UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

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ORAL ARGUMENT IS REQUESTED

15-CV-5236 (LTS)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION AND SUMMARY OF ARGUMENT

As racially and ethnically diverse as New York City is in the aggregate, it is just as intensely segregated at the neighborhood and community district levels. To avoid reinforcing segregation in lotteries that determine who gets to live in affordable housing made available by the City, all the City had to do was treat all income-eligible New Yorkers equally, regardless of where in the City they live. Instead, the City, influenced by those who want to maintain the racial and ethnic *status quo*, has had a longstanding, across-the-board policy of giving a preference for 50 percent of the units to households already residing in the district where new housing is located (the "outsider-restriction policy"). That policy, in violation of the Fair Housing Act and the New York City Human Rights Law, automatically operates to squeeze the income-eligible pool of an underrepresented racial or ethnic group from what it would be under a citywide, equal access system, and thus operates to limit underrepresented groups from areas where they have traditionally not lived. In the circumstance of African-Americans like the plaintiffs in this case, the City's outsider-restriction policy limits access to disproportionately white neighborhoods of opportunity. Though the City assiduously avoids presenting itself in the garb of the segregationist of years past, and instead describes its policy benevolently as what African-Americans and Latinos "want," the City's conduct, in addition to causing an illegal disparate impact, constitutes intentional discrimination.

Because it is instantly apparent that swapping out a diverse pool of income-eligible households for a segregated one by definition favors the overrepresented racial or ethnic group at the expense of the underrepresented one, the City's main argument on its motion is to try to divert blame. But the City's reliance on Section 421-a of the New York Real Property Tax Law, a section that provides City financial assistance through the abatement of City taxes, is

unavailing because: (a) that law explicitly disclaims requiring anything that would violate federal requirements; (b) the Fair Housing Act contains an express preemption provision invalidating any state law that would permit or require anything prohibited by the Act; (c) the provision of Section 421-a cited by the City has no application to construction begun after December 31, 2015; and (d) the City had and has an across-the-board outsider-restriction policy that long predated the 2007 Section 421-a provision, was not obliged to change its own policy because of that state provision, and continues as before to apply the policy to all City-assisted housing. *See* Point I.

The City's second strategy is to ignore entirely the fact that plaintiffs continue to be interested in and will be applying for the extensive affordable housing opportunities that the City plans to create hereafter, at a time when the Section 421-a provision relied on by the City will not exist and can have no conceivable impact on the City's policy. As the continued operation of the outsider-restriction policy will continue to injure plaintiffs, it thus provides a basis for standing entirely independent of the lotteries that they have already entered. The upcoming applications also mean that the City's "lottery position" argument (that plaintiffs have low lottery numbers, and therefore low odds of getting an apartment, and that the outsider-restriction policy does not have an impact on them) is completely irrelevant: plaintiffs' alleged position in lotteries already conducted has nothing to do with the injury that will be caused by future lotteries operated under the outsider-restriction policy. The City's lottery argument also ignores a basic legal principle recognized by the Supreme Court and the Second Circuit: an injury does not simply occur at the bottom-line "result" stage – *i.e.*, when a person does or does not obtain an apartment – but is complete as soon as a defendant has denied someone *the opportunity* to *compete* on an equal playing field without regard to protected class status. *See* Point II.

Plaintiffs' averments about both disparate impact and intentional discrimination far exceed the low bar of "plausibility" that the Second Circuit has recently reemphasized at the pleading stage. In terms of disparate impact, the complaint makes clear what is already obvious to every New Yorker: while the City is multi-racial and multi-ethnic in the aggregate, it is highly segregated at the neighborhood level. Indeed, the complaint shows, *inter alia,* that New York City is the second most segregated major city in the United States, that neighborhoods of opportunity are disproportionately white, and that there is a significant disparity between the citywide percentage of African-Americans and the percentage of African-Americans in the overwhelming percentage of community districts, measured either by population or income-eligible households. By taking a larger citywide percentage of the income-eligible African-Americans households from which applicants can emerge and shrinking that percentage by allocating apartments from a district-based pool with a significantly smaller percentage of such households, the City perpetuates segregation. Likewise, since those who get the better in-district ("insider") odds to get an apartment in neighborhoods of opportunity are disproportionately white and those who get the substantially lower outsider odds are African-Americans, the City's policy bears more heavily on African-Americans. In any event, and regardless of the ultimate result, the City's policy denies African-Americans the opportunity to compete on an equal playing field. *See* Point III.

As far as intentional discrimination, the same factors that caused the Second Circuit to affirm a liability finding in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), are present here: disparate impact being the natural consequence of the City's policy; the City's long history of intentional racial segregation; a pretextual reason for the policy that is belied by the fact that preference is given both to the person who moves into a community district one day

before a lottery ends and to the person who lives in a neighborhood that has long been thriving, and by the fact that preference is denied to an out-of-district resident who may have been living through extreme hardship for decades in another part of the City; direct evidence that the policy was intended to preserve neighborhood ethnic identity and that the City, shamelessly engaging in stereotyping, itself conceptualizes the policy in terms of what racial and ethnic groups "want"; and evidence that the City wanted to avoid race- or ethnicity-based opposition to opening housing on an equal basis to all and instead was influenced by those who want to maintain a racial or ethnic *status quo*, including evidence that the City was frightened even of discussion of the barriers to fair housing choice. *See* Point IV.

Finally, the New York City Human Rights Law is not preempted both because state law did not require the City to act as it did, and because the State has no interest – overriding or otherwise – in requiring conduct that perpetuates segregation. The City also mischaracterizes both the pleading and substantive requirements of the City Human Rights Law. *See* Point V.

STATEMENT OF FACTS

Plaintiffs incorporate by reference the allegations of the complaint (C. 1-190).[1] In brief, plaintiffs are three African-American women who applied for affordable housing opportunities made available by the City in one or more of the following community districts: Manhattan Community Districts 5, 6, and 7, all of which are disproportionately white (C. 13-15, 100-102). Plaintiffs are also interested in, and intend to apply to, other affordable housing opportunities that will be emerging in high-opportunity and other disproportionately white community districts (C. 13-15, 172, 180). Over the next several years, the City will be making available a substantial

[1] Numbers in parentheses preceded by "C." refer to paragraphs of the First Amended Complaint (ECF No. 16).

number of affordable housing opportunities: at least tens of thousands of units, and perhaps more than 100,000 units (C. 172).

As out-of-district applicants, plaintiffs were injured and will continue to be injured by New York City's ("the City's") outsider-restriction policy (C. 100-102, 177, 180). That policy, created in the late-1980s, originally gave preference for 30 percent of affordable housing units in a development to current residents of the community district in which the development was located (C. 80-82), but was increased in or about 2002 to a preference for 50 percent of the units in all City affordable housing lotteries (C. 7, 83-90). At all times relevant to the complaint, the City was and remains responsible for formulating, proposing, promulgating, administrating, and enforcing the outsider-restriction policy (C. 16), with implementation and oversight the responsibility of the Department of Housing Preservation and Development ("HPD") (C. 132). The City does not dispute that it has this policy and will continue to have it going forward.

The City's outsider-restriction policy operates to limit the opportunity to compete on an equal playing field regardless of race and perpetuates segregation because the City has a long and continuing history of being residentially segregated on a citywide basis (C. 32-46, 76). As measured by the "dissimilarity index,"[2] for example, the City is the second most segregated large city in the U.S. (C. 34-35), and the City's decline in dissimilarity index from 1980 to 2010 was the smallest of any large city (C. 36, 38). The City's segregation exists at the community district level, too (C. 48-75). This is true whether segregation is measured in terms of population (C. 32-46, 76) or in terms of households eligible for participation in the City's affordable

[2] "Segregation is smallest when majority and minority populations are evenly distributed. The most widely used measure of evenness is the dissimilarity index. Conceptually, dissimilarity measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall." John Iceland et al., *Racial and Ethnic Residential Segregation in the United States, 1980-2000* 117 (U.S. Census Bureau 2002), https://www.census.gov/housing/patterns/publications/censr-3.pdf.

housing lotteries (C. 47-75). Thus, for example, 17 of 59 community districts have African-American populations of less than 5.0 percent and 11 community districts have African-American populations of greater than 65 percent (C. 50-51). Half of the City's African-American population lives in only about 15 percent of the City's community districts (C. 76).

In 42 community districts, almost three-quarters of the total, the relative difference between the percentage of African-Americans citywide (approximately 22.8 percent; *see* C. 49) and the percentage of African-Americans in the district was 50 percent or more (C. 53). In terms of African-American households who are eligible to participate in the affordable housing opportunities made available by the City, there is a similar relative difference between the citywide and community district percentages (C. 62). Depending on the income band, between 40 and 42 community districts have a relative difference between citywide and community district percentages of 50 percent or more (C. 63-68). This means that, in districts where African-Americans are underrepresented, the citywide percentage is *at least* twice the community district percentage.

In most cases where affordable housing opportunities are made available through lottery, including the lotteries conducted for units in Manhattan Community Districts 5, 6, and 7 and other disproportionately white neighborhoods of opportunity, the number of applicants from outside of the community district far exceeds the number of applicants from inside the community district (C. 100). As such, each out-of-community-district applicant has significantly lower odds to be selected than does each in-community-district applicant (C. 100).

Because the overwhelming percentage of community districts in the City is characterized by residential segregation – that is, the district is substantially less diverse than the city as a whole (C. 48-76) – the policy of preferring those from inside the district (C.90) operates to

perpetuate segregation in those districts, including in Manhattan Community Districts 5, 6, and 7; other disproportionately white community districts (which are also, disproportionately, neighborhoods of opportunity); and other community districts and neighborhoods (C. 101). In other words, allowing all qualified applicants to compete on equal terms regardless of where they live in the City would predictably result in a lower level of segregation in the housing units than is the case under the City's outsider-restriction policy (C. 101).

