No. 22-CV-303

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

KEISHA STALEY, *et al.*,
APPELLANTS,

V.

DISTRICT OF COLUMBIA, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUES

Appellants Keisha Staley, Sharon Edwards, and Reggie Donaldson brought this suit to enjoin construction of a school bus terminal at 1601 W Street NE. Appellants' complaint posits a number of theories about why this terminal allegedly violates laws regarding the environment, human rights, public notice, and zoning, but it fails to allege that the terminal's construction will cause appellants any imminent, concrete harm. The Superior Court accordingly denied appellants a preliminary injunction (a decision they do not challenge on appeal) and then dismissed the complaint for lack of standing.

The issues presented on appeal are:

1. Whether appellants lack standing to pursue their claims where they failed to allege that they would suffer any imminent, concrete harm from the construction of the school bus terminal.

2. Alternatively, whether appellants have plausibly stated a claim for relief under any legal theory.

STATEMENT OF THE CASE

Appellants filed their complaint, JA 1-43, on October 27, 2021 and moved for a preliminary injunction on November 18. SA 2. The Superior Court held a preliminary injunction hearing on February 8, 2022 and orally denied appellants' motion the next day. SA 4-5. On February 23, the District of Columbia moved to

dismiss appellants' complaint. SA 5. The Superior Court granted that motion on March 24. SA 6; JA 124-31. Appellants timely appealed that dismissal on April 23. SA 6.

STATEMENT OF FACTS

Appellants' statement of the case (Br. 9-13) and statement of facts (Br. 13-20) contain no citations to the complaint. Instead, appellants' brief contains various assertions unsupported by any citation, and where the brief does cite documents, many were not part of the record before the Superior Court.[1] The Court may accordingly disregard these sections of appellants' brief or take other remedial measures. *See* D.C. App. R. 28(a)(8), (e); Order, *Staley v. District of Columbia*, No. 22-CV-303 (D.C. Aug. 22, 2022) (striking appellants' original brief for failure to comply with Rule 28, among others, and instructing appellants that failure to timely file a brief in compliance with this Court's rules would subject the appeal to

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[1] *See, e.g.*, Br. 10-11 (asserting without citation that Brentwood residents are more likely to suffer certain illnesses), 11 (asserting without citation that half of the District's "toxic facilities" are located in Ward 5), 11-12 (summarizing purported expert conclusions, citing no testimony or evidence), 12 n.3 (citing "Brentwood Mapping" graph at JA 132-135 that does not appear to be in the Superior Court record), 13 (asserting without citation purported facts about the bus terminal), 16-17 (quoting a February 25, 2022 email that does not appear to be in the Superior Court record), 18 (asserting without citation that more than half of the District's "Industrial Facilities" are located in Ward 5), 18-19 (asserting without citation that certain types of vehicles and facilities are located in Brentwood), 19 (citing photos at JA 91 that do not appear to be in the Superior Court record), 19-20 (asserting without citation various facts about Ivy City neighborhood).

dismissal). The following facts (none of which are subject to dispute) are drawn from the complaint, the documents incorporated in it by reference, as well as matters of public record.[2]

1. The District Plans To Construct A New School Bus Terminal To Replace An Existing Terminal In The Same Neighborhood.

This case concerns the construction of a terminal in the Brentwood neighborhood to house, fuel, and maintain school buses used by the Office of the State Superintendent of Education ("OSSE") to transport children with disabilities. *See, e.g.*, JA 2, 142. The District acquired the 4.27-acre parcel of land at 1601 W Street NE for the project in 2016. *See* JA 140-47 (Mayor's letter to Council with attachments); D.C. Council, *CA21-0401 - Proposed Agreement of Purchase and Sale with