Appeal No. 22-CV-303

DISTRICT OF COLUMBIA COURT OF APPEALS

KEISHA STALEY, *et al*.

Appellants,

v. **2021 CAB 3930**

DISTRICT OF COLUMBIA, *et al*.

Appellees.

On Appeal from the Superior Court of the District of Columbia

Civil Action Number 2021 CA 003930 B

(Judge Hiram E. Puig-Lugo, D.C. Superior Court)

APPELLANTS' BRIEF

/s/ Johnny Barnes

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Dated: 19 September 2022

THE PARTIES

Appellants - At all times relevant, each Appellant has been a long-time Resident of the Brentwood Community in Ward Five of the District of Columbia.

Keisha Staley has lived in Brentwood for more than 40 years. Both of her elderly parents live in the same household. Her Father is 75 years old and suffers from Prostate Cancer. Her younger Brother, who also lives in the household, suffers from Asthma. The Family relies upon street parking and now find it difficult to park at times, even without the proposed Bus Terminal.

Sharon M. Edwards has lived in Brentwood since 1998. At 59 years old, she has heart problems, asthma is on seizure medication and had surgery in January 2017. She is unable to work due to those health conditions. Ironically, at one time, she was employed by the D.C. Office of the State Superintendent of Education ("OSSE") and engaged in the discussions surrounding this proposed Bus Terminal.

Reggie Donaldson is the father of four children, all of whom together with his spouse live in their home in Brentwood. The Family has resided there for 15 years. Reggie has asthma and Reggie; Jr. was diagnosed with asthma after the Family moved to Brentwood. Their 15-year-old Daughter, Geannie, has eczema, and their 9-year-old son, Robert, has constant headaches. The oldest Daughter, Mary, is away from the home and appears to have been spared. The Family, like all others

in Brentwood, has difficulty with traffic and parking. The infirmities and other impacts experienced by the Staley, Edwards and Donaldson Families are typical in Brentwood, some better, some worse.

Appellee Bowser, in her official capacity as Mayor of the District of Columbia – At all times relevant Appellee Muriel E. Bowser, the Mayor of the District of Columbia, has been vested with the Executive Power for this Municipality and as the Chief Operating Officer established as an independent agency OSSE. At all times relevant to this matter Defendant Bowser was responsible for the acts and omissions of employees and agents of the District of Columbia. For any times that she was not Mayor, she inherits the acts and omissions of employees and agents.

Appellee District of Columbia – At all times relevant, the District of Columbia has been a municipal entity comprised of its agencies, departments and divisions, and the officers and managers of those agencies, departments, and divisions, including the DCRA and its Business and Licensing Administration, the Administrators of each of its Administrations, the Mayor, and other administrators. Accordingly, Appellants assert *respondeat superior*, where appropriate.

Rule 26.1. Corporate Disclosure Statement. None of the Appellant Parties are a corporation or a partnership. All are current residents of Brentwood.

There were no Intervenors, Amici Curiae, or Counsel in the trial court.

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JURISDICTION OF THIS COURT – RULE 28(a)(5) STATEMENT

This appeal is from a final order, a judgment of dismissal that disposes of all Parties' claims, establishing this court's jurisdiction.

Following acceptance of their Complaint by the Trial Court on 2 November 2021, Appellants filed a Motion for Injunctive Relief on 18 November 2021. Discovery was served upon Appellees on 19 November 2021. Appellees did not timely respond to the Discovery and indeed never responded. Appellees filed an Opposition to Appellants' Motion for Injunctive Relief on 16 December 2021, and Appellants filed a Reply on 29 December 2021. After hearing, the Trial Court denied Appellants' Motion for Injunctive Relief on 6 January 2022. Appellants filed and served additional Discovery also on 6 January 2022. This matter then came before the Trial Court on Appellees' Opposed Motion to Dismiss Appellants' Complaint, filed 23 February 2022, and Appellants' Opposition, filed 6 March 2022, and Appellees' Reply, filed 14 March 2022. Appellants respectfully present their Opening Brief in this Appeal. For reasons that follow, the Order of the Trial Court of 24 March 20922, Dismissing the Complaint of Appellants should be Reversed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

STATEMENT OF THE CASE

Appellees have blatantly and continuously ignored the Law. The Supreme Court has not tolerated such behavior, especially when it comes to the Environment

This is an appeal from a Trial Court's Grant of a Motion to Dismiss. Review by this Court is therefore *de novo*. The Trial Court examined the actions of Agencies of the District of Columbia Government and should have considered the abuse of discretion by those Agencies and the clear error in their actions and inactions. Courts, including the United States Supreme Court, have halted the construction of a Dam, nearly completed construction, costing $150 million, to save the snail darter, a fish facing extinction; ruling that the construction of the Dam was a *prima facie* violation of the Environmental Species Act (ESA). That Federal

Court of Appeals deferred to the plain language of the ESA, *Hiram Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1069 (CA6 1977); The United States Supreme Court affirmed the Court of Appeals Decision by a vote of 6 to 3, *Tennessee Valley Authority v. Hiram Hill et al.*, 437 U.S. 153 (1978)[1]. Similarly, a $44 million road project was halted in San Antonio, Texas to save endangered, eyeless spiders, known as the Bracken Bat Cave Mesh weaver.

Surely, this $20 million, proposed Bus Depot in a residential neighborhood, the subject of the instant matter, can be halted in the Brentwood Community of Washington, D.C. to spare the health, safety and perhaps lives of these besieged citizens, especially, inasmuch as, like the Tennessee Valley Authority, the District of Columbia's Office of the State Superintendent of Education (OSSE) and other District Agencies, even though expressly asked, have ignored countless laws in its "Bull in the China Shop" path to push through this ill-conceived proposal.

Even without the proposed Bus Depot, unlike those who live in all other neighborhoods in the District of Columbia, those who live in Brentwood, **due to**

[1] At the Federal District Court level, in advance of the appeal to the Federal Court of Appeals, local citizens and conservation groups sued in the District Court, claiming that the project did not conform to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* After finding TVA to be in violation of NEPA, the District Court too enjoined the Dam's completion pending the filing of an appropriate Environmental Impact Statement. *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (ED Tenn.), aff'd, 468 F.2d 1164 (CA6 1972). The Dam was built, only because Congress eventually passed a rider on an appropriations bill that exempted the Tellico Dam from the ESA. Construction was completed in 1979, but *TVA v. Hill* is nonetheless considered a conservation success in that it demonstrated the courts' willingness to enforce the ESA.

existing, suffocating industrial pollution, are more likely to be afflicted with severe asthma, respiratory illness, cancer, lung disease, heart ailments, premature deaths and premature births, as well as other related health challenges, than in any other place in Washington, D.C. Aggregate those health challenges by the invasion of the COVID Pandemic and the situation is horrifying!