By the same process, the outsider-restriction policy operates to impose a disparate impact on plaintiffs, other African-American New Yorkers, and Latino New Yorkers in connection with the opportunity to compete for affordable housing opportunities in neighborhoods of opportunity, including neighborhoods within Manhattan Community Districts 5, 6, and 7 and other disproportionately white community districts (C. 102). Thus, for example, for Manhattan Community Districts 5, 6, and 7, the in-district applicants with higher odds to be selected are disproportionately white, with disproportionately few African-Americans; the out-of-district applicants are less white and more African-American (C. 102).

The City knows or should know that the abandonment of the outsider-restriction policy would result in more housing citywide for African-American and Latino New Yorkers in neighborhoods of opportunity than the maintenance of the outsider-restriction policy (C. 122).

The City's policy is also a function of intentional discrimination (C. 8, 171). Relevant to that intent is the disparate impact already discussed and the context of the City's long history of intentional discrimination (C. 17-30, 142-147). Also relevant is the fact that the only explanation for the City's policy set forth on HPD's website is pretextual (C. 134). That explanation states that the "community preference was established to provide greater housing opportunities for long-time residents of New York City neighborhoods where HPD has made a significant

investment in housing" (C. 133). However, preference is given regardless of length of residency in the community district (C. 92-94); regardless of whether an in-district applicant has not "persevered through years of unfavorable housing conditions" or an out-of-district applicant has (C. 95); and even where the community district – like Manhattan Community Districts 5, 6, and 7 – is characterized by high levels of opportunity (C. 96). (Note that the *economic* profile of residents would not change were the outsider-restriction policy abandoned: whatever maximum household income level the City sets would continue to apply to all applicants (C. 105-106).)

The City was motivated by the desire to avoid race-based opposition to abandoning outsider-restriction in favor of an equal access policy (C. 171). Some of the support for the City's outsider-restriction policy comes from community boards, local politicians, and advocacy groups who want to preserve existing racial or ethnic demographics of a district (C. 160); the City considered it politically expedient to accede to this influence, and did so (C. 161-162). The City also feared that an abandonment of the policy would generate race- or ethnicity-based opposition from the community boards and others (C. 161). These were not one-time concerns. As a matter of policy, the City thinks it is a bad idea to have public *discussion* as to what determines barriers to fair housing choice (C. 163). Such discussion, according to the City, could be counterproductive because it is difficult to have a "thoughtful discussion" of issues of racial and ethnic housing segregation "against the backdrop of local politics" (C. 163).

The City – which never determined what housing mobility options New Yorkers were interested in and, indeed, ignored New Yorkers who wanted to move freely without outsider restriction (C. 9, 97-99) – indulged in race-based assumptions as evidenced by its statement that "[c]ommunity districts throughout the City with large black and Hispanic populations want this community district preference" (C. 165).

In maintaining its outsider-restriction policy, the City contravened what, in the absence of discrimination, would be its normal substantive practices. The City has said that there is "no greater danger" than the existence of inter-group prejudice, knows that segregation fosters prejudice and inter-group antagonism, knows that school integration has benefits for all groups, and knows that the abandonment of its outsider-restriction policy would result in more housing citywide for African-Americans and Latinos in neighborhoods of opportunity than the maintenance of the policy (C. 112-113, 120, 122). The City also operates under a mandatory obligation to affirmatively further fair housing as a recipient of federal housing and other funds (C. 128-129). Despite this, the City did not study the impact of its policy on segregation or on the goal of affirmatively furthering fair housing (C. 154); it did not bother to track lottery outcomes by community district or by ethnic identification (C. 157); and the "guiding principles" and "visions" of its current housing plans do not include reducing segregation or avoiding its perpetuation (C. 148-151).

ARGUMENT

POINT I

THE CITY'S SECTION 421-A ARGUMENT FAILS BECAUSE THE SOON-TO-BE-EXPIRING PROVISION DOES NOT AUTHORIZE VIOLATIONS OF THE FAIR HOUSING ACT AND BECAUSE THE CITY'S POLICY PREDATES AND OPERATES INDEPENDENTLY OF SECTION 421-A'S PROVISION.

The City's principal assertion in its motion, and its only argument that plaintiffs lack standing, is, in substance, "the State made us do it," citing repeatedly to N.Y. Real Property Tax Law § 421-a (McKinney 2015) ("Section 421-a"), which purportedly "requires" or "obligate[s]" the City to implement the outsider-restriction rule. *See, e.g.*, Def.'s Mem. of Law in Supp. of Its

Mot. for Dismissal 7, 10, ECF 20 ("Def. Mem."). The assertion is baseless. As will be demonstrated, there is no evidence that the City was actuated by Section 421-a and was not simply continuing to carry out the City's pre-existing, across-the-board policy that had been in place for close to 20 years prior to the enactment of the Section 421-a provision in question. But first, we bring to the Court's attention several reasons that, even assuming *arguendo* that Section 421-a had any relevance to this matter, the City is in no way sheltered by it.

A.

The City relies on (but deliberately does not quote from) Section 421-a, choosing to conceal from the Court the fact that the relevant subparagraph disclaims requiring anything that would violate federal requirements.[3] In particular, Section 421-a(7)(d) provides that: "*Unless preempted by federal requirements* . . . (iii) residents of the community board where the multiple dwelling which receives the benefits provided in this section is located shall, upon initial occupancy, have priority for the purchase or rental of fifty percent of the affordable units." Section 421-a(7)(d) (emphasis added).[4]

Fair Housing Act requirements are certainly "federal requirements." So are the affirmatively furthering fair housing ("AFFH") regulations promulgated thereunder, to which the City, as a recipient of federal community development block grant and other housing funds, has been and continues to be subject (C. 128-130). The most recent such regulations, effective earlier this year, include the requirement to take meaningful actions "to overcome historic

[3] In a letter dated September 2, 2015, sent to Defendant pursuant to Rule 2(b) of this Court's Individual Rules of Practice, plaintiffs' counsel pointed out the limiting language of Section 421-a(7)(d), the preemption provision of the Fair Housing Act, and the upcoming expiration of the relevant state provision, but the City chose nonetheless entirely to ignore these fundamentals in its opening papers.

[4] Subdivision 7, which will *not* be applicable to construction that commences as of January 1, 2016 (*see* discussion *infra* p. 13), is, even now, not applicable to all housing, but only the subset of housing constructed in "geographic exclusion areas," a term that includes but is not limited to Manhattan. Section 421-a(7)(a)(ii).

patterns of segregation," 24 C.F.R. § 5.150 (2015), and to replace "segregated living patterns with truly integrated and balanced living patterns," 24 C.F.R. § 5.152 (2015); the current certifications include the requirement that it "will take no action that is materially inconsistent with its obligation to affirmatively further fair housing." 24 C.F.R. § 91.225(a)(1) (2015). *See also United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, *N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (holding that AFFH certification is not "a mere boilerplate formality" but a "substantive requirement, rooted in the history and purpose of the fair housing laws and regulations" requiring active compliance).

Because compliance with the Fair Housing Act and the AFFH regulations are federal requirements, a fair reading of Section 421-a(7)(d) is that if outsider-restriction violates either the Act or the regulations, the State is *not* requiring such a policy. As such, before one could determine whether Section 421-a applies at all, one must answer the question of whether the outsider-restriction policy does violate the Fair Housing Act or the AFFH regulations. That question, of course, is precisely the one that plaintiffs have put before the Court on the merits.[5] Where, as here, "the overlap in the evidence is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, then the Court must leave the jurisdictional issue for the trial." *All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006).

B.

Even if Section 421-a did not have its own disclaimer provision and instead purported to require an outsider-exclusion policy, it still would not aid the City. The Fair Housing Act itself

[5] The City's failure to comply with its AFFH obligations is also integral to this lawsuit, both because of its relevance to the City's intent in maintaining and expanding the outsider-restriction policy, and because those obligations are superior to claims of "necessity" that the City might raise in response to plaintiffs' disparate impact showing.

contains an express preemption provision: "[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615 (2015). *See, e.g., Astralis Condo. Ass'n v. Sec'y, U.S. Dept. of Hous. & Urban Dev.*, 620 F.3d 62, 70 (1st Cir. 2010) (rejecting defense that party charged with violating Fair Housing Act was obliged to act as it did by state statute and highlighting the fact that Section 3615 "expressly command[s]" that "*any*" state statute purporting to require or permit a Fair Housing Act violation is to that extent invalid) (citation omitted); *Mayer v. Ridley*, 465 F.2d 630, 636 (D.C. Cir. 1972) (even if recorder of deeds were "acting under statutory compulsion when he records racial covenants, this fact alone does not insulate his conduct from judicial review" because Section 3615 would have rendered that portion of the D.C. Code unlawful); *Human Res. Research & Mgmt. Grp., Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 253 n.13 (E.D.N.Y. 2010) (to the extent that provisions in county law regulating substance abuse recovery houses "conflict with the FHA, the FHA preempts them").

Section 3615 does not only invalidate a conflicting law prospectively (that is, only after a federal court has rendered a judgment). The finding that a state or local statute contravened Section 3615 means that such a statute has been invalid all along. *Waterhouse v. City of American Canyon*, No. C 10-01090 WHA, 2011 WL 2197977, at *6 (N.D. Cal. June 6, 2011).

Since the City's outsider-restriction policy does violate the Fair Housing Act (*see* Points III & IV *infra*), the relied-on provision of Section 421-a has not been and cannot be a lawful warrant for the City's pursuit of that policy. In any event, the issue is identical to the merits issue that must be determined at trial rather than on the pleadings.

C.

While the City has cryptically acknowledged that Section 421-a has recently been amended (Def. Mem. 7, n.7) – a new program, Section 421-a(16), *may* go into effect in 2016, but only if an agreement on prevailing wages is reached, *see* Section 421-a(16-a) – the City has withheld from the Court the fact that existing Section 421-a on which the City relies does not apply to construction that commences after December 31, 2015. Section 421-a(2)(c)(ii).[6] (The full text of Section 421-a as most recently amended is annexed to the Declaration of Craig Gurian in Opposition to Motion to Dismiss – "Gurian Decl." – as Exhibit B).

