to perpetuation of segregation claims, which arise under Admin. Code § 8-107(5)(a)(1)(a). *See id.*

[160] *See, e.g.*, DREP Brief, at 56 (pretending that defendant's problem is a failure to measure "precisely"); and at 58 (complaining that plaintiffs want to know "exactly how many households at risk of displacement or that feared displacement were helped by the CP policy").

[161] *See* EG 2021. Indeed, Professor Goetz's declaration is framed more like a lawyer's argument than an expert's report. For example, it mimics defendant's mistaken premise that Professor Orfield (who was retained to assist the Court to recognize "coded" race-based language) had some obligation to address the policy's responsiveness to known race-based opposition. *See, e.g.*, EG 2021, at 22, ¶ 42. *Cf.* Point I, *supra*, at 3, and 6-23 (Sections A, D, E, and F).

(A) Justification 1: Helping those who have persevered through long years of difficult housing conditions. Abandoned by defendant.

(B) Justification 2: Preventing and mitigating non-imminent displacement from neighborhood. Preliminarily, it is the case that "displacement from neighborhood" only became central to the defense once the original justification based on a broad definition of displacement was understood by defendant to be untenable. A demonstrative exhibit provides vivid proof.[162]

Substantively, defendant wants the Court to ignore the needs of those hurt by the policy when assessing the substantiality or significance of defendant's interests.[163] But one cannot assess substantiality or significance without context. The first piece of context is provided by former Commissioner Been: "I would agree that having housing [] – period – is more important than where the housing may be."[164] The parties agree, in other words, that mitigating displacement by providing housing *somewhere* is more important than providing housing to an individual in a *particular place*. The second piece of context is that the policy's preference for insiders is definitively not a preference for those with greater need or deservingness. Defendant admits that income is the only proxy for need upon which defendant relies in its lotteries; and that, among income-eligible applicants, the policy neither determines nor is designed to determine which applicants are more or less deserving, or more or less in need.[165]

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[162] Professor Goetz missed the point when he cited to his Aug. 2020 declaration to assert that the justification has always specifically been non-imminent displacement from neighborhood. *See id.* at 34, ¶ 65. Plaintiffs are comparing the pre-motion Feb. 2019 Goetz report – a report made prior to Professor's Goetz's deposition, defendant's responses to plaintiffs' requests to admit, and to defendant's response to plaintiffs' 56.1 statement – with that Aug. 2020 declaration, made after the first two items and concurrent with the third. The exhibit makes clear how displacement-from-neighborhood in the declaration was tacked on to the pre-existing material in the report. *See* MD 2021 Ex 128.

[163] *See* DREP Brief, at 56 (arguing "the fact that [outsiders] are also at risk of displacement is of no moment").

[164] *See* Been I, MD Ex 7, at 93:13-22.

[165] *See* P56.1DR, at ¶¶ 114-16, 118.

The third piece of context: it is uncontested that the affordable housing supply facilitated by defendant does not nearly meet demand.

What we see first, therefore, is that defendant chooses to allocate a limited resource in a way that causes disparate impacts and stymies integrative moves. We see next that the justification is to prefer insiders who are *indistinguishable* in need or deservingness from the group of outsiders that the policy hurts. The policy does so even though the more important value – getting housing *somewhere* – is by definition impaired for the outsider disfavored by the policy each time an insider is favored by the policy. This is not, in other words, a circumstance where there are multiple, harmonious interests,[166] but rather one where the policy's harming of outsiders directly conflicts with the more-important value that all who are income-qualified need housing somewhere. The policy also imposes an artificial and arbitrary distinction between equally needy residents that cannot be said to be substantial or significant.

What about those who wish to stay in a neighborhood? They can still apply in an equal-access lottery, without being given undue advantage. Note that defendant admits that a newcomer to a neighborhood can be more invested in that neighborhood than a person who has lived there for a long time, and that many people are not tied to neighborhood.[167] Again, defendant has drawn an artificial and arbitrary interest that cannot be said to be substantial or significant.