Since the 1950s --- when, due to a Court Decision eliminating restrictive covenants and the Brentwood Neighborhood in Washington, D.C. shifted from all White to mostly Black --- half of the toxic facilities in the District of Columbia (50%) have been located, by Appellees, in one voting area, known as Ward Five. The remedy for that disparate impact and disparate treatment is to equalize where toxic facilities are located; move some out of Ward Five and into the other seven Wards of the District of Columbia. The placement of these toxic facilities in the Brentwood only began after Whites moved out and Blacks moved in. None of such facilities are in the White voting areas of Washington, D.C.

According to the Expert, Sarah Jane Shoenfeld, who has singularly mapped segregation in Washington, D.C.[2] and who certified under oath that, in the 1950s,

[2] Ms. Shoenfeld is a Historian and serves as the Principal for Prologue D.C. Her complete Vita is annexed. The Vita of Ms. Schoenfeld and the Fourteen Experts who signed two Letters to Appellee Bowser, expressing their strong concern with going forward with the Bus Depot and the basis of their concern is included in the Joint Appendix at pages 51 to 88.

most of the area south of "W" Street, N.E. --- the Street on which the Bus Depot is proposed --- remained undeveloped and owned by the Real Estate & Improvement Co. of Baltimore. This area had been reserved for non-industrial development until the area began to be Black occupied over the course of this decade. In 1958, the area became zoned for heavy/general industrial use below "W" Street and for light manufacturing from about 15th St East to Montana Avenue, directly across "W" Street, upon which Black occupied public housing (Montana Terrace) would be built just a decade later. By 1970, the blocks north of "W" Street were more than 90% Black-occupied. Black households continue to make up most households along the blocks north of "W" Street.[3]

The D.C. Human Rights Act Protects Residency, Where One Lives, and Race, who one is, as a Class. Enacted by the D.C. Council with the intention "…to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit …" It is a broad remedial statute, to be generously construed, *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d

[3] The Brentwood Mapping Graph created by Ms. Schoenfeld and found at pages 132 to 135 of the Joint Appendix, dramatically demonstrates this disparate and discriminatory history.

392, 398 (D.C. 1991). The Courts have described the Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds," *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000). While violating the Human Rights Act, Appellees have ignored countless other laws and regulations, including the D.C. Environmental Policy Act. The Court's *Tennessee Valley Authority Case* does not tolerate such misdeeds.

STATEMENT OF RELEVANT FACTS

The District of Columbia Department of Energy & Environment --- the very Agency tasked with protecting the District's Environment --- District of Columbia Mayor, Muriel Elizabeth Bowser, the District of Columbia Department of General Services, the District of Columbia Office of the State Superintendent of Education, and even the District of Columbia's Office of Attorney General, have all proposed, supported and sought to implement a commercial Bus Depot in the Brentwood Residential Neighborhood, in direct contravention to applicable laws and regulations. The Bus Depot, if erected and put in use, will house 250 buses and 500 personnel, most of whom will drive into an already congested community and park their cars on already congested streets. These buses will begin operating at 4:00 a.m., in the morning, when most Brentwood Residents are yet asleep.

Without proper permitting, according to their own Attorneys, --- the District of Columbia Office of Attorney General --- Appellees began construction of the proposed Bus Depot on 21 December 2021. The backdrop to that start day is shockingly revealing.

Two years earlier, on 1 November 2019, Mr. Wayne Gore with the D.C. Department of General Services stated in an email:

"In preparation for the project, the A/E team conducted an environmental impact study for internal use. **As part of the building permit process, all applicants are required to submit an Environmental Intake Form (EIF) with their application to determine if an Environmental Impact Screening (EIS) is required. If an Environmental Impact Screening is required, an interagency review team will look over the applicants' Environmental Impact Screening Form (EISF) and make a determination**." (Emphasis supplied)

A number of exchanges between Appellees, including Mr. Gore and the residents of Brentwood, can be found in the Joitn Appendix, at pages 110 to 120. **That process, outlined by Mr. Gore, was not followed**. As indicated, construction began on 21 December 2021, and demolition began long before that date. **For the first time, on 4 February 2022, the D.C. Department of General Services submitted an Environmental Impact Screening Form (EISF)**. The EISF can be found at pages 92 to 104 of the Joint Appendix. Indeed, two Paragraphs in that very recently revealed EISF are shocking:

D. UNAVOIDABLE IMPACTS

The site has been confirmed to contain elevated levels of volatile organic compounds in select areas as outlined in the Environmental Site Assessment. Furthermore, seven (7) subgrades,

abandoned tanks are confirmed to be within the property area. **Both soil remediation and tank removal [will] be required for this project**.

E. MITIGATION STEPS

All disturbed soil which has been confirmed to be contaminated with petroleum shall be remediated and backfilled as required by DOEE. Any tanks found within the building footprint are to be removed or abandoned in-place in compliance [with] all regulatory codes. Positive drainage shall be provided throughout the site in conjunction with designated bio-retention areas as outlined on the site plan attachments.

This is irrefutable PROOF that Appellees did not follow the D.C. Environmental Policy Act when siting the Brentwood Bus Depot! They are only now issuing an Environmental Impact Screening Form – the very first step in the process. Moreover, the documents reveal the site is **HIGHLY CONTAMINATED**.

Then, just three weeks later, on 23 February 2022, the EISF Coordinator sent the following Memorandum to the Interagency Review Team: Attached is the EISF

application for the subject project. Please complete an environmental assessment for your respective areas and return it to me by **March 4, 2022**. Please call me at 535-2506, should you have any questions.

1. Project: 1601 West Street, NE Bus Terminal

2. Location: 1601 West Street, NE

EISF #: 00-0958

The EISF application was verified on 15 February 2022, by Mr. Jalloh Mohamed, under criminal penalty if there were any false statements. The application contained a construction start date of April 2020, and an operational date of 31 August 2022.