To the extent that the new program were to go into effect, that program does not contain any outsider-restriction requirement. Unlike the requirement in expiring Section 421-a(7)(d)(ii) relating to use of the same common entrances (*i.e.*, no "poor door") that is continued in new Section 421-a(16)(f)(i); and unlike the requirement related to unit sizes of affordable units in expiring Section 421-a(7)(d)(i) that is continued in new Section 421-a(16)(f)(ii); the requirement in expiring Section 421-a(7)(d)(iii) relating to priority for residents of community districts is not continued in new Section 421-a(16).[7] *See* Gurian Decl., Ex. B.

Thus, separate and apart from the significance of "unless preempted by federal requirements" and the Fair Housing Act's express preemption provision, there will be no Section 421-a preference provision that will have applicability to affordable housing developments in which plaintiffs are interested and will be applying (C. 13-15, 180) where construction

[6] As amended by N.Y. Session Laws of 2015, ch. 20.

[7] That new Section 421-a(16)(q) gives the City authority to "condition the eligibility for the scope or amount of 421-a benefits in any manner" – effectively continuing the authority contained in expiring Section 421-a(2)(i) – means there is no State-based barrier to the City continuing its illegal outsider-restriction program. New Section 421-a(16)(f)(x) provides that "[t]he agency [defined as HPD] may establish by rule such requirements as the agency deems necessary or appropriate for (A) the marketing of affordable housing units, both upon initial occupancy and upon any vacancy." Gurian Decl., Ex. B.

commences on or after January 1, 2016. As discussed in Point II, that fact eliminates any bearing that the City's argument could have on the continuing and ongoing harm that plaintiffs are apt to suffer as they continue to apply for new lotteries (C. 13-15, 180), which will encompass perhaps more than 100,000 units (C. 172).

D.

The fact that Section 421-a did not and could not have required or obliged the City to act as it did is already fatal to the City's motion to dismiss. Beyond this, however, the City's attempt to manufacture a dispute as to whether it was implementing its own policy is without merit. First, the City really is not raising a question of causation, but rather one of motivation. The City does not challenge the allegation that it was the one who "required the developer" to conduct a lottery with outsider-restriction (C. 88-90). The City's "requiring" yielded (caused) the developer to act as it did. No other party interposed itself between the City and the developer.[8] What the City is really saying is that there came a time that it *acquired an additional justification* for the policy that it applied to affordable housing regardless of where it was located. But that argument does not go to jurisdiction, it goes to the second-stage question in both a disparate impact case (can the defendant whose policy causes a disparate impact prove that it has a sufficiently strong necessity for that policy) and in an intentional discrimination case (can the defendant prove that, notwithstanding the fact that discrimination was a motivation for the conduct, it would have done the same thing in the absence of the discriminatory factor). As such, the question is not relevant at the pleading stage.

But even if the question of motivation were conflated with that of causation of injury, the City has presented no evidence to question the allegations that it was operating its own policy.

[8] Similarly, no party forced the City to ignore the warning built-in to Section 421-a(7)(d) that no mandate was being imposed where outsider-restriction was preempted by federal requirements.

The starting point is the complaint. It plainly alleges that the outsider-restriction policy is a City policy (C. 80-99), and makes further factual allegations: at "all times relevant hereto, the City was and remains responsible for formulating, proposing, promulgating, administering, and enforcing the outsider-restriction policy challenged in this action" (C. 16). The City's provision of assistance in connection with its affordable housing programs includes tax exemptions or abatements (C. 80). Whenever it provides such assistance, it implements, enforces and effectuates its own outsider-restriction policy (C. 7, 88-90) (emphasis added).

The City does not actually challenge these facts. And, tellingly, the City chooses not to describe what "421-a benefits" are, leaving the Court to imagine that they are a *State* benefit. In fact, Section 421-a is the mechanism whereby developers are provided a *City* tax subsidy. It is not state taxes that are abated, but rather *local* taxes that are abated. *See, e.g.*, Section 421-a(2)(a)(i) (describing the exemption from "taxation for local purposes"). This is exactly the type of housing assistance that complainants have alleged always triggers the City's outsider-restriction policy (C. 80, 88-90).

Nevertheless, the City would like the Court to simply accept the untested averment of one of its officials to the effect that the City no longer applies its *own* outsider-restriction policy everywhere, apparently hoping that the Court will believe that the City puts aside its own policy when a Section 421-a tax exemption is involved. If the Section 421-a provision *had* changed City policy, that would have happened in 2007: the City acknowledges that the Section 421-a provision on which it relies was only enacted in that year (Def. Mem. 7). But the City offers no evidence in its outside-the-pleadings submissions to rebut plaintiffs' allegation that the City's outsider-restriction policy "remained unchanged since 2002" (C. 87).

More broadly, the City cannot point to anything even vaguely suggesting that it was

Section 421-a that caused it to act as it did. The City had been operating its outsider-restriction policy for more than 15 years (C. 81) prior to 2007. Having had a longstanding across-the-board policy, the City neither explains nor documents a procedure by which it altered the across-the-board application of that policy in 2007; post-2007 developments receiving Section 421-a benefits and those that did not were all subject to outsider-restriction, making any purported change entirely invisible.

In other words, the enactment of the Section 421-a provision in 2007 bears no necessary relationship to causation of the City's preexisting action. When an actor is already engaged in a continuing course of conduct, there is no reason to assume that the cause for its actions has changed. To show that Section 421-a bore a relation to what the City was doing, the City would have had to have shown that Section 421-a did have an impact on its actions: that is, the City would have abandoned its course of conduct but did not do so because of the Section 421-a provision. The City conspicuously fails even to aver that any housing development overseen by HPD would not have been subject to outsider-restriction in the absence of the Section 421-a provision. Instead, the City actually concedes that some relevant units would be subject to the City's outsider-restriction policy if Section 421-a were not in place (Def. Mem. 7, n.8).

It only makes sense that there is no evidence of any such sequencing (*i.e.*, looking at Section 421-a first, then the City's own outsider-restriction policy). When, like the City, you have an across-the-board outsider-restriction policy in place, even an applicable Section 421-a provision would not have any impact on what you were already doing. You would say, "Our existing policy is in compliance; we'll just continue to apply our policy."

It is also uncontested that the City's only stated reason for its outsider-restriction policy set forth on its website makes no reference to any portion of the policy being a function of

Section 421-a. *See* C. 133 (quoting the explanation on the City's website; no reference is made to Section 421-a or any State requirement). Given the foregoing, the Court should not countenance the City's going outside of the pleadings. But, if the Court were so inclined, it should be aware that the City has withheld the evidence of its own 2012 AFFH statement in which the City represented, without qualification: "The City of New York *employs a standing policy* to give preferential treatment, that is, to be first in line, for 50% of new affordable apartments to residents of the community district in which an affordable development is located" (emphasis added). *See* Affirmatively Furthering Fair Housing Statement at 61, Gurian Decl., Ex. C. That documentary evidence stands in sharp contradiction to the unsubstantiated averments that the City has presented, and underlines the falsity of that position.

Finally, even if the Court believed that the City had raised a question about the circumstances under which the City's policy operated, determining those circumstances is entirely enmeshed in the substantive issues to be decided (for example, the scope of the disparate impact of the outsider-restriction policy), and is thus a determination to be made at trial.

POINT II

THE CITY IGNORES ALTOGETHER THE ONGOING INJURY ITS POLICY CAUSES PLAINTIFFS AND WOULD HAVE THE COURT IMPROPERLY NARROW STANDING IN A WAY TO PRECLUDE ANY CHALLENGE TO DISCRIMINATORY LOTTERY POLICIES.

Independently fatal to the City's motion, it completely disregards the future injury that plaintiffs have averred they will suffer going forward in upcoming lotteries, because the outsider-restriction policy hinders their ability to compete equally with insiders in those lotteries and continues to perpetuate segregation. In so doing, the City disregards another basis for standing that is a basic principle of the Fair Housing Act.

The Fair Housing Act explicitly grants standing to any "[a]ggrieved person" who believes he "*will be* injured by a discriminatory housing practice *that is about to occur.*" 42 U.S.C. § 3602(i) (2015) (emphasis added). The Act further expressly directs courts to provide appropriately fashioned remedies "if the court finds that a discriminatory housing practice . . . *is about to occur*. . . ." 42 U.S.C. § 3613(c)(1) (2015) (emphasis added). HUD's implementing regulations note accordingly that the Fair Housing Act "does not require these persons to expose themselves to the injury involved with the actual act of discrimination before filing a complaint." Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232-01, 3238 (Jan. 23, 1989). It is precisely because of this broad language in the statute that the Second Circuit has reversed a district court for refusing to enjoin a zoning provision prior to its implementation. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 434 (2d Cir. 1995). "[A] person who is likely to suffer [a discriminatory] injury need not wait until a discriminatory effect has been felt before bringing suit." *Id.* at 425. *See also Human Res. Research & Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 249 (E.D.N.Y. 2010) ("[A] plaintiff has standing to allege violations of the FHA for *threatened* injury.").

The complaint in this case plainly alleges future as well as past injury. Plaintiffs, all income-eligible African-Americans who seek to live in neighborhoods of opportunity (C. 13, 14, 15), all "intend[] to continue to apply to the City's affordable housing developments" (C. 13, 14, 15), and will continue to suffer by being "restricted [in their] ability to compete for housing on an equal basis with persons who already live in . . . high opportunity areas" (C. 177). As the complaint specifically points out: "[s]o long as plaintiffs continue to be interested in pursuing, and income-eligible for, affordable housing units located in high-opportunity and other disproportionately white community districts . . . they will continue to be harmed by the outsider-

restriction policy" (C. 180).