The foregoing assumed, *arguendo*, that defendant had evidence linking the policy to the prevention or mitigation of non-imminent displacement from neighborhood. *But it does not*. Even defendant's return to rent-burden[168] (after disparaging it in the last round of briefing)[169] only

[166] *See* DREP Brief, at 60.

[167] *See* P56.1DR, at ¶ 117; and PRO Brief, at 53-54.

[168] *See* DREP Brief, at 56.

[169] *See* DOX Brief, at 62 (defendant "has not conceded that rent burden is a proxy for displacement risk").

highlights two things. First, defendant does not have an interest in disfavoring outsiders – who are equivalently rent-burdened to insiders.[170] Second, defendant still does not have any estimate either for the scope of CP-beneficiaries who were actually at risk of non-imminent displacement,[171] *or* for the scope of CP-beneficiaries who received housing actually within their neighborhoods.[172]

While defendant suggests that there is no reason to believe that insiders are not at risk of displacement,[173] defendant does not even bother with a ballpark estimate of the scope of the relationship between the policy and addressing the risk, *and does not speak at all to the question of how many insiders actually got apartments in their neighborhoods.* As noted, defendant wants the Court to ignore the policy's impact on the prospects of those at-risk (yet disfavored) outsiders.

Thus, the question is not a matter of demanding "perfect tailoring,"[174] it is a matter of defendant's producing no evidence allowing a reasonable conclusion that *defendant proved* an adequate fit between policy and interest (defendant now admits the policy's over-inclusiveness;[175] the policy's intended under-inclusiveness in respect to the equivalent needs of outsiders cannot be denied). *Cf. United States v. City of New York* (*"Firefighters*"), 637 F. Supp. 2d 77, 125 (E.D.N.Y. 2009) (citing failure to demonstrate fit between facially neutral practice and needs of defendant).[176]

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[170] That equivalent rent-burden as between insiders and outsiders is referenced and discussed in PI Brief, at 52-53.

[171] Sizeable (and equivalent) minorities of both insider and outsider applications were from households who were *not* rent-burdened; solid (and equivalent) majorities of both insider and outsider applications were from households who were *not* extremely rent-burdened. *See* BD, at 56, Table 14.

[172] *See* P56.1DR, at ¶ 134 (stating it is not disputed that "A community district is often composed of multiple neighborhoods; a lottery applicant being award[ed] a unit in the community district of his or her current residence is not necessarily being awarded a unit in the neighborhood of his or her current residence.").

[173] *See* DREP Brief at 56.

[174] *See id.*

[175] *See id.* (acknowledging "the policy may be over-inclusive").

[176] In other words, since outsiders are both equivalently rent-burdened as insiders and no less "deserving" than insiders, the policy is arbitrary both in theory *and* in practice.

Defendant's reference to "investing in neighborhoods that have lacked investment for many years"[177] is inapposite. Defendant is able to (and should) make investments in underserved neighborhoods. Making those investments is not contingent on having a preference policy.

Lastly, the idea that the policy is a "unique" tool is contravened by the evidence. Not only does keeping a family in its current apartment also, by definition, keep that family in its neighborhood, defendant in fact touts *housing preservation* as a key tool for keeping families in their *neighborhoods*.[178] We also know that reducing displacement-from-neighborhood pressure does not depend on action within a neighborhood: each success in keeping a New Yorker from losing his or her home *anywhere* redounds to the benefit of New Yorkers living in other neighborhoods. Defendant now admits this through Professor Goetz.[179] The community preference is not a "necessary" part of a strategy to fight displacement from neighborhood.

(C) Justification 3: Fear of non-imminent displacement from neighborhood. If possible, defendant is further from proving this justification – either as a substantial or significant interest, or in terms of the policy being necessary or substantially related to advancing the interest – than with the policy in connection with actual non-imminent displacement from neighborhood. To the extent that defendant has a legitimate interest in addressing fears (as opposed to changing conditions concretely), it cannot be that there is a significant or substantial interest in subordinating via the policy such fears as outsiders have about the consequences of losing their current

[177] *See* DREP Brief, at 61.