Then on 25 February 2022, the D.C. Department of Energy and Environment sent the following to the affected Advisory Neighborhood Commissioners:

From: Zangrilli, Jacob (DOEE) <jacob.zangrilli@dc.gov>
Sent: Friday, February 25, 2022 11:09 AM
To: Brevard, Gail (SMD 5C01) <5C01@anc.dc.gov>; Rogers, Lauren (SMD 5C02) <5C02@anc.dc.gov>; Manning, Jacqueline (SMD 5C04) <5C04@anc.dc.gov>; Oliver, Darlene (SMD 5C05) <5C05@anc.dc.gov>; Thomas III, Harry (SMD 5C06) <5C06@anc.dc.gov>; Montague Jr., Jeremiah (SMD 5C07) <5C07@anc.dc.gov>
Cc: Criner-Brown, Allyson (DOEE) <allyson.criner-brown@dc.gov>; Bullo, Ibrahim (DOEE) <ibrahim.bullo@dc.gov>

Subject: ANC 5C Notification - EISF -1601 West St NE (OSSE Bus Terminal)
Good Morning ANC 5C [The Brentwood Location]. This week DOEE received an Environmental Impact Screening Form for the OSSE Bus Terminal Project at 1601 W Street NE. **The demographics of the project area, and the intended**

final use of the site, warrant increased community notification, participation, and feedback. To that end, I am providing you all with the EISF submission, existing site plans, proposed site plans, and EISF project summary. (Emphasis supplied**)**

Please note that the EISF is currently under DOEE review. This e-mail is for awareness and to establish a line of communication with the community. Please let me know if you have any questions and I will try to answer them to the best of my ability or put you in contact with the appropriate person.
Respectfully,

Jacob Zangrilli
Environmental Protection Specialist
Office of Enforcement and Environmental Justice
Department of Energy & Environment
Government of the District of Columbia
1200 First St., NE 7th Floor
Washington, DC 20002
Desk: 202-535-2645
Cell: 202-497-4351

Notably, Mr. Zangrilli's statement, "The demographics of the project area, and the intended final use of the site, warrant increased community notification, participation, and feedback. To that end, I am providing you all with the EISF submission, existing site plans, proposed site plans, and EISF project summary," underscores the failings of Appellees in following the ANC Laws.[4]

[4] **Note** - Under the Rules of Evidence, a declaration against interest is defined as a statement made by a declarant who is unavailable that is against the declarant's pecuniary, proprietary, or penal interest when it was made. A statement against interest is admissible as an exception to the hearsay rule. Similarly, an Admission against Interest is an out-of-court statement by a party that, when uttered, is against the party's pecuniary, proprietary, or penal interest and that is admissible under

Appellees have blatantly ignored Equal Treatment of Brentwood

More than half of the Industrial Facilities in the District of Columbia plague just one of eight wards, Ward Five, where the Brentwood Community is located. The cumulative effects of this disproportionate, disparate, and discriminatory placement of Industrial Facilities are long term and compounded. Now, the Appellees want to put a Bus Terminal in the heart of this residential neighborhood, with 250 buses, 500 employees who drive to work and occupy the limited neighborhood parking spaces, a fueling station and a training facility for bus drivers. The Facility would be placed at the vortex of Montana Avenue and "W" Street, one block from New York Avenue and the Amtrak Yard where trains assemble. In addition, nearby is diesel spewing snowplows, salt trucks, limousine buses and other trucks

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both an exclusion and an exception to the rule against hearsay. Such a statement is admissible even if the declarant is available, because an admission by a party-opponent is non-hearsay and, thus, does not require unavailability, *On Lee v. U.S.*, 343 U.S. 747 (1952). In D.C., the party seeking to admit evidence under this exception must satisfy four conditions. First, the proponent must prove that the declarant is unavailable. The declarant might be refusing to testify, *Laumer v. United States*, 409 A.2d 190,199-200 (D.C. 1979) (*en banc*). Second, corroborating circumstances must clearly indicate the trustworthiness of the statement. The court might consider, for example, the time of the declaration and the party to whom it was made; the existing of corroborating evidence; and the extent to which the declaration is really against the declarant's interests. *See United States v. Edelen*, 996 F.2d 1238, 1242 (D.C. Cir. 1993). Third, the proponent must prove that the declarant knew when making the statement that it was against his or her interest. Finally, the proponent must demonstrate that the statement was against the declarant's proprietary, pecuniary, or penal interest, *Id.*at 196. Each prong of this Test is here met

and buses on at least 10 acres of land owned by the District Government and within breathing distance of its Brentwood residents. Worse, already in the Neighborhood is the Brentwood Solid Waste Disposal Facility, located at 1241 "W" Street, N.E.; the DPW Solid Waste Collection Division, the DDOT Street and Bridge Maintenance Division, located at 1531 "W" Street, N.E.; next to the Capitol Paving of D.C. Construction Company, located at 1525 "W" Street, N.E.; the Federal IPC Transfer (the recycling center), located at 1220 "W" Street, N.E.; and the Fort Meyer Construction Company, located at 1155 "W" Street, N.E. **Dramatic Photos of all of these toxic facilities, each within a stone's throw of the homes of Plaintiffs and hundreds of other Brentwood Residents is Page Ninety-One of the Joint Appendix**.

The Community of Brentwood is adjacent to the Community of Ivy City. Because of previous actions by Appellees, 1) Ivy City is already surrounded by hundreds of diesel-fueled school buses on both sides of Kendall Street, just a short walk from residences; 2) it is currently surrounded by hundreds of diesel-spewing snow and salt trucks; 3) at least a hundred diesel-spewing limousine buses are at the edge of Ivy City; 4) various other diesel-spewing buses and two and a quarter ton trucks park on several streets of Ivy City, without control or regulation by the District Government; and 5) hundreds of automobiles park in and near and along every street in

Ivy City several nights a week to patronize the City Winery Nightclub, just a short walk from homes in that Community. Vehicles, numbering in the hundreds, typically idle in Ivy City, especially in wintry or frigid conditions, including the very harmful diesel-spewing trucks, buses or equipment.

SUMMARY OF THE ARGUMENT

Like a bull, rumbling through a China Shop Appellees have sought to construct this Bus Depot in a residential neighborhood, 1) without complying with the provisions of the D.C. Environmental Policy Act; 2) without producing an Environmental Impact Statement, as required by law for this project; 3) without satisfying the Advisory Neighborhood Commission Act and other statutory mandates; 4) while claiming that residents of Brentwood lacked standing to bring this lawsuit; and 5) while discriminating against Appellants and other residents of the Brentwood Community due to characteristics that are protected by the D.C. Human Rights Act and various Federal Laws.