These complained-of impending injuries, which must, of course, be accepted as true, render the City's allegations about the expiring Section 421-a policy and about plaintiffs' alleged position in already-conducted lotteries entirely irrelevant. It is unchallenged that the City has had and continues to have an across-the-board outsider-restriction policy (C. 7, 88-91), and expects to apply it to tens of thousands of housing units, perhaps even more than 100,000 housing units, in the next several years (C. 172).

Were amended Section 421-a to go into effect in January, it does not have any provision relating to preference for existing community residents (*See* Point I.C *supra*). As such, Section 421-a has no bearing on the injury the City's outsider-restriction policy will cause plaintiffs when they apply for the units the City will be making available, and thus no conceivable impact on standing (C. 174, 180).

Similarly, the City's argument that plaintiffs' have "log number[s]" that make it "extremely unlikely" that plaintiffs would be eligible for open units in three past developments even without the outsider-restriction policy (Def. Mem. 15 and Decl. of Comm'r Vicki Been in Supp. of Def.'s Mot. to Dismiss Decl. ¶ 20, ECF No. 18), is irrelevant to any future harm. The "log number" information, an unverified, outside-of-the-pleading assertion, is in any event entirely irrelevant to future developments, developments for which plaintiffs will receive different log numbers that cannot be known or predicted at this time.

More fundamentally, the City appears to be emphasizing the current log numbers because it misconstrues plaintiffs' injury as occurring *only* if plaintiffs are *actually denied* an apartment due to the outsider-restriction policy. But the City is incorrect – it is not the denial of an apartment, but the denial of equal participation in the lottery that is the harm, as the Second

Circuit has recognized. In *Comer v. Cisneros*, 37 F.3d 775, 789 (2d Cir. 1994), a "suburban residency preference" gave some suburban residents and workers (a relatively white group) an advantage over Buffalo residents (a more heavily minority group) in connection with rental housing subsidies. *Id.* at 780. In granting standing, the Second Circuit found that the injury "is not the failure to obtain housing assistance in the suburbs, but is *the missed opportunity to compete for suburban housing on an equal footing with the local residents*." *Id.* at 794 (emphasis added). *See also Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (an element of the selection process that disfavored African-Americans operated as a barrier regardless of whether or not the African-Americans were ultimately underrepresented in the pool of candidates who were hired because the law "guarantees these individual black respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria"); *see also Wards Cove Packing Co, Inc. v. Atonio*, 490 U.S. 642, 653 n.8 (1989) (holding that where particular practice has disparate impact, case exists "notwithstanding the bottom-line racial balance").

Comer is directly on point. And, as in *Comer*, this Court should find plaintiffs have standing to challenge a policy that impedes their ability to compete equally with local residents. Indeed, the injury in this case is more traditionally "concrete" than it was even in other leading Fair Housing Act cases. *E.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (holding a black "tester," posing as a renter to collect evidence of racial steering practices in housing, had standing to seek damages under the Fair Housing Act); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-12 (1972) (holding that a white and black tenant both had standing to challenge their landlord's discrimination against non-white rental applicants); *Ragin v. Harry Macklow Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993) (given the private attorney general provision of the Fair Housing Act and Supreme Court precedent, newspaper readers had standing

to challenge a newspaper ad that excluded African-American models).

It should also be noted that the "log number" argument that the City is urging (Def. Mem. 15) would always completely cripple application of the Fair Housing Act's disparate impact protections to the City's housing lotteries, notwithstanding its broad impact on hundreds of thousands of people (C.167). According to the City, a plaintiff would first be required to know her "log number" – something that itself is not publicly available, and would presumably itself require a lawsuit – and then, *only* an individual who discovers from that lawsuit that she is precisely and perfectly placed on that list (not too high as to be selected and not too low as to be, as a practical matter, never selected regardless of the outsider-restriction) would actually have a live conflict and be able to challenge the policy, assuming she were even able to move quickly enough to challenge the policy right at the point that her log number was "just right." But requiring such an impossibly limited set of circumstances as a prerequisite to a discriminatory challenge is *not* governing law, since the Supreme Court has long recognized that an illegal practice capable of repetition but evading review cannot be considered moot.[9]

Finally, the City half-heartedly argues in one paragraph that these three African American plaintiffs "do not have standing to assert discrimination claims on behalf of other African-Americans or on behalf of a minority group to which they do not belong, namely Latinos" (Def. Mem. 11). Again, the City is wrong. As the Supreme Court has observed, "as

[9] *See Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975) (citing to *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)). In particular, the doctrine applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 149. Even assuming *arguendo* that the City's "log numbers" are factually correct (which plaintiffs do not, and which are averred far outside the pleadings), it would be impossible for a plaintiff to prosecute and conclude an action for any single lottery on time, even though plaintiffs will be applying repeatedly to future lotteries, and be subjected to the same unlawful outsider-restriction again. *See, e.g., Lloyd v. City of New York*, 43 F. Supp. 3d 254, 269 (S.D.N.Y. 2014) (although none of the inmate plaintiffs was any longer at the relevant facility to be enjoined, they averred credibly that they could well be placed there again in the future).

long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979). The only case cited by defendants, a Western District of New York case, is inapposite. There, a white, Catholic corrections officer brought an employment discrimination action for injuries he suffered, and additionally tacked on an entirely unrelated claim of discrimination *against inmates* for abuse by other guards. The district court appropriately struck those allegations. *Sidari v. Orleans County*, 174 F.R.D. 275, 284 (W.D.N.Y. 1996).

Here, injury has been suffered directly by the plaintiffs. The fact that their own concrete injuries arise from the same facts that also injure other African-American and Latino outsiders (C. 172-82) is not necessary to plaintiffs' standing nor pled to assert anyone's standing but rather as part of the factual showing that plaintiffs intend to make that the City's policy systematically reinforces the segregation experienced by all racial and ethnic groups, a showing that will be relevant to the Court's consideration of plaintiffs' prayer for equitable relief. The remedy the Court ultimately orders must, of course, be adequate to end the City's illegal conduct. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). *See also LeBlanc-Sternberg*, 67 F.3d at 435 (reversing district court and directing it to "fashion appropriate equitable remedies" consistent with "Fair Housing Act principles").

POINT III

PLAINTIFFS' DISPARATE IMPACT ALLEGATIONS FAR EXCEED THE LOW BAR THAT EXISTS FOR PLEADING A CLAIM.

Faced with the fact that its policy represents a clear violation of the Fair Housing Act (as already found by one state court),[10] the City invites the Court to consider matters outside of the pleadings, impose an enhanced pleading burden, force plaintiffs to treat issues that would only arise *after* a prima facie case at later stages of a disparate impact analysis, speculate about evidence that defendant may choose to submit at some undetermined point in the case, and rule against plaintiff not because of the absence of evidence but because of a critique of the *quantity* of evidence. The Court should decline these invitations and deny the motion.

A. General principles applicable to evaluating the sufficiency of pleadings

It is beyond dispute that, on a motion to dismiss, all the allegations of the complaint must be accepted as true and all reasonable inferences drawn in favor of the non-moving party. But two recent Second Circuit decisions reemphasize just how low a burden the "plausibility" requirement imposes on a plaintiff. While the plausibility standard requires more than a "sheer possibility" of discrimination, it is *not* akin to a probability requirement. *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015) (citations omitted). "On a motion to dismiss, the question is not whether a plaintiff is *likely* to prevail, but whether the well-pleaded factual allegations *plausibly* give rise to an inference of unlawful discrimination, *i.e.,* whether plaintiffs allege enough to 'nudge[ ] their claims across the line from conceivable to plausible.'" *Vega v.*

[10] *See Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831, 837-38 (Sup. Ct. N.Y. Cty. 2011) (enjoining development of properties in the Broadway Triangle Area of Brooklyn, finding that the application of the City's outsider-restriction policy "only serves to perpetuate segregation in the Broadway Triangle" in violation of the Fair Housing Act, and also finding that the City could not have complied with the Fair Housing Act because it admitted that it had not evaluated the impact of the community preference on segregation in the Broadway Triangle). The City did not perfect an appeal of that ruling, and the underlying matter remains pending.

Hempstead Union Free Sch. Dist., 801 F.3d 72, 87 (2d Cir. 2015) (citations omitted).

Moreover, *Vega* confirms the continuing vitality of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), referring to the Supreme Court's "endorsement of *Swierkiewicz*." *Vega*, 801 F.3d at 84 (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007)). *Swierkiewicz* teaches two important lessons. The first distinguishes a complaint's function in providing notice of a claim from the later process of producing evidence: "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz*, 534 U.S. at 511 (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). The second makes clear the impropriety of demanding a particularized showing in a complaint before "discovery has unearthed relevant facts and evidence." *Id.* at 512.

B. The first expression of disparate impact: perpetuation of segregation

Recognizing that much progress "remains to be made in our Nation's continuing struggle against racial isolation" and acknowledging that the Fair Housing Act has a "continuing role in moving the nation toward a more integrated society," the Supreme Court has affirmed what had been the unanimous view of each Circuit court that had considered the matter: disparate impact claims are cognizable under the Fair Housing Act. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2525-26 (2015) (hereafter, *"ICP"*). Suits targeting, *inter alia*, "housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification," the Court held, "are at the heartland of disparate-impact

liability." *Id.* at 2511.

It is not only policies that bear more heavily on one racial or ethnic group than on others (*see* discussion *infra* Part C) that are prohibited by the Fair Housing Act. Discriminatory effect also arises in the context of "harm to the community generally by the perpetuation of segregation." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988). *See also* 24 C.F.R. § 100.500(a) (2015) (HUD rule defines disparate impact to include any practice that "actually or predictably…creates, increases, reinforces, or perpetuates segregated housing patterns" because of protected class status).

The City's outsider-restriction policy takes what would otherwise be a single, undifferentiated group – all residents of the City, regardless of where they are living – and transforms that single group into two (C. 81-90). For each development, the City's outsider-restriction policy sets aside 50 percent of all affordable apartments ("restricted apartments") and gives every person already living in the community district where the development is located ("insiders") a preference over every person not already living in the community district ("outsiders") for the restricted apartments (C. 90-99).