[178] *See* excerpt of Dec. 20, 2018 press release, "De Blasio Administration Launches Neighborhood Pillars Program to Protect Tenants and Preserve Affordability," MD Ex 129, at 1 (emphasis added) (quoting the then-Commissioner of HPD as stating that "[p]reservation is the cornerstone of the Mayor's housing plan and our efforts to keep New Yorkers in their homes *and neighborhoods*.").

[179] Plaintiffs had described this as a very straightforward proposition, citing Professor Orfield. *See* PRO Brief, at 67-69 and at 68 n.220. Professor Goetz now confirms that the underlying Orfield observations are "simple observations about supply and demand in housing markets, observations that are familiar to anyone with even a passing interest in housing." *See* EG 2021, at 24, ¶ 47.

apartments to the fears that insiders have of being forced from their neighborhoods. Defendant certainly does not identify a reason to do so.

That it cannot do so is hardly a surprise when there are so many unknowns: Who is fearful? Of what are they fearful? How is their fear allocated (as between, say, fear of losing their existing apartment, fearing of having to leave their neighborhood, and fear of having to move out of the city altogether)? The answer that "it is difficult to say" only reflects the fact that there is no evidence – anecdotally or otherwise – of either the scope of the different types of fears (*i.e.*, how many people harbor them, either overall or as between insiders and outsiders), or of the depths of each of the different types of fears. Likewise, there is no evidence of what getting a lottery apartment means from the perspective of reduction of fear – either to the insider or to the outsider.

This would be a matter of speculation, but defendant does not even offer speculative answers to these questions. That is the definition of not being able to prove either a substantial or significant interest in addressing a particular type of fear over others, or a necessity or substantial relation of the policy in connection with the interest.[180]

Finally, to the extent that defendant is actually saying that fear of non-imminent displacement from neighborhood should only be considered in the context of securing approval for affordable housing, that aspect of the justification is dealt with in the next section.

(D) Justification 4: Getting affordable housing approved. Much as defendant now wants to downplay it ("overcoming opposition from Councilmembers is only one small component" of the justification),[181] the reality is that CMs are the ones who approve zoning

[180] Note that a family fearing non-imminent displacement from neighborhood cannot place any reliance on actually getting an apartment when that family needed it. *See* PRO Brief, at 48 (identifying the great number of contingencies).

[181] *See* DREP Brief, at 63.

changes needed to facilitate affordable housing developments.[182] So, actually, defendant remains stuck both with the question being what CMs would do in a city without a preference and with the fact that defendant has no answer – except to sometimes say it cannot answer and other times speculate.[183] The speculation becomes even more attenuated because defendant admits that CMs consider multiple factors when deciding on land use issues; that defendant's executive branch has a variety of incentives that can influence CMs; that it is very unusual for a CM to be given all of the items for which the CM has negotiated; and that defendant is unable to conclude that the same factor will be determinative in persuading CMs to support a particular land-use change or project.[184] *Cf.* 24 C.F.R. § 100.500(b)(2) ("A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative").

Needing to persuade one part of an entity to proceed[185] in connection with what another part of the entity says is in the entity's interest is indeed an unprecedented justification. And it would be a dangerous justification to accept:

> The consequences of accepting a municipal entity's circular reasoning are breathtaking. Any branch of any government anywhere could hold action in the jurisdiction's interest hostage to the continuation of a discriminatory policy. Consequently, the protections of the FHA would take a back seat to the

[182] *See* P56.1DR, at ¶ 161. *See also id.* at ¶ 162 (admitting same true for individual affordable housing projects requiring approval).

[183] When former HPD Commissioner Torres-Springer speculated, she acknowledged that she was doing so. *See* materials cited in P56.1DR, at ¶ 169. When Deputy Mayor Been did speculate, she proposed four CMs of 51 who might turn down affordable housing without a 50 percent preference, *see* Feb. 11, 2021 declaration of Frances Polifione, ECF 943, Ex 68, at 28:10-31:17. (Two of those CMs, Mark-Viverito and Mendez, are no longer in the Council). That testimony cannot change her previous testimony that she did not "know for a fact" what CMs would do once the policy had been disallowed by the Court or eliminated by defendant voluntarily. *See* materials cited in P56.1DR, at ¶ 169.