Because of these actions and inactions by Appellees, the effort by Appellants to secure Injunctive Relief and thereby preserve the status quo should have been met with favor by the Trial Court. It was not. The Standard of Review of a Trial Court's Decision, when evidence is adduced is Clear Error. Such error is clearly present here.

ARGUMENT

Standard of Review - This Court Reviews de novo Grants of a Motion to Dismiss

In evaluating a motion to dismiss for failure to state a claim, the Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. The United States Supreme Court has stated that the plaintiff must allege a "plausible entitlement to relief" by setting forth "a set of facts consistent with the allegations. Appellant did that below. This Honorable Court has established that it will review *de novo* the dismissal of a complaint under D.C. Superior Court Civil Rule 12 (b)(6) for failure to state a claim upon which relief can be granted, *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011); *Grayson v. AT&T Corp.*, 15 A.3d 219, 228 (D.C. 2011) (*en banc*); *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1022–23 (D.C.2007).

Appellees and the Trial Court ignored the powerful views of fourteen experts

At the outset, it should be noted that fourteen unbiased experts who did preliminary analysis of the impact of the proposed Bus Depot stated in a Letter to Appellee, Mayor Bowser[5], **"The bus terminal will add these traffic-related risks to**

[5] A complete copy of that Letter is made a part of The Joint Appendix, as part of the Exhibits submitted with the Complaint, at pages 44 to 40. In addition, the Vitae of the Fourteen Experts who signed a Letter to Appellee Bowser, expressing their

a community whose existing health inequity has been outlined in the 2018 Health Equity Report. Out of the fifty-one proximal neighborhood groups, Brentwood ranked high in deaths due to illnesses and health outcomes for which air pollution contributes to higher risk.

- 11th in deaths due to heart disease
- 13th in deaths due to chronic lower respiratory disease
- 15th in deaths due to strokes
- 16th for lowest life expectancy at birth
- 17th in deaths due to diabetes

The most recent District of Columbia Health Equity Report referred to by the Experts and led by Dr. LaQuandra Nesbitt who currently serves as the Director of the District of Columbia's Department of Health, in and of itself is riveting, revealing, alarming and most disturbing. Drawing from that Report and other sources, that elite group of scientists and environmental educators have issued a word of caution to Defendants on the adverse conditions that would result from still another toxic and congestion causing facility in Brentwood. Their conclusions include:

- Health impacts of school bus pollution
- Cumulative health impacts of multiple concentrated pollution sources
- Traffic studies, congestion, parking and other deleterious and destructive harms
- The further degradation of air quality
- Prevalence of asthma and other respiratory illness in the affected community

strong concern with going forward with the Bus Depot and the basis of their concern is included in the Joint Appendix, at pages 51 to 88.

- Prevalence of cancer, low birthweight/infant mortality, and other health impacts in the affected community
- Land use and zoning, particularly with siting industrial facilities in an urban setting
- Other environmental considerations such as water, soil, etc.

And the most recent EJScreen Assessment, found in the Joint Appendix, at pages 105 to 107, conducted by the U.S. Environmental Protection Agency found the following:

Additional Review Required

Site Name: Proposed OSSE school bus terminal at 1601 W Street NE
Site Address: 1601 W St NE, Washington, DC 20018
Lat/Long: 38.918919, -76.980300
Horizontal Collection Method: Address Matching-House Number
Reference Point: 1601 W St NE, Washington, DC 20018

EJSCREEN provides information on eleven different EJ Indexes. Each EJ Index combines one environmental measure with demographic data to characterize potential areas of EJ concern that may warrant further consideration or analysis.

According to the EJSCREEN Common User Guidelines, a site will be considered a good candidate for additional review when an EJSCREEN analysis for that area shows one or more of the eleven Primary EJ Indexes is at or above the 80th percentile in the **nation**. Region III's protocol when conducting an additional screening review is that if the site is **also** located in an area where one or more of the eleven Primary EJ Indexes is at or above the 80th percentile for the **state**, that

site is in an area of potential EJ concern. An area may also warrant additional review if other readily available information suggests the potential for EJ concerns. For this assessment information was considered on the block group which contains the site as well as using a one-mile radius around the site due to sparse population.

When considering the block group which contains **1601 W St NE, Washington, DC 20018,** and the area within a one-mile radius around the facility, ALL of the primary EJ Indexes are at-or-above the 80th percentile in the nation and several are above the 80th percentile in the state. For the one-mile radius area around the facility, the Percentage of people of Color Population is 84% (vs 64% in the state) and Low-income Population is at 39% (vs 29% state). The EJSCREEN assessment indicates this is an area of EJ concern.

The EJSCREEN report is included in the Joint Appendix and contains all state, national and regional percentiles for EJ indicators and demographic data. The EJSCREEN is a screening tool for pre-decisional use only. It can help identify areas that may warrant additional consideration, analysis, or outreach. It does not provide a basis for decision-making, but it may help identify potential areas of EJ concern. Users should keep in mind that screening tools are subject to substantial uncertainty in their demographic and environmental data, particularly when looking at small geographic areas. Important caveats and uncertainties apply to this

screening-level information, so it is essential to understand the limitations on appropriate interpretations and applications of these indicators. Please see EJSCREEN documentation for discussion of these issues before using reports. This screening tool does not provide data on every environmental impact and demographic factor that may be relevant to a particular location. EJSCREEN outputs should be supplemented with additional information and local knowledge before taking any action to address potential EJ concerns. This version of EJSCREEN (https://www.epa.gov/ejscreen) is available to the public and the attachment may be shared. Do not release Region III's protocols associated with EJSCREEN.

For Inclusion in Case Conclusion Data Sheets/ICIS:

EJSCREEN Flag National: __X__Yes _____No
EJSCREEN Flag State: __X__ Yes _____No

Enhanced Review for Potential EJ Concerns:
__X__ Enhanced Review – Potential EJ Concern Found
_____ Enhanced Review – Potential EJ Concern Not Found
_____ No Enhanced Review

Basis of EJ Determination (Select all that apply):
_____ Community Self-Identification
__X__ EJSCREEN data
_____ EPA knowledge of community (including inspector observation)
_____Other bases
_____Other Federal Government knowledge of community/location
_____Public Input
_____State/Local/Tribal Government knowledge of community/location

Explanation of Basis:

When considering the block group which contains **1601 W St NE, Washington, DC 20018,** and the area within a one-mile radius around the facility, ALL of the primary EJ Indexes are at-or-above the 80th percentile in the nation and several are above the 80th percentile in the state. For the one-mile radius area around the facility, the Percentage of people of Color Population is 84% (vs 64% in the state) and Low-income Population is at 39% (vs 29% state).