Insiders are demographically different from outsiders, and materially so. The complaint examines "households who are eligible for the City's affordable housing programs" (C. 61). On a citywide basis, regardless of the relevant "area median income" ("AMI") band examined, the percentage of African-Americans ranged between about 25 and 26 percent (C. 63, 65, 67).

The complaint sets forth a comparison of the percentage of eligible households citywide that are African-American with the percentage of eligible households within each community district that are African-American, establishing that "significant differences exist in most" (C. 62). The "relative difference" measure provided and defined in the complaint represents the

result of the comparison.[11] In 40 to 42 community districts, depending on the AMI band, the relative difference between the percentage of citywide eligible households who are African-American and the percentage of eligible households in a community district who are African-American is *at least* 50 percent (C. 64, 66, 68).

With respect to community districts in which African-Americans are underrepresented – like Manhattan Community Districts 5, 6, and 7 and other disproportionately white community districts (C. 96, 100-102, 122, 178, 181) – this means that the percentage of African-Americans in the outsider pool is twice the percentage of African-Americans in the insider pool or more (put the other way, the percentage of African-Americans in the insider pool is half the percentage of African-Americans in the outsider pool or less). These allegations establish only the lower bound of relative difference from the citywide eligible household pool that exists in respect to a strong majority (more than two-thirds) of the City's community districts. Other allegations in the complaint suggest that the relative difference with respect to many community districts is even more intense, *see* discussion *infra* p. 39, but, in either case plaintiffs have plausibly alleged that the impact is substantial and not isolated to just one or a few community districts.

Where, as here, it is the City's policy itself that takes the citywide African-American percentage of income-eligible households from which applicants can emerge and unmistakably and sharply shrinks that percentage by shifting to a district-based pool, it is predictable that the ultimate racial composition of that housing will be less African-American than if the policy did not exist. *See, e.g., MHANY Mgmt., Inc. v. Incorporated Village of Garden City*, 985 F. Supp. 2d 390, 427 (E.D.N.Y. 2012) (finding violation after an inquiry that focused "on the housing opportunities available under the rejected [zoning] designation versus the approved [zoning]

[11] Relative difference is obtained by taking the difference between the citywide percentage of a group and the community district percentage of that group, and then dividing the difference by the citywide percentage of the group (C. 52).

designation"); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 448 (E.D.N.Y. 1995) (holding that, where practice controlling availability of housing opportunities operated to the benefit of village insiders and to the detriment of village outsiders, and where there was a significant disparity between the percentage of African-American outsiders and the percentage African-American insiders, it was "evident" that the policy perpetuated segregation).

C. The second expression of disparate impact: practice bearing more heavily on a racial group

Huntington's second category of disparate impact occurs where there is "adverse impact on a particular minority group." *Huntington*, 844 F.2d at 937. *See also* 24 C.F.R. § 100.500(a) (2015) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons"). The appropriate focus is the impact of the practice itself on eligibility for further consideration, not the ultimate bottom-line results.

As discussed *supra* Point II, *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994), was a case where a "suburban residency preference" gave some suburban residents and workers (a relatively white group) a preference over Buffalo residents (a more heavily minority group) in connection with rental housing subsidies. *Id.* at 780. The Second Circuit found that the injury "is not the failure to obtain housing assistance in the suburbs, but is *the missed opportunity to compete for suburban housing on an equal footing with the local residents*." *Id.* at 794 (emphasis added). The ruling is consistent with Supreme Court precedent. *See Teal*, 457 U.S. at 451 (1982) (holding that the law "guarantees these individual black respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria"). In other words, *any* stage of the process that disadvantages a racial or ethnic group is unlawful. *See Wards Cove*, 490 U.S. at 653 n.8 (holding that where particular practice has disparate impact, case exists "notwithstanding the

bottom-line racial balance")).

Here, the City's outsider-restriction policy relates to eligibility to compete for 50 percent of the affordable housing units made available by the City. The basis for the priority it affords is community district residence. In terms of race and ethnicity, a group may be underrepresented or overrepresented in a community district as compared with that group's presence in the City as a whole. This applies for every community district throughout the city, but we focus here, by way of illustration, on "the lotteries conducted for units in Manhattan Community Districts 5, 6, and 7" (where one or more plaintiffs have applied) and "other disproportionately white neighborhoods of opportunity" (where plaintiffs intend to apply) (C.100-102). All three of the specifically enumerated community districts have African-American populations that are disproportionately low as compared with the citywide presence of African-Americans (22.8 percent), with two (Manhattan Community Districts 5 and 6) among the 17 in the City with African-American populations of less than 5.0 percent, and Manhattan Community District 7 having an African-American population of less than 8.0 percent (C. 49-50).

A comparison of how the underrepresented group is able to compete compared to the overrepresented group (a differentiation that would not exist in the absence of the City's policy) makes the disparate impact clear. In disproportionately white community districts,[12] white applicants, in percentage terms, compete under the outsider-restriction policy without any disadvantage whatsoever compared with what would exist without the policy (all City residents competing equally). "No disadvantage," of course, implies that whites have 100 percent of what their rate of participation would be absent the policy (participation is not squeezed). But the City's policy does more for whites in these districts. To the extent that the percentage of whites

[12] Depending on community district, the overrepresented group will vary, but the City's policy always works to favor the racially or ethnically overrepresented and to disfavor the racially or ethnically underrepresented.

in a community district exceeds their citywide average, whites are *helped* by the policy (there is a greater percentage of whites able to participate than there would be without the City's policy). Thus, depending on the extent of overrepresentation,[13] whites may be able to participate at a rate of 125, 150, or even 200 percent of what it would be if based on citywide eligibility.[14]

For African-Americans in relation to disproportionately white community districts, the picture is radically different. The outsider-restriction policy substantially reduces the percentage of African-Americans that can compete for the restricted apartments as compared with the percentage that would be competing in the absence of the policy. *See* discussion of scope of underrepresentation *supra* pp. 25-26 (showing that, at most, the outsider-restriction policy permits African-Americans to compete for these apartments at 50 percent of the rate that they otherwise would). Thus the outsider-restriction policy effectively caps African-American participation at no more than 50 percent of what it would otherwise be and places a floor under white participation in these districts at 100 percent plus the extent of overrepresentation.

There is another way to illuminate the difference. "In most cases where affordable housing opportunities are made available through lottery, including the lotteries conducted for units in Manhattan Community Districts 5, 6, and 7 and other disproportionately white neighborhoods of opportunity," the complaint explains, "the number of applicants from outside of the community district far exceeds the number of applicants from inside the community district" (C.100). As such, each "out-of-community-district applicant has lower odds to be selected than does each in-community-district applicant" (C. 100).

[13] Given the fact that so many community districts have such a low percentage of African-Americans, it stands to reason that many disproportionately white districts are *substantially* more white than the citywide average, and thus whites are *helped substantially* by the outsider-restriction policy in these community districts). *See also* discussion *infra* p. 39.

[14] This is very different from the circumstance one would expect, say, with an employment test. There, both groups being compared would have *some* failure rate, so both groups wind up under 100 percent. Here, by contrast, the overrepresented group is getting awarded "extra credit" that results in a higher-than-100-percent result.

If there were, for example, 50,000 applicants altogether, and 2,500 of them were in-district applicants competing for 50 apartments subject to the preference, the insider odds of being selected for one of the restricted apartments would be 1 in 50. The remaining 47,500 applicants competing for the 50 apartments not subject to the preference[15] would have outsider odds of 1 in 950 – not even including the fact that insiders get to compete for the non-restricted apartments, too.

Those very different chances to compete between insider and outsider are not distributed equivalently between racial and ethnic groups. Whites get the benefit of insider odds, being overrepresented in these community districts; African-Americans, being underrepresented in these community districts, are disproportionately denied the better insider odds (C. 102).

Thus, the plaintiffs have alleged that African-Americans do suffer an adverse impact as a group. *See, e.g., Huntington*, 844 F.2d at 938 (town's refusal to permit construction of affordable housing bore more heavily on African-Americans); *MHANY Mgmt., Inc. v. Incorporated Village of Garden City*, 985 F. Supp. 2d 390, 427 (E.D.N.Y. 2013) (finding disparate impact violation where zoning decision "significantly decreased the potential pool of minority residents likely to move into housing developed at the Social Services Site in proportion to the number of non-minorities affected"); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 565-66 (N.D. Tex. 2000) (disparate impact violation established where town's ban on apartments limited subsidized housing, a type of housing that had been found to be needed by black households at a rate twice as high as white households).

The matter is put most clearly in another residency preference case, *Langlois v. Abington*

[15] For ease of computation, we have bundled together all apartments not subject to the outsider-restriction policy: 38 percent to any income-qualified New Yorker, regardless of where in the City they live (C. 88); 5 percent where a preference goes to City employees, regardless of where in the City they live (C. 89); and 7 percent where a preference goes to City residents with disabilities, regardless of where in the City they live (C. 89).

Hous. Auth., 234 F. Supp. 2d 33 (D. Mass. 2002). The "overarching intuitive principle" is that, "where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents *cannot but* work a disparate impact on minorities." *Id.* at 62.

The City may well attempt to argue that, depending on the community district, *different* racial and ethnic groups are benefitted. Thus, whites are benefitted when it comes to disproportionately white community districts, while African-Americans are benefitted when it comes to disproportionately African-American districts, for example. But the "everyone is benefitted somewhere" idea is no aid to the City. First, it would be nothing more than an admission that the outsider-restriction policy perpetuates segregation (the policy reinforces existing segregation by helping more African-Americans stay in African-American districts and more whites stay in white districts).