[184] *See id.* at ¶¶ 163-66.

[185] Defendant seems to have amnesia both in connection with the fact that Deputy Mayor Been cited the opposition of neighborhoods and "their elected representatives" in her first declaration in connection with this case, *see* Been 2015 Dec, at 3-4, ¶ 8; and with the fact that, as noted, it is defendant who approves developments through its legislative arm.

> political convenience of elected officials. A law designed to eradicate residential segregation may not be subordinated in this way.[186]

Defendant says that *it* is not relying on CM testimony,[187] but it *is* relying on conversations between CMs and Deputy Mayor Been, and plaintiffs have had no access to CMs in discovery. As explained previously, regardless of the underlying discovery decision, defendant's attempt to now *use* its one-sided access to CMs is profoundly unfair; especially since, after the disposition of the discovery motion, defendant admitted that the "best source for providing a CM's own explanation for why he or she would or would not act in the future…is the CM himself or herself."[188] The lack of CM testimony also highlights even further the speculative nature of the justification under current circumstances. Had CMs been deposed under oath, by contrast, their professed future course in a world without preference could have been evaluated, with the "whys" and "why nots" tested by cross-examination. *See Sherrod v. Breitbart,* 304 F.R.D. 73, 76 (D.D.C. 2014) (holding that public statement and press conferences were not substitutes for the kind of probing available at deposition regarding, *inter alia*, factors influencing the official's decision: "The public statements the Secretary chose to make cannot possibly substitute for the answers to questions specifically directed to his underlying reasoning").[189]

Defendant tries to explain away its inaction in respect to Council Speaker Johnson's

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[186] *See* LC Brief, at 18.

[187] *See* DREP Brief, at 65 n.66.

[188] *See* PRO Brief, at 60-61. The cited Second Circuit holdings addressing unfairness were not predicated on it being unfair *because* a privilege was involved, but rather it was unfair to deny one side access to evidence while allowing another side use of that evidence *even where there was* privilege. *Id.*

[189] *See also Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982) (holding that the public record is no substitute for other documentation because: "Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record."); and *MHANY,* 819 F.3d at 609 (discrimination continues to pollute American life but is often simply masked in more subtle forms).

openness to modifying the preference,[190] but it fails to appreciate the import of that inaction in relation to the principle that a justification must be *necessary*. A policy cannot be said to be necessary if the defendant has not even bothered to determine whether its modification would have an impact on the most powerful CM's willingness to approve projects and land-use changes.

To the extent that defendant seeks to claim that dealing with fear of non-imminent displacement from neighborhood will help get housing approved, it first ignores the fact that CMs have full power to approve projects and land-use changes notwithstanding any opposition that may exist (which, in and of itself, is fatal to the claim). It also ignores the multiple factors that defendant admits go into opposition. In other words, all of the unknowns regarding the role and extent of different kinds of fears and the extent to which the policy has an impact on displacement-related fear (discussed in the preceding section) are only a subset of the undefined nature of what defendant is asking the Court to accept. In connection with generating opposition to affordable housing development, defendant has also been unable to estimate the relative role of fear of non-imminent displacement from neighborhood versus other factors like complaints about the level of affordability of apartments offered.[191] Note that defendant acknowledges that the rationale for the policy is *not* that affordable housing would never be built without it, but rather that having the policy is a "help" in getting the housing built.[192] Being "helpful" to an unspecified extent, even if that assessment were backed by evidence, is a far cry from "necessary" or "significantly related."

Plaintiffs' motion in connection with justifications asks that each be considered separately; that is, in relation to each justification, whether defendant has adduced evidence from which a jury

[190] *See* DREP Brief, at 65.