The District of Columbia Environmental Policy Act

The plain, unambiguous language of the District of Columbia Environmental Policy Act of 1989, D.C. Code § 8-109 et seq. (2001 Edition, as amended) is noticeably clear. Appellees and the Trial Court ignored the Act, failed, and refused to follow it, which has as its purpose:

"To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner."

D.C. Code § 8-109.03(a) requires the preparation of an Environmental Impact Study ("EIS") for any "major action that is likely to have substantial negative impact on the environment;" and D.C. Code § 8-109.01(1) defines major action as

"any action that costs over $1,000,000 and that may have a significant impact on the environment."

"Absent a clearly expressed intention to the contrary, language must be regarded as conclusive." See *United States v. Kirby*, 74 U.S. 482 (1868); *Rector Holy Trinity Church v. United States* 143 U.S. 457 (1892); *Chung Fook v. White*, 264 U.S. 443 (1924); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

The relevant regulations illuminate the statutory language: DCMR Title 20, Chapter 7200.1; 20 DCMR Title 20, Chapter 7201.2 (Major Actions for Which Environmental Impact Screening Forms are required; 20 DCMR 7201.2(i); 20 DCMR Sec. 903; and 20 DCMR Sec. 1506. The cost of most of the current construction ($20 million) is obviously over $1,000,000 (which must be adjusted to current dollars. Any objectionable construction within the neighborhood should be viewed through the lens of the Environmental Policy Act.

An Environmental Impact Statement is required for this Project

The D.C. Environmental Protection Act requires the preparation of an Environmental Impact Statement (EIS) for any "major action that is likely to have substantial negative impact on the environment," D.C. Code § 8-109.03(a). The statute defines an "action" as "a project or activity that involves the issuance of a lease, permit, license, certificate, other entitlement, or permission to act by an agency of

the District Government, *Id.* § 8-109.02(1). In addition, a "major action" is defined to be "any action that costs over $1,000,000 and that may have a significant impact on the environment [,]" D.C. Code § 8-109.02(2)." Agents of Appellees have indicated in writing that these provisions of law have not been complied with by Appellees.

The Advisory Neighborhood Commission Act was never satisfied by Appellees

Despite never having been provided with Notice or an opportunity to state its views, on 17 November 2021, the ANC5C Commissioners[6] unanimously passed a motion to oppose the OSSE bus terminal. When there are plans for construction, citizens have the right to notice and participation before such construction can begin. Notice to ANCs of certain actions or proposed actions by the District Government is governed by sections 13(b) and (c) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.) (Collectively referred to as the ANC Act). Subsection (b) states:

[6] The ANC affected by the proposed "W" Street Bus Terminal. The ANC Resolution opposing the Bus Depot is found at pages 89 and 90 of the Joint Appendix. The Affidavit of ANC Commissioner Oliver is found at pages 121-123.

"Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single member district affected by said actions, and to each affected Ward Councilmember, except where shorter notice on good cause made and published with the notice may be provided or in the case of an emergency and such notice shall be published in the District of Columbia Register. In cases in which the 30-day written notice requirement is not satisfied, notification of such proposed government action or actions to the Commissioner representing the affected single member district shall be made by mail. The Register shall be made available, without cost, to each Commission. A central record of all such notices shall be held by the Office of Advisory Neighborhood Commissions," D.C. Code § 1-309.10 (a) and (b) (2004 Supp.)

Notice of actions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation, must be given to each affected Commission area, D.C. Code § 1-309.10(c)(1) (2004 Supp.). Notice must also be given to each affected Commission "before the award of any grant funds to a citizen organization or group, or before the formulation of any final policy decision or guideline with respect to grant applications, comprehensive plans, requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area, the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems," D.C. Code Section 1-309.10(d)(3)(A) (2001 Edition, as amended).

The issues and concerns raised by ANC officials shall be given great weight during the deliberations by the governmental agency and those issues shall be discussed in the written rationale for the governmental decision taken. Citizens are not without recourse as the landscape of Washington, D.C. rapidly changes.

Notwithstanding clear, unequivocal statutory mandates Appellees elected to ignore the law regarding notice to the affected ANCs; and because notice is typically not provided the affected ANCs often have no opportunity to have their views timely considered. The Brentwood Bus Depot is not about liquor licenses, alley closings or neon signs in restaurants. This situation is about life, air quality, traffic congestion, noise pollution, the health, safety and lives of District citizens.

Notice to ANCs of certain actions or proposed actions by the District Government is governed by sections 13(b) and (c) of the Advisory Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.) (collectively the ANC Act).

Other Violations of Law and regulations by Appellees

The recent *Durant* Case signaled change in the District of Columbia with The *Durant* Case, *Durant v. District of Columbia Zoning Commission*, 139 A.3d

880 (D.C. 2016). In *Durant*, this Honorable Court stated, "We normally defer to [an] agency's decision so long as it flows rationally from the facts and is supported by substantial evidence." *Levy v. District of Columbia Rental Hous. Comm'n,*126 A.ed 684, 688 (D.C.2015). Specifically, "[b]ecause of the Commission's statutory role and subject-matter expertise, we generally defer to the Commission's interpretation of the zoning regulations and their relationship to the Comprehensive Plan," *Howell v. District of Columbia Zoning Comm'n,* 97 A.3d 579, 581 (D.C.2014). "We do not defer, however", the Court stated, "to an agency interpretation that is unreasonable or contrary to the language of the applicable provisions, e.*g., Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment,* 642 A.2d 125,128 (D.C.1994)." In the end, the D.C. Court of Appeals concluded, "For the foregoing reasons, we conclude that the Commission has failed to justify a conclusion that the proposed PUD would be a moderate-density use." The Application was denied.

Open Meetings and Transparency – Government in the Sunshine

D.C. Code § 1-207.42 requires that only meetings "at which official action of any kind is taken" need be open to the public. Following that command, public officials meet secretly to deliberate and formulate their positions and invite the

public in only to witness the formal voting, after the deed is done. That is what happened in the instant situation.