Second, it would ignore the fact that the neighborhoods as to which the City's outsider-restriction policy restricts African-Americans' opportunities to compete have particular and desirable features: the disproportionately white community districts are those that, disproportionately, include neighborhoods of opportunity ("neighborhoods in this City with high quality schools, health care access, and employment opportunities; well-maintained parks and other amenities; and relatively low crime rates") (C. 7, 100-102). *See also* C. 122 ("[A]bandonment of the outsider-restriction policy would result in more housing citywide for African-American and Latino New Yorkers in neighborhoods of opportunity than the maintenance of the outsider-restriction policy"). As such, the relative difficulty of competing for housing in neighborhoods of opportunity is not counterbalanced by the City's willingness to make it especially easy for African-Americans to compete for housing in neighborhoods with

lower quality schools, less health care access, fewer employment opportunities, less well-maintained parks and other amenities, and relatively higher crime rates.

Third, it would ignore the fact, articulated in the context of Title VII but equally applicable here, that "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Teal*, 457 U.S. at 455.

At this stage, though, all that matters is that the complaint set forth facts that make it plausible that the City's outsider-restriction policy bears more heavily on African-Americans.

D. Defendant's vague and generalized challenges to the pleading are without merit

Defendant's principal tactics are to ignore facts set forth in the complaint and to have the Court treat this motion as one for summary judgment: that is, a motion made after the parties have had a full opportunity for discovery, including expert discovery, and where the Court's focus would be on whether the parties had proved through the production of evidence the burdens imposed by the three stages of a disparate impact case. As such, defendant's challenges are either without substance or else inapposite.

1. Plaintiffs adequately pled causation

The connection between the City's policy and the adverse impacts complained of is palpable: applicants emerge from the pool of income-eligible households, and the City has chosen to replace a more diverse citywide pool of such households with a distinctly less diverse

district-only pool for 50 percent of affordable housing opportunities.[16] That an underrepresented group's narrowed presence among the income-eligible households allowed to compete would then translate to a smaller percentage of applicants from that underrepresented group is a causative connection that is, most certainly, "plausible on its face." *Twombly*, 550 U.S. at 570.

Left with no other alternative, the City resorts to speculation about various "other factors" that could "influence who applies for affordable housing" (Def. Mem. 14). But even if the City had presented evidence that one or more "other factors" contributed to the impacts ascribed by plaintiffs to the City's outsider-restriction policy (and it has not and could not do so at this stage), the City would be asking the Court to weigh evidence, not perform the pleading stage question of determining whether the connection pled is plausible. In other words, the City's argument is exactly the opposite of the path commanded by *Vega* and *Littlejohn*.

Moreover, nothing indicates that the "insiders" and the "outsiders" differ in any aspect other than race. Thus, if it were to turn out that African-Americans have a higher-than-average level of interest in affordable apartments, that (for now entirely speculative) fact would not just raise the percentage of insider applicants who are African-American, it would raise the percentage of outsider applicants who are African-American. The ratio between African-American insiders and outsiders would not change. The process works exactly the same in the other direction. As such, it would remain the racial differentiation caused by the City's outsider-restriction policy that is responsible for the perpetuation of segregation and disparate impact on African-Americans.

The Supreme Court's recent ruling in *ICP* does not assist defendant's position. Notably,

[16] As noted elsewhere, the racial group that is hurt or helped varies by community district, but in every case, the City's policy works to narrow the pool of the underrepresented group and widen the pool of the overrepresented group. That is precisely what the reinforcement of segregation is.

the ruling did not say that a plaintiff who "fails to allege statistical evidence demonstrating a causal connection at the pleading stage" must have her case dismissed. The stated requirement was to allege "facts at the pleading stage," *ICP*, 135 S. Ct. at 2523; the Supreme Court did not, *sub silencio*, overrule *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and create a heightened pleading standard. *ICP*'s use of the terms "produce" and "demonstrating" in connection with the phrase "*or* produce statistical evidence demonstration a causal connection," *ICP*, 135 S. Ct. at 2523 (emphasis added), connotes a later process of proving something through evidence, a process that occurs at the summary judgment or trial stage (*ICP* did not review the disposition of a motion to dismiss; the case came to the Supreme Court after there had been a judgment entered after a bench trial).

Finally, with respect to opportunity to compete on equal terms, the outsider-restriction policy, by definition, places an underrepresented group in the lower-odds category and the overrepresented group in the higher-odds category. As such, independent of how other steps in a lottery or application process might proceed, it is the policy itself that denies equal opportunity when it shifts from a citywide pool to an in-district pool.

2. Data on applicants are not required

To the extent that the City's motion is premised on the complaint's absence of data about actual applicants to specific developments (Def. Mem. 13-14), the argument is both disingenuous and contrary to Circuit precedent. As alleged in the complaint, the City itself has *withheld* data that it possesses regarding the race and ethnicity of more than 700,000 participants in the City's affordable housing programs (C. 167-169). Imagine if the law were that defendants could forestall challenges to their policies by the simple expedient of hiding applicant data. Such a

result would eviscerate disparate impact claims across the board.

In fact, because applicant data are not always available, the Second Circuit has ruled that even at the summary judgment stage the use of either general population data or the pool of people eligible (as opposed to merely those who had applied) can be appropriate. *Malave v. Potter*, 320 F.3d 321, 326-27, 327 n.4 (2d Cir. 2003) (*citing Wards Cove*, 490 U.S. at 650-51, 651 n.6)).

In addition, questions about applicant data demonstrate the wisdom of *Swierkiewicz* in rejecting any requirement for a particularized showing in a complaint before "discovery has unearthed relevant facts and evidence." *Swierkiewicz*, 534 U.S. at 512. As shown in the next section, statistical data are not required *at all* in a complaint. *See* discussion *infra* Point III.D.3. Finally, this is a case where, even at later stages, applicant data will not necessarily be needed. Both types of disparate impact in the housing context can arise *prospectively* (as with future lotteries as to which plaintiffs wish to participate), and thus arise when applications have not been taken. *See, e.g., Huntington*, 844 F.2d at 938 (predictive impact revealed by looking at comparative need, not comparative applications).

3. The City mischaracterizes the statistical information provided in the complaint as well as the need for such information at this stage of the case

The City, unable to pretend that plaintiffs have not put forward statistical allegations, instead focuses on complaining that the statistics are "limited" or that they do not provide information on the "City as a whole" (Def. Mem. 13-14). But the City closes its eyes to a very basic fact: statistical data are not required to be pled in a complaint *at all* because it "would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery." *Jenkins v. N.Y.C. Transit Auth.*, 646 F.

Supp. 2d 464, 469. (S.D.N.Y. 2009). *See also L.C. v. LeFrak Org, Inc.*, 987 F. Supp. 2d 391 (S.D.N.Y. 2013) (noting that it is inapposite in connection with the motion to dismiss question – the adequacy of a pleading – to cite the summary judgment stage requirement that the plaintiff have produced statistical evidence of disparity).

The City seeks repeatedly to divert the Court's attention with cases in very different procedural postures. The City cites *United States v. City of New York*, 637 F. Supp. 2d 77 (S.D.N.Y. 2010) [hereinafter, the "*Firefighters'* case"], for the proposition that the "significance of Plaintiffs' statistics is bolstered by evidence that the disparities have been significant as a practical matter." *Id.* at 94, *quoted in* Def. Mem. 15. That decision arose in the context of a motion for summary judgment. And the language quoted only serves to highlight why it has no application here: the submission of evidence, let alone the "bolstering of evidence," is not a function of the complaint that initiates a case. *In re Malone*, 592 F. Supp. 1135 (E.D. Mo. 1984), the 31-year-old Missouri case cited by the City for the proposition that statistical evidence is required (Def. Mem. 16) was a matter decided after a bench trial.[17]

Even if statistical evidence were required at this stage, the City's challenges are remarkably wrongheaded. First, the City mischaracterizes the allegations of the complaint. Thus, for example, the City states that, "Plaintiffs have not asserted any statistics regarding the racial demographics of the particular community districts where plaintiffs entered affordable housing lotteries (Community Districts 5, 6, and 7)" (Def. Mem. 17). That is simply not true. Among the allegations about these community districts are the following: the African-American population of the first two is less than 5.0 percent and of the third is less than 8.0 percent (C. 50);

[17] To complete the picture, the City cites *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir.1977). That case, on remand from the Supreme Court, had initially come to the Seventh Circuit after a bench trial. *Tsombinidis v. West Haven Fire Dept.*, 352 F.3d 565 (2d Cir. 2003), cited elsewhere by the City (Def. Mem. 12), likewise arrived at the Circuit after a bench trial.

the percentage of income-eligible African-American households in all of those community districts is less than half of the citywide percentage of income-eligible African-American households (C. 62-68); and all three of those community districts are disproportionately white (C. 100-102).

As to citywide data, the City ignores extensive allegations in the complaint, including the fact that, depending on AMI, the relative difference between the income-eligible African-American households in the city and an individual community district is at least 50 percent in between 40 and 42 districts (C. 61-68). The City should also understand that calculation of "relative difference" involves a calculation between the citywide percentage and the individual community district percentage (C. 52). That the City does not like the fact that the plaintiffs did the math (instead of presenting raw data and requiring the court to calculate relative difference) has nothing to do with the requirements of pleading.

Note, too, that plaintiffs allege that the City itself admits that housing segregation is a "persistent and constraining" feature of "housing markets throughout the United States" (C. 114). Plaintiffs also allege that the City was and is characterized by "high levels of residential segregation" (C 32-33); that "approximately 50 percent of African-Americans live in only about 15 percent of the City's community districts" (C. 76); and that the City was and is the second most segregated large city in the United States in terms of the dissimilarity index as measured between African-Americans and whites (C. 34-40). Here again, these are calculations reflecting citywide statistical data, calculations that, by definition, relate African-American underrepresentation to white overrepresentation (and vice versa), more than what is required.[18]

[18] The City's assertion that plaintiffs do not have a relevant comparison between African-Americans and whites (Def. Mem. 14-15) is incorrect. First, as explained above, *see supra* Section D.2, applicant data are not required. Second, the existence of a high dissimilarity index between African-Americans and whites (C. 34-40) means that African-Americans are highly underrepresented where whites are highly overrepresented (and vice versa), and the

See, e.g., Twombly, 550 U.S. at 570 (rejecting any requirement of "heightened fact pleading of specifics"); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (citation omitted).