[191] CMs, presumably on behalf of their constituents, repeatedly raise the issue of levels of affordability; another factor is the extent to which needed infrastructure improvements or benefits will be provided. *See* P56.1DR, at ¶ 166 and materials cited therein.

[192] *See* DREP Brief, at 64-65.

could conclude – without speculation – that the evidence made it more likely than not that the justification was legally sufficient. Plaintiffs believe that the absence of actual evidence is fatal to defendant's ability to persuade any jury in respect to any of the justifications.

POINT V

THE EXISTENCE OF FACTUAL DISPUTES AND THE NEED FOR CREDIBIILITY DETERMINATIONS PRECLUDE SUMMARY JUDGMENT AS TO LESS-DISCRIMINATORY ALTERNATIVES.

If the Court were to reach the less-discriminatory alternatives stage,[193] plaintiffs' evidence of such alternatives is sufficient to withstand defendant's motion for summary judgment. The DREP Brief adds nothing, not even attempting to grapple with the reasonable inferences about the plausibility of plaintiffs' alternatives that are required to be drawn in plaintiffs' favor.

As a preliminary matter, defendant is wrong to say that plaintiffs' alternatives must serve defendant's interests "as well" for FHA purposes.[194] In fact, the requirement under the regulation is only that the interest "could be served by another practice…"[195] *See MHANY Mgmt., Inc. v. Cnty. of Nassau*, 2017 WL 4174787, at *7, 12 (E.D.N.Y. Sept. 19, 2017) (holding that the question is not if a policy "is equally effective," but if it "would have served the Village's interests").[196]

Second, all but the ninth of plaintiffs' alternatives presume the elimination of the policy. Alternatives without the discriminatory policy are by definition less discriminatory.[197]

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[193] Plaintiffs believe that the evidence requires the Court to grant plaintiffs summary judgment in respect to the policy having caused disparate impacts and perpetuation of segregation, and in respect to defendant not having shown the existence of legally sufficient justifications. Accordingly, plaintiffs believe this stage will not need to be reached.

[194] DREP Brief, at 66. In any event, defendant has no argument in respect to the "as well" point, having never provided the Court with any measure or even approximation of the extent to which the policy achieves its supposed goals.

[195] *See* 24 C.F.R. § 100.500(c)(3) (2013), Ex 2 to Gurian LM Dec.

[196] *Bryan v. Koch*, 627 F.2d 612, 619 (2d Cir. 1980), cited in DREP Brief, at 66, is a Title VI decision alluding in *dicta* to Title VII cases, not to the FHA. As for the City HRL, once plaintiffs have produced substantial evidence, the burden of persuasion is on *defendant* to demonstrate that the alternatives would not serve its needs as well.

[197] The ninth alternative – combining CDs for preference – would reduce the demographic variance of each CD preference area from the demographics of the city as a whole, something that the entire discussion of disparate impact

Third defendant does not and cannot argue that the alternatives are not feasible to execute.[198]

Defendant is apparently operating under the misapprehension that each of plaintiffs' alternatives need to be viewed in isolation and tested to see whether each resolves all of what, for the purpose of this discussion only, are assumed to be defendant's substantial interests. In fact, the question is whether each *interest* – non-imminent displacement from neighborhood, fear of non-imminent displacement from neighborhood, and the desire to get affordable housing approved – is served by *one or more* of the alternatives.[199]

It is clear that each interest *is* served.[200] Defendant does not, for example, address the fact that fear of non-imminent displacement from neighborhood can be ameliorated by creating and communicating the conditions whereby the impact of such displacement is made *less consequential.* Providing mobility counseling (Alternative 5) gives a resident both a sense that she or he will have adequate resources to navigate a new place were she or he to have to move, and an appreciation of what a new place can offer. Such information and resources render the potential future (non-imminent) possibility of having to move a less-frightening scenario.[201]

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shows would be less discriminatory. *See also* PRO Brief, at 80 (citing Deputy Mayor Been's testimony that she did not think she would keep preference at 50 percent if her only concern were to maximally reduce racial segregation).