In passing the D.C. Home Rule Act, Congress made it clear that public observation of the governmental decision-making process has a salutary effect.[7] The Sunshine Amendment was offered on the House Floor and accepted without substantive debate.[8] In executing and issuing the Executive Order, the Mayor's Office failed and more recently continues to fail to comply with the provisions of the Sunshine Amendment in the Self Government Act which states, "(a) all meetings (including hearings) of any department, agency, board or commission of the District government, including meetings of the District Council, at which official action of any kind is taken shall be open to the public. *No resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at such meeting*."[9] (emphasis supplied). These are all final and formal actions. There are no exceptions as are contained in the statutes of some other jurisdictions. At the time of passage of the Self Government Act, several Florida court rulings were instructive. For a meeting to be public, it was not enough that it be held in a public

[7] A Law Review Article in support of open meeting laws and frequently read at the time the Self Government Act passed is *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 Harvard Law Review 1199, 1200 – 1203 (1962).
[8] 119 Congressional Record H 8836 (daily edition October 10, 1973).
[9] Self-Government Act, Section 742, 87 Stat. 831 (1973).

place, it could only be deemed public if there was advance notice and reasonable opportunity for citizens to attend. *Bigelow v. Howze*, 291 So. 2d 645, 647-48 (Fla. Dist. Ct. App. 1974). And see *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. Dist. Ct. App. 1973), where the court held, "Although the [Sunshine Law] does not specifically mention such a requirement, as a practical matter *in order for a public meeting to be in essence 'public,' we hold reasonable notice thereof to be mandatory*." (Emphasis supplied).

Appellants have Standing

Before refusing to grant injunctive relief, the Trial Court stated that it would likely find Standing for the Plaintiffs in the instant Case; then in its Order of Dismissal, the Trial Court questioned the Standing of Plaintiffs. This was a grave error. As the United States Supreme Court has observed, imminent harm encompasses threatened" as well as "actual" injury, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). And see *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 99 (1979). Even a "small probability" of harm is sufficient to take a lawsuit out of the category of "hypothetical," *Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Indeed, "relatively minor increments of risk" qualify for standing and meet the requirements of *Lujan, Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228,

1231-1234 (D.C. Cir. 1996). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court endorsed the "partial assignment" approach to standing to sue, allowing private individuals to sue on behalf of the U.S. government for injuries suffered solely by the government. The United States Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), found that Massachusetts and eleven other states had standing, due to its "stake in protecting its quasi-sovereign interests" as a state, to sue the EPA over potential damage caused to its territory by global warming. The Court rejected the EPA's argument that the Clean Air Act was not meant to refer to carbon emissions in the section giving the EPA authority to regulate "air pollution agent[s]".And, in an even later environmental Case, on November 2, 2018, the U.S. Supreme Court announced that the trial in a case brought by 21 people, including minors, against the federal government for its role in the global warming crisis, could continue, *Juliana v. United States*, 10 U.S. 327 (2018).

Standing is the legal right to initiate (participate in) a lawsuit. A party must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. There are three requirements for standing: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or

hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). In deciding whether a party has standing, a court must consider the allegations of fact contained in the complaint and affidavits in support of the party's assertion of standing. See *Warth v. Seldin*, 422 U.S. 490, 501 (1974). And see *Warth*, 422 U.S. at 501 (when addressing motion to dismiss for lack of standing, both the D.C. Superior Court and the Court of Appeals must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing. Standing is founded "in concern about the proper--and properly limited--role of the courts in a democratic society, "*Warth*, 422 U.S. at 498. In the instant matter, Appellants show 1) concrete personal injuries that are actual or imminent; 2) that are clearly traceable to Appellees' conduct; and 3) that are "likely" to be redressed if the relief sought is granted, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Appellants meet the Standing requirements. The evidence at this stage, clearly demonstrates that the actual or

imminent threat of personal injuries test is met. These are probabilistic injuries. And these injuries are traceable to the acts of Appellees. Moreover, at this stage Appellants' burden is at a point where a Tribunal must, "… presume that general allegations embrace the specific facts … necessary to support the claim," *Lujan* at 561.[10] Given that the fate of the injury and damages that is the subject of this Complaint can only be fully protected by the Appellants, Standing cannot be questioned. *Riverside Hospital v. D.C. Department of Health*, 944 A.2d 1098 (2008) in fact found that Plaintiff had standing to assert its rights.

Appellees own words, declarations against interest, take Appellants' grievances out of the area of speculative, "The site has been confirmed to contain elevated levels of volatile organic compounds in select areas as outlined in the Environmental Site Assessment. Furthermore, seven (7) subgrade and abandoned tanks

[10] As the United States Supreme Court has observed, imminent harm encompasses "threatened" as well as "actual" injury, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). And see *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 99 (1979). Even a "small probability" of harm is sufficient to take a lawsuit out of the category of "hypothetical," *Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Indeed, "relatively minor increments of risk" qualify for standing and meet the requirements of *Lujan*, *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1231-1234 (D.C. Cir. 1996). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court endorsed the "partial assignment" approach to standing to sue, allowing private individuals to sue on behalf of the U.S. government for injuries suffered solely by the government.

are confirmed to be within the property area. Both soil remediation and tank removal be required for this project." And those words of Appellees undergird and reinforce the words of multiple expert views, unrebutted and uncontested admonition from a range and growing number of lettered, health experts[11] about the cumulative and ongoing threat to the health, safety and life of residents in the Brentwood Neighborhood of Washington, D.C.[12] Appellees state in their EIF, "All disturbed soil which has been confirmed to be contaminated with petroleum shall be remediated and backfilled as required by DOEE. Any tanks found within the building footprint are to be removed or abandoned in-place in compliance [with] all regulatory codes. Positive drainage shall be provided throughout the site in conjunction with designated bio-retention areas as outlined on the site plan attachments." The concreteness of Appellants' claims are further underscored by the EJSCREEN of the Environmental Protection Agency and Appellees' own Health Equity Report. And, how much more concrete can one get than the sworn claims of Brentwood Residents, below?