Another apparent contention of the City – that plaintiffs have to *plead* that a disparate impact is "sufficiently substantial" or "statistically or practically significant" (Def. Mem. 15-16) – is even more absurd. The City cites the quoted language as coming from the Supreme Court's *ICP* case, but the quoted language simply does not exist anywhere in the case.[19] As pointed out earlier in this brief, all the Supreme Court requires in terms of pleading is that a plaintiff "allege facts at the pleading stage." *ICP*, 135 S. Ct. at 2523.

Questions of statistical significance, of course, are quintessentially the province of expert testimony, not requirements at the initial pleading of a case. *See Jenkins*, 646 F. Supp. 2d at 469 (finding case that required statistically significant showing at summary judgment stage inapposite to determination of sufficiency of complaint, where no such showing is required).

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complaint specifically identifies Manhattan Community Districts 5, 6, and 7 as among the disproportionately white community districts where the outsider-restriction policy perpetuates segregation and has a negative impact on African-Americans (C. 100-102). Where a group is overrepresented in a district, the local preference, by definition, *helps* not hurts the overrepresented group. *See* discussion *supra* pp. 28-29, explaining how that preference increases the gap). Third, *Frederick v. Wells Fargo Home Mortg.*, No. 13-CV-7364 (DLI)(LB), 2015 WL 1506394 (E.D.N.Y. Mar. 30, 2015), the only motion to dismiss case cited by the City, is entirely inapposite. There, the *pro se* plaintiffs – who had previously brought the same claims unsuccessfully on more than one occasion – did not identify a practice that they said caused the impact. *Id.* at *6. Here, plaintiffs have done so. The *Frederick* court also makes clear that the plaintiff in that case specifically admitted that they currently "lack the necessary information to support their claim." *Id.* at 7. Plaintiffs in this matter have provided ample information.

[19] The phrases do appear in the *Firefighters'* case, not in conjunction with any pleading requirement, but in connection with what is required on a motion for summary judgment. *See United States v. City of New York*, 637 F. Supp. 2d at 87 (pointing out, ironically, that "there is no one test that always answers the question" of what constitutes a "sufficiently substantial" disparity, but that substantiality is measured "on a case-by-case basis"); *see also id.* at 83 (referencing "statistically" or "practically significant"); *but see Comer*, 37 F.3d at 794 ("[T]he injury to the Belmont plaintiffs cannot be defeated by showing that, as a practical matter, the plaintiffs would never receive housing assistance anyway. The injury is not the failure to obtain housing assistance in the suburbs, but is the missed opportunity to compete for suburban housing on an equal footing with the local residents").

Despite the City's protestations, a quick review of the complaint demonstrates that plaintiffs have in this case not only met their pleading obligations regarding the scope of disparity but also gone far beyond. As discussed earlier, the *lower bound* of relevant differences can be expressed either as the African-American pool absent the outsider-restriction policy being at least twice the pool with that policy or that, in disproportionately white districts, African-Americans are squeezed to 50 percent of their no-policy participation rate whereas whites are artificially inflated beyond 100 percent of their participation rate in the absence of the policy.

But the complaint also gives reason to believe (*i.e.*, makes plausible) the fact that African-American participation, in many cases, is squeezed by the policy even more. Among the complaint's extensive allegations regarding the profound difference between the demographics of the City as a whole and the demographics of each of the City's 59 community districts (C. 47-60, 76), is the allegation that 17 community districts, including Manhattan Community Districts 5 and 6, have African-American populations of less than 5.0 percent (C. 50). From a population perspective, therefore, the minimum relative difference between citywide African-American population (22.8 percent, *see* C. 49) and each of those community districts is 78.07 percent. This translates into a more than *fourfold* difference between the in-district African-American population and the citywide African-American population.

There is, of course, no one particular statistical threshold that is required: courts have generally "judged the 'significance' or 'substantiality' of numerical disparities on a case-by-case basis." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 n.3 (1988) (citation omitted). A "case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and…their usefulness depends on all the surrounding facts and circumstances.'" *Id.* (citation omitted).

What is important here is that an impact of between two-to-one and four-to-one, is, to put it mildly, "plausibly significant." At trial, comparable gaps have resulted in findings of liability. *See,* e.*g., Huntington*, 844 F.2d at 938 (finding illegality where gap, depending on measurement, was either slightly more or slightly less than three-to-one).

Likewise, one test that has been used is the "four-fifths" test, which asks whether the disadvantaged group's participation is pushed below 80 percent of the comparator group (in which case the test is regarded as evidence of adverse impact). *Langlois*, 234 F. Supp. 2d at 57. Here, in disproportionately white districts, African-American participation with the outsider-restriction policy is no more than 25 to 50 percent of what it would be; that of whites is more than 100 percent. Thus, the outsider-restriction policy fails the four-fifths test.[20]

4. Neither purported justification nor claimed absence of less discriminatory alternatives is relevant to the pleading of a disparate impact claim

Proving or *demonstrating* anything is irrelevant to pleading, but, even when proof is put to the test (as on summary judgment), purported justifications are a "stage two" matter and the existence of less discriminatory alternatives is a "stage three" matter in disparate impact cases. *See* 24 C.F.R. § 100.500(c)(3) (2015) (allocating burdens of proof in this manner); *see also ICP*, 135 S. Ct. at 2522-23 (noting that, like business necessity in the Title VII context, Fair Housing Act defendant gets opportunity to prove that its disparate-impact causing policy was necessary). As such, the City's comments on these issues are irrelevant to disparate impact pleading.

[20] The test is formulated in terms of the apartments subject to the outsider-restriction policy. Adding in apartments not subject to the policy would violate *Teal*'s proscription of looking at a bottom-line result and hiding the impact of the policy itself. But even if all apartments were improperly counted, African-American participation would then range from less than 52.5 percent to less than 75 percent (compared to more than 100 percent for whites), still causing the outsider-restriction policy to fail the test.

POINT IV

PLAINTIFFS' INTENTIONAL DISCRIMINATION ALLEGATIONS FAR EXCEED THE LOW BAR THAT EXISTS FOR PLEADING SUCH A CLAIM.

As recently reemphasized by the Circuit, a plaintiff's burden is "minimal" in making allegations that race was "a motivating factor" (not necessarily a but-for cause) in a decision. *Vega*, 801 F.3d at 85-86. *See Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1042 (2d Cir. 1979) (in Fair Housing Act case, "[w]e find no acceptable place in the law for partial racial discrimination"). *See generally Desert Palace v. Costa*, 539 U.S. 90 (2003) (plaintiff in a mixed-motive case entitled to rely on circumstantial evidence only). Because discrimination rarely announces itself, "plaintiffs usually must rely on 'bits and pieces' of information" – a "mosaic" – to support an inference of discrimination. *Vega*, 801 F.3d at 86 (citation omitted).

An inference of intent may be established in a number of ways, many of which are discussed in *Yonkers Bd. of Educ.*, the seminal housing and school segregation case where the housing element centered on Yonkers having sited affordable housing to perpetuate segregation and done so in part to cater "to the racially motivated opposition of a segment of the community." *Id.* at 1124-25. *Cf.* Def. Mem. 5-6 (a purpose of the outsider-restriction policy is to "mak[e] it possible to overcome local resistance"). Plaintiffs have made numerous allegations that give rise to multiple inferences of discrimination and pass the plausibility bar handily.

A. Disparate impact

Part of the "totality of the relevant facts" that go into drawing an inference of "discriminatory purpose" is that a policy "bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). "Frequently the most probative evidence of

intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Id.* at 253 (Stevens, J., concurring). As such, the existence of disparate impact itself "may be an important starting point" in determining intent. *Yonkers Bd. of Educ.*, 837 F.2d at 1221. Here, that impact is powerfully present. *See supra* Point III.

B. Historical context

Another probative factor of discriminatory intent of a governmental entity is the "historical background of the decision…, particularly if it reveals a series of official actions taken for invidious purposes." *Yonkers Bd. of Educ.*, 837 F.2d at 1221 (*quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977)). New York City engaged in intentional discrimination for decades. The siting of public housing in the City was and remains a notorious example of pandering to racial prejudice (C. 23). Large areas were deemed off-limits to public housing because of anticipated resistance from neighborhood residents; other areas thought to be more malleable received a disproportionate amount of such housing (C. 23-24).

The City's discrimination did not end in the 1940s or 1950s. From 1960 through 1988, the City's Housing Authority had a racial steering component as part of its tenant assignment policy (C. 29). During the Bloomberg administration, 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 (C. 143), and decreases in density occurred most frequently in white neighborhoods (C. 144). Those decreases in zoning making it more difficult to construct affordable housing with desegregation

potential in those white neighborhoods (C. 144). The articulated rationale for reducing density was "preserving neighborhood character," a phrase not difficult to associate with a desire to preserve *racial* character. *Cf. Yonkers Bd. of Educ.*, 837 F.2d at 1189, 1992 (opponents would frequently decry the effect that subsidized housing would have on the "character" of the neighborhood). In fact, the City has explicitly told HUD that a fair housing analysis should "allow" for local "nuance, culture, and character" (C. 166). As fair housing analyses only deal with matters of protected class status, the City's reference to "character" and "culture" can only reasonably be supposed to refer to race or ethnicity. And the City continues to have an affordable housing siting policy that it knows results in such housing generally being built "in areas of relatively higher racial/ethnic concentrations and lower-income households than can be found in areas of 'higher opportunity'" (C. 135).

This history, including actively participating in segregation in order to forestall local opposition, is another part of the mosaic that yields the inference of intentional discrimination.