[198] The ninth alternative about combining CDs is an exception to this rule, with defendant arguing impracticality, and plaintiffs explaining how the alternative could be executed. *See* PRO Brief, at 72. That disagreement represents an illustration of a factual dispute requiring defendant's motion to be denied.

[199] *See* PRO Brief, at 72 (referencing "the combined alternatives proposed"). *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002) is instructive. The Court noted that defendant's justifications "collapse into the very definition of residency preferences." *Id.* at 69. A similar point holds at this stage: if each alternative must address the same interests in the same ways, the only acceptable alternative to the policy would be the policy itself.

[200] For getting affordable housing approved: *see, e.g.*, Alternatives 2, 6, 7, 8, and 9. For addressing non-imminent displacement from neighborhood: *see, e.g.*, Alternatives 3, 4, and 8. For addressing fear of non-imminent displacement from neighborhood: *see, e.g.*, Alternatives 1, 3, 4, 5, 7, and 9. For all, *see* PRO Brief, at 63-72.

[201] In respect to mobility counseling, an HPD deputy commissioner explained in 2016, "We're doing [the] bare bones basic required." *See* May 3, 2016 email to Matthew Murphy, MD Ex 26, at Bates 104862. Even *today*, defendant is only discussing limited steps going forward: "Evaluat[ing] new initiatives that assist HPD voucher holders who are

Likewise, a "no net-loss" policy (Alternative 7) assures that resident that she or he will have some place to go, thereby achieving the same reduction in fear.

Defendant does not address either the fact of, or the opportunity to communicate about, improvements in rent regulations and other tenant protections (Alternative 3). These new developments, if pursued and expanded, will reduce the risk of eviction, and therefore of *actual* displacement from *both* apartment and neighborhood. Communication of these protections can reasonably be understood as a measure that would reduce fear of such displacement.

Alternative 4 calls "for defendant to continue and expand on its existing preservation and construction efforts,"[202] and thus reduce displacement pressures in all neighborhoods.[203] After all, "what happens in one part of the city affects other parts of the city," and thus reducing displacement pressures in one area "translates" to less competition elsewhere.[204] Defendant has not refuted the utility of this approach. Indeed, Professor Goetz called it "fairly elementary" that more supply reduces demand pressures,[205] Note as well that *actual* reduction in displacement pressures should reasonably lead to a reduction in fear of displacement, including of the sub-type that defendant says the policy tries to address.

As for getting affordable housing built, the key remains getting defendant's legislative arm

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seeking to move to amenity-rich neighborhoods, including higher payment standards in certain neighborhoods and intensive counseling and financial assistance *for a limited number of families* who are interested in moving." *See* excerpt of defendant's "Where We Live" report, MD 2021 Ex 130, at 203, § 4.1.3 (emphasis added).

[202] *See* PRO Brief, at 69.

[203] *See id.* at 67-69.

[204] *See id.* at 63.

[205] *See* EG 2021, at 24-25, ¶ 47. Before she was trying to contradict plaintiffs' alternatives, then-Commissioner Been noted that "[a]dding supply in general helps to prevent displacement," even when the added supply is market-rate (*i.e,* "non-affordable" housing. *See* Been I, MD Ex 7, at 72:14-22. To the extent that she argues differently now, that creates both a factual dispute and an issue of credibility, both jury questions that preclude summary judgment as to less discriminatory alternatives and to intent.

to approve the measures needed to do so. And, in the alternatives envisioned, the CMs would be acting in a landscape where the preference policy was no more. Alternative 6, for example, providing for neighborhood renewal and enhancement, is a feasible way of yielding CM support (defendant has done this in the past).[206] Defendant has neither identified a reason why it cannot increase such assistance (especially in neighborhoods that have been traditionally underserved); nor explained why helping *all* residents of a neighborhood instead of the relative few who get lottery housing would not be an attractive carrot to a CM; nor disputed the proposition that, in addition to CMs, neighborhood residents would be influenced in favor of affordable housing development if the development came paired with such community-wide benefits.