Appellants Met the Legal Standards for Injunctive Relief

The Trial Court refused to maintain the status quo, by not granting an

[11] Now numbering fourteen (14).
[12] See *Plaintiffs' Exhibit A*, included as part of Plaintiffs' Appendix.

interim injunction to Appellants, even though the four-part test for such an injunction was met. A plaintiff may demonstrate its entitlement to preliminary injunctive relief by showing that (1) it has a substantial likelihood of success on the merits, (2) it would suffer irreparable injury if injunctive relief is denied; (3) injunctive relief would not substantially injure the opposing party or other third parties; and (4) injunctive relief would further the public interest, *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "These factors interrelate on a sliding scale and must be balanced against each other," *Davenport v. AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). Thus, "[a]n injunction may be justified … where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury," *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). The purpose of injunctive relief "is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The instant matter more than satisfies all four prongs of this standard.

a. Plaintiffs are likely to succeed on the merits "[A]n injunction may be justified … where there is a particularly strong likelihood of success on the merits," *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). If a movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make

as strong a showing on another factor, *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). The factors for securing injunctive relief have typically been evaluated on a sliding scale, *Id.* at 1291. A court's "first step" is to balance the likelihood of irreparable harm to the plaintiff with the likelihood of harm to the defendant, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). "If a decided imbalance of hardship should appear in plaintiff's favor," a lesser demonstration of likelihood of success would be required," *Blackwelder Furniture Company v. Selig Manufacturing, Inc.*, 550 F.2d 189, 195 (4th Cir. 1977). "The plaintiff need only raise questions going to the merits … as to make them fair ground for litigation and thus more deliberate investigation," *Id.* This Bus Depot, if it is allowed to go forward, will, for ten years or more, place its buses within feet of the historic Crummell School, in the heart of Ivy City, a residential Community, at least 20% of whom already suffer from respiratory illnesses. Appellees will not suffer substantial harm if the requested relief is issued. Indeed, the License Agreement entered between the Appellees allows flexibility for the District of Columbia to locate or relocate the proposed bus depot at an alternative site. The public interest favors granting relief It is always in the public interest when laws, regulations and policies are not properly followed, *Air Terminal Services, Inc. v. Department of Transportation*, 400 F. Supp. 1029 (D.D.C. 1973),

aff'd 515 F.2d 1014 (D.C. Cir. 1975). These Appellees have flaunted District of Columbia and Federal laws in many ways, at many levels. The public interest favors granting declaratory and injunctive relief when an Agency fails to competitively secure services as required, *Aero Corporation v. Department of the Navy*, 558 F. Supp. 404 (D.D.C. 1983). Federal courts routinely depart from a strict application of the traditional four-factor test when it comes to environmental cases. This movement can be traced in part to the United States Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153, 171, 195 (1978). In *TVA* the Court concluded that it had no choice but to enjoin the Tellico Dam project—after construction of the dam was nearly complete at a cost in excess of $150 million, based on the finding that the project would violate the Endangered Species Act. Indeed, injunctions are favored where harm to the environment is alleged, and some federal courts suggest that injunctions are "usual" in environmental litigation, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010). ***The environment, once destroyed, is not likely to be repaired. Human health, safety and life, once lost, cannot be restored. Injunctive relief is the only way to preserve our air, promote green space, protect citizens, and a future for those who come after us***.

Additional, Relevant Legal and Factual Background

Although many courts do not compel complainants to present comparator evidence,[13] an important element of a *prima facie* case of disparate treatment is a showing that two similarly situated things were treated differently. The U.S. Supreme Court laid out the elements of a *prima facie* case of discrimination. In the instant Case, a prima facie case is shown by establishing that Plaintiffs 1) are members of a protected class;[14] 2) suffer regular adverse, disparate treatment at the hands of Defendants; and 3) similarly situated residents, outside of the protected class, receive more favorable treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). All of the elements of the *McDonnell Douglas* test are met. "[T]he burden of establishing a *prima facie* case of disparate treatment is not onerous," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A

[13] See *Brown v. Henderson*, 257 F.3d 246, 253 (2d Cir. 2001) ("Thus, though it is helpful in proving sex discrimination, we have held that it is not strictly necessary for a plaintiff to identify an employee who was treated more favorably than the plaintiff and who was similarly situated to the plaintiff, except for being of the opposite sex."); *Sarullo v. U.S. Post. Serv.*, 352 F.3d 789, 798 n.7 (3d Cir. 2003); *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); and *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 859 n.9 (8th Cir. 2005) ("Of course, a discharged employee need not rely on comparisons with similarly situated employees to prove unlawful discrimination.) "Nothing in the case law in this circuit requires a plaintiff to compare [himself] to similarly situated co-workers to satisfy the fourth element of [his] prima facie case," *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000).

plaintiff can establish a *prima facie* case by "offering evidence adequate to create an inference that decisions by those authorized to make them were based on a [illegal] discriminatory criteria, " *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846 (9th Cir. 1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)); and see *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (plaintiff can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test if plaintiff provides evidence suggesting decision was based on discriminatory criteria), *United States v. Loud Hawk*, 784 F.2d 1407 (1986). A complainant who provides such evidence for his or her *prima facie* case may be able to survive summary judgment on this evidence alone, *Lowe*, 775 F.2d 998, at 1008. "The purpose of America's laws is the removal of artificial, arbitrary, and unnecessary barriers to [equal treatment] when the barriers operate invidiously to discriminate on the basis of … impermissible classification," 411 U.S. 792, 800-801 (1973). In sum, *McDonnell Douglas* enunciates that the primary purpose of laws banning discrimination is to assure neutral treatment practices and decisions. In this Case, the Brentwood Community has been treated differently than all other District of Columbia communities when it comes to the location of toxic facilities.

No Real Concern about Traffic Impacts that would result from the Bus Depot

As early as 26 February 2020, Brentwood Residents sought the purported Traffic Study that had been undertaken by Appellees to justify locating the proposed Bus Terminal amongst their homes.[15] That request was preceded by a Petition, signed by close to 200 Brentwood Residents, signed and presented on 29 January 2020 to, among others, several of Appellees' agencies (including DGS, OSSE and DDOT). The Petition, ignored by Appellees, "strongly objected" to the proposed Bus Depot.

Appellees undertook a one-day traffic study, about which the Consultant hired to do so at a community meeting on 28 June 2020, stated publicly that he "wouldn't 'stake his license' on the assessment." In addition to the 250 buses that will be traversing this Neighborhood as early as 4:00 a.m. in the morning; there will be 500 additional employees who, due to limited public transportation, will further congest traffic, and worse, take up the very limited neighborhood parking especially on "W" Street, across from the proposed Facility. Shockingly, the traffic study concedes that among the 250 buses to be operational, one will leave every 40 seconds during morning hours, and one will return every 30 seconds during evening hours.

Further Relevant Legal and Factual Background

Appellees, who are pushing the ill-conceived "W" Street Bus Depot in

[15] The Traffic Study requests are found at pages 108 and 109 of the Joint Appendix.