C. Pretext

The City's official explanation of the reason for its outsider-restriction policy, the only one set forth on HPD's website, reeks of pretext. The policy was purportedly established "to provide greater housing opportunities for long-time residents of New York City neighborhoods where HPD has made a significant investment" (C.133). But the policy is not remotely tailored to that end. Preference is given *regardless* of how long a person has lived in a district (C. 92), even if a person has only moved into the district the day before the application period ends (C. 94). There is also no tailoring to districts where "HPD has made a significant investment"; instead, the preference exists across the board (C. 88-91).

Likewise, the policy is not tailored to giving a preference to someone who has lived in a community district where he has "persevered through years of unfavorable housing conditions" (C. 95). A City resident could have persevered through decades of unfavorable conditions in the South Bronx, but would get no preference for an Upper West Side apartment on that basis (C. 95). The existing Upper West Side resident who had not suffered through those conditions would not be barred from getting the preference for that apartment (C. 95-96). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 147 (2000). Such an inference, the Supreme Court explained, is "consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id.* (citation omitted).

Here, there is even more: allegations that explain why the City would be covering up the real reasons for its policy. Some of the support for the City's outsider-restriction policy comes from community boards, local politicians, and advocacy groups who want to preserve existing racial or ethnic demographics of a district (C. 160); the City considered it politically expedient to accede to these wishes, and did so (C. 161-162). The City also feared that an abandonment of the policy would generate race- or ethnicity-based opposition from the community boards and others (C. 161). These were not one-time concerns. As a matter of policy, the City thinks it is a bad idea to have public discussion as to what determines barriers to fair housing choice (as HUD requires) (C.163). Why did the City think that HUD should not require a statement of such "determinants"? According to the City, doing so could be counterproductive because it is difficult to have a "thoughtful discussion" of issues of racial and ethnic housing segregation "against the backdrop of local politics" (C. 163).

Implicit in this statement is the City's view that, when issues of racial and ethnic segregation arise, local politics tend not to yield thoughtful discussions, but rather kneejerk responses. The fear of having discussions that might increase racial tension is a plausible explanation both for why the City would, as it had done in decades past, avoid the prospect of race-based resistance by using a policy that maintains a racial status quo and for using a pretext that avoids raising questions about the racial implications of its policy.

D. The significant influence of race on the City's maintenance of its outsider-restriction policy

Some of the support for the outsider-restriction policy that comes from community boards, local politicians, and advocacy groups stems from a desire to preserve existing racial or ethnic demographics or culture of a neighborhood or a community district (C. 160), and the City considered it politically expedient to accede to the wishes of these forces (C. 161). Indeed, the City has now admitted that it views its outsider-restriction policy as helping it to "overcome local resistance" (Def. Mem. 6).

Even if a municipal entity believes that race-based views of constituents are simply a "fact of life" and decides to concentrate on the "politically feasible," *Yonkers Bd. of Educ.*, 837 F.2d at 1223 (citation omitted), responding to those forces remains legally impermissible. *Id.* at 1223-24 (noting, *inter alia,* that "[t]he Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens").

The City says that "[c]ommunity districts throughout the City with large black and

Hispanic populations want this community district preference" (C. 165). This is no defense.[21] On the contrary, the City's statement shows that racial considerations were clearly on its mind. When the City frames a statement in terms of what a racial or ethnic group "wants," it is reasonable to deem the City to have believed the racial or ethnic composition of the supporting group to be a salient fact (otherwise there is no need to mention a group's purported desires). Moreover, it turns out that the City made this claim never having bothered to find out what range of out-of-district housing options residents of various community districts might want (C. 97-99), a fact that suggests either that the City was operating on the basis of stereotyped assumptions about people wanting to live with others of their race and/or using the desire of community boards, local politicians, and advocacy groups to maintain the racial and ethnic status quo as a proxy for what African-Americans and Latinos want (C. 158, 160).[22]

Additional support for the proposition that the outsider-restriction policy, at its core, takes race and ethnicity into account is provided directly by the statement of a developer-participant in the City's affordable housing program: the purpose, it explained, was to "help the area retain its traditional Latino identity" (C. 164). This remarkable admission not only adds direct evidence to the indirect evidence previously provided, it also bolsters (even though bolstering is not needed at this stage) the fact that the City really was contending with forces that actively want to maintain a racial and ethnic status quo, precisely the forces that the complaint alleges the City

[21] Whether an action is taken in response to those who want to keep white neighborhoods white, African-American neighborhoods African-American, or Latino neighborhoods Latino, there is no exception to the rule, even if the actor does not himself act because of "animus." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (for Title VII and Section 1981 purposes, it is acting because of race that is unlawful, "regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities"), *superseded by statute on other grounds*, 28 U.S.C. § 1658 (2015), *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 378-82 (2004); *Weiss v. La Suisse*, 141 F. App'x 31, 33 (2d Cir. 2005) (plaintiff "need not show that the defendant acted with racial animus"); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472-73 (11th Cir. 1999) (liability attaches when a decision is "premised on race"; no requirement that a decision "be motivated by invidious hostility or animus").

[22] That the City's view did not emerge from actual data or analysis is discussed below, *see infra* p. 47.

did not want to upset.

E. Departures from normal practice

Another probative source of evidence that an entity is acting because of race is where there are "[s]ubstantive departures" from the norm, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Yonkers Bd. of Educ.*, 837 F.2d at 1221 (*quoting Village of Arlington Heights*, 429 U.S. at 267-68). The City has said that there is "no greater danger" to the welfare of the City and its inhabitants than inter-group prejudice, including that based on race or ethnicity, and the City knows and has known that the existence of residential segregation fosters prejudice and inter-group antagonism (C. 112-113). Just this year, the City passed a law requiring the Department of Education to report on the demographics of schools because the schools were found to be racially segregated and "a considerable body of research indicates that racial, cultural and economic diversity of schools is strongly associated with a range of short and long term benefits for all racial groups" (C. 120). In light of these key interests of the City, one would reasonably expect the City to be tackling residential segregation (among other things, the driver of segregation in schools).

Moreover, doing so is required by the City's obligations as a recipient of federal housing and other funds to affirmatively further fair housing (C. 128-130). In the normal course, one would expect that a grant recipient would take those opportunities seriously, since significant funding would otherwise be at risk. The City has done entirely the opposite.

The City never bothered to assess residents' interest in housing mobility (C. 97-99); it rejected proposals to replace its outsider-restriction policy with a citywide lottery system (C. 138); it did not study the impact of its policy on segregation or on the goal of affirmatively

furthering fair housing (C. 154); it did not bother to track lottery outcomes by community district or by ethnic identification (C. 157); and the "guiding principles" and "visions" of its current housing plans do not include reducing segregation or avoiding its perpetuation (C. 148-151).

When one policy (housing siting) results in a racial and ethnic disparity in where the housing is built (C. 135), an entity interested in fulfilling its affirmatively furthering fair housing obligation would take actions to reverse that disparity. Instead, the City operates the outsider-restriction policy and thereby exacerbates the effects of the siting policy (C. 136).

It is reasonable on these facts to conclude that, when it came to the outsider-restriction policy and segregation, the City did not take seriously what would otherwise be critically important obligations, not even in gathering facts about the policy nor being willing to identify reduction in residential segregation as a goal. The most plausible explanation is that the City considered it politically infeasible and counterproductive to take steps that would stir up opposition from those who wanted to maintain the racial and ethnic status quo, a concern of the City since the 1940s (C. 23-24).

F. Conclusion: plaintiffs have drawn a powerful mosaic

Plaintiffs' allegations make clear that there are multiple bases for believing it plausible that the City, in establishing, expanding, operating and maintaining its outsider-restriction policy, was acting, at least in significant part, because of race. At a later moment, it will be possible to allocate more precisely how much of "because of race" stems from the City's own views (like its stereotyping about what different groups "want" and its desire to preserve what is euphemistically described as neighborhood "character" and "culture") and how much stems from the views of others (the City's responsiveness to the insistence of others that one or another

racial or ethnic group continues to dominate a neighborhood and its desire to avoid stirring up race-based opposition to its affordable housing agenda). But, at the motion to dismiss stage – "before the reception of *any* evidence either by affidavit or admissions" – the court's function is limited to determining simply whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz*, 534 U.S. at 511 (emphasis added) (*quoting Scheuer*, 416 U.S. at 236). Plaintiffs have surely nudged their claims "across the line from conceivable to plausible," *Vega*, 801 F.3d at 87 (*quoting Twombly*, 550 U.S. at 570), and the motion must therefore be denied.

POINT V

THE NEW YORK CITY HUMAN RIGHTS LAW PROVIDES PLAINTIFFS ADDITIONAL PROTECTIONS, AND THE LAW IS NOT PREEMPTED BY NEW YORK STATE LAW.

The New York City Human Rights Law ("City HRL") is construed more liberally than its federal counterpart (Def. Mem. 21). The 2005 Local Civil Rights Restoration Act "'created a one-way ratchet,' by which interpretations of state and federal civil rights statutes can serve only as 'a *floor* below which the City's Human Rights Law cannot fall.'" *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (citations omitted). Having satisfied the pleading requirement for disparate impact claims for Fair Housing Act purposes, plaintiffs do so for City HRL purposes, too.

The City ignores the crucial teaching of *Bennett v. Health Mgmt. Sys., Inc.*, 936 N.Y.S.2d 112 (N.Y. App. Div. 1st Dep't 2011), with respect to intentional discrimination, which explains 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." *Id.* at 123. Here, defendant's stated reason for the outsider-restriction policy set forth

on its website is pretextual, as is the "persevered through years of unfavorable living conditions" conceit presented to the Court (Def. Mem. 5). *See supra* Point IV.C. This is just what *Bennett* contemplated: "If one explanation offered by a defendant is able to be construed by a jury as false and therefore evidence of consciousness of guilt, that same jury would be permitted to weigh that evidence when assessing the veracity of the other explanations the defendant has offered." *Bennett,* 936 N.Y.S.2d at 123, n.13. And that is the summary judgment standard. "The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification." *Littlejohn*, 795 F.3d at 311.

CONCLUSION

Defendant's motion should be denied, and defendant's request to extend its time to file an answer should be denied as well.

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