Defendant reserves special derision for plaintiffs' two-part Alternative 2: conveying to New Yorkers both the importance of reducing residential segregation and of fighting the citywide housing crisis on a united, citywide basis.[207] In fact, there is every reason to believe that there are opponents of affordable housing who need to hear this message: "[t]he City," defendant says, "has never denied that some opposition to the development of affordable housing may be race-based."[208] And a campaign of this type directly targets what one of defendant's high-ranking HPD officials acknowledged was the "politically sensitive" issue of broaching desegregation, as manifested especially in voting against affordable housing projects.[209] Plaintiffs' alternative,

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[206] *See* PRO Brief, at 70.

[207] The alternative is set out, *id.* at 64-65. For defendant's failure to treat the alternative seriously (and for an example of Professor's Goetz's unfortunate tendency to engage in *ad hominem* attacks), *see* EG 2021, at 27-28, ¶ 52 (deriding Professor Orfield's "public education campaigns" as just "convincing residents to adopt his (Orfield's) views about integration"). As it happens, a campaign that focused on the idea that "all of our neighborhoods belong to all of us," *see* PRO Brief, at 65, is not merely "Orfield's[] views about integration." The City HRL states that "there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of [protected class status]." Admin. Code § 8-101.

[208] *See* DREP Brief, at 12.

[209] *See* PRO Brief, at 78.

therefore, addresses defendant's stated interest: in both tackling a cause of opposition to affordable housing development (pro-segregative, parochial views) and in encouraging a new reason to support that development (a segregation-remediating, citywide focus), the alternative can reasonably (and obviously) be viewed by a jury as addressing opposition to affordable housing development.[210]

Ironically, defendant's skepticism about the need to persuade New Yorkers to imagine things differently is not shared by the Mayor:

> A recovery for all of us means *reimag[ining]what New York City government can do* to confront the inequalities and systemic racism that pervade America. This year, we will enact real structural reforms to change the nature of government and ensure the Office of the Mayor of New York City is permanently positioned to combat racism and inequality.[211]

Finally, it must be reiterated that defendant's articulation of why plaintiffs' alternatives are inadequate does not constitute an exception to the rule that credibility questions are to be weighed by a jury. Thus, a jury is entitled to weigh Deputy Mayor Been's current defense of the CM veto[212] against her having actively encouraged the public expression of expert opinion opposed to the veto (Alternative 8) after the veto led to "ridiculous" rejections when she was Commissioner.[213] A jury also should be permitted the chance to weigh defendant's objections that practical difficulties would arise from combining CDs (Alternative 9) against evidence that defendant knew this was a "workable solution."[214]

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[210] As for the need to develop an approach that fights the citywide housing crisis on a united, citywide basis (Alternative 2, part 2), defendant never explains why that standard organizing tool would not be applicable here.

[211] *See* excerpt of "State of the City 2021: Mayor de Blasio Announces A Recovery for All of Us," Jan. 28, 2021 (quoting the Mayor's remarks in his State of the City speech), MD 2021 Ex 131, at 2 (emphasis added).

[212] *See* Been Aug. 2020 Dec., at 46-47, ¶ 94 n.75.

[213] *See* D56.1PR, Appendix, at ¶ 79.

[214] *See id.* at ¶ 70.

Defendant has not met any of its burdens; the suite of alternatives that plaintiffs have put forward are reasonably interpreted as serving defendant's supposed needs; and credibility issues need to be resolved. This branch of defendant's motion, too, must be denied.

CONCLUSION

For the reasons stated, the Court should award plaintiffs partial summary judgment, finding: (a) that the policy causes disparate impacts pursuant to the FHA and the City HRL; (b) that the policy perpetuates segregation pursuant to the FHA and the City HRL; and (c) that each of the justifications for the policy advanced by defendant are not legally sufficient under either the FHA or the City HRL. For the reasons stated, the Court should deny defendant's cross-motion in its entirety, including its motion as it relates to plaintiffs' intentional discrimination claims under the FHA and the City HRL, and as defendant's motion relates to the issue of less-discriminatory alternatives under the FHA and the City HRL.

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