Brentwood, seem to share the Trump view --- laws don't apply to them. This proposal has moved forward, contrary to law, without an Environmental Impact Statement; without formal notice to the citizens; without giving residents meaningful input; without transparency; without regard to the Comprehensive Plan; without required attention to Zoning issues; apparently without competitive bidding or concern for the First Source Law; and, of course, without regard to the historic inequities of such projects in Ward Five in general and Brentwood in particular. Requests made to Appellees for appropriate environmental assessments have been ignored.

The Disproportionate Impact, Disparate Treatment, Discrimination

Both disparate impact and disparate treatment are discriminatory practices. Disparate impact is often referred to as unintentional discrimination, whereas disparate treatment is intentional. Disparate impact occurs when policies, practices, rules or other systems that appear to be neutral result in a disproportionate impact on a protected group.

Burdens of proof for a claim of disparate treatment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e) et. seq. (1982) was established in the U.S. Supreme Court, and that D.C. Courts generally follow the Title VI analysis in discrimination cases. Respondents have treated Complainants and all of Brentwood differently, disparately and discriminatorily.

As indicated, although many courts do not compel plaintiffs to present comparator evidence,[16] an important element of a *prima facie* case of disparate treatment is a showing that two similarly situated individuals or classes were treated differently. The U.S. Supreme Court laid out the elements of a *prima facie* case of discrimination. In the instant matter a *prima facie* case can be shown by establishing that 1) Plaintiffs are members of a protected class;[17] 2) Plaintiffs suffered adverse, disparate, wrongful action at the hands of Defendants; and 3) similarly situated individuals or classes, outside of the protected class, receive more favorable treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). All of the elements of the *McDonnell Douglas* test are met. "[T]he burden of establishing a *prima facie* case of disparate treatment is not onerous," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A plaintiff can establish a

[16] See *Brown v. Henderson*, 257 F.3d 246, 253 (2d Cir. 2001) ("Thus, though it is helpful in proving sex discrimination, we have held that it is not strictly necessary for a plaintiff to identify an employee who was treated more favorably than the plaintiff and who was similarly situated to the plaintiff, except for being of the opposite sex."); *Sarullo v. U.S. Post. Serv.*, 352 F.3d 789, 798 n.7 (3d Cir. 2003); *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); and *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 859 n.9 (8th Cir. 2005) ("Of course, a discharged employee need not rely on comparisons with similarly situated employees to prove unlawful discrimination.) "Nothing in the case law in this circuit requires a plaintiff to compare [himself] to similarly situated co-workers to satisfy the fourth element of [his] prima facie case," *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000).

prima facie case by "offering evidence adequate to create an inference that decisions by those authorized to make them were based on a [illegal] discriminatory criteria, " *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846 (9th Cir. 1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)); and see *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (plaintiff can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test if he or she or they provides evidence suggesting rejection was based on discriminatory criteria), amended, 784 F.2d 1407 (1986). The D.C. Human Rights Commission citing *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir.1981), which held that an employee proves a prima facie case when she shows that "two employees were involved in or accused of the same offense and are disciplined in different ways." This question was precisely the inquiry made by the Court in a recent matter, *Coleman v. Donahoe*, 667 F.3d 835 (2012). In *Coleman*, the Court stated, "… we reiterate here that the similarly situated inquiry is flexible, common-sense, and factual. It asks 'essentially, are there enough common features between the individuals to allow a meaningful comparison?' *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir.2007), aff'd, 553 U.S. 442 (2008).

The D.C. Human Rights Act Protects Residency

The D.C. Human Rights Act was enacted by the D.C. Council with the intention "…to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit …" It is a broad remedial statute, to be generously construed, *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The Courts have also described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds," *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000). The Act applies to the District Government, D.C. Code § 2–1402.73, and does not allow discrimination based upon residence.

In *Rap, Inc. v. D.C. Com'n on Human Rights* 485 A.2d 173 (1984), the D.C. Court of Appeals noted that the order and burdens of proof for a claim of disparate treatment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e) et. seq. (1982) was established in the U.S. Supreme Court, and that D.C. Courts generally follow the Title VI analysis in discrimination cases brought under the D.C. Human Rights Act. Citing *Greater Washington Business Center v. District of Columbia Commission on Human Rights*, 454 A.2d 1333, 1338 (D.C.1982); and *Newsweek Magazine v. District of Columbia Commission on Human Rights*, 376

A.2d 777, 789 (D.C.1977). Appellees have treated all of Brentwood differently, disparately and discriminatorily than the remainder of Washington, D.C.

Conclusion

Notwithstanding having flouted, scoffed at and wholly ignored, disregarded and disobeyed the plain, clear unambiguous language of multitudinous statutory and regulatory mandates in the District of Columbia; and notwithstanding the unrebutted and uncontested admonition from a range and growing number of lettered, health experts[18] about the cumulative and ongoing threat to the health, safety and life of residents in the Brentwood Neighborhood of Washington, D.C., Appellees, in Trump-like fashion, have forged forward with the construction of a $20 million Bus Terminal, in the heart of that Community.

If Appellees are not enjoined and stopped, now, they will put at even greater risk and exposure seniors, the young and all persons affected and aggrieved. Because of Appellees, the residents of Brentwood face, "… the potential increase in traffic-related pollutants and noise due to the bus terminal [that] can contribute further to current poor health outcomes in the Brentwood neighborhood. While CO levels projected in the air quality analysis are below NAAQS, the increases in traffic-related pollutants and noise are likely to be at a level that increases health risks for residents

[18] Now numbering Fourteen (14).

of all ages, starting **as early as prenatal and childhood** development." (Emphasis supplied). In the United States Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153, 171, 195 (1978), the Court concluded that it had no choice but to enjoin the Tellico Dam project—after construction of the dam was nearly complete at a cost in excess of $150 million, based on the finding that the project would violate the Endangered Species Act. Indeed, injunctions are favored where harm to the environment is alleged, and some federal courts suggest that injunctions are "usual" in environmental litigation, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010). **The environment, once destroyed, is not likely to be repaired. Human health, safety and life, once lost, cannot be restored. Injunctive relief is the only way to preserve our air, promote green space, protect our citizens and maintain a future for those who come after us**.

Respectfully Submitted,

/s/ *Johnny Barnes*

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Dated: 19 September 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, a true copy of the foregoing Brief and Appendix of Appellants was served upon the Court and all Counsel of Record using the Court's Electronic Service System.

/s/ ***Johnny Barnes***

Dated: 19 September 2022 Johnny Barnes, D.C. Bar Number 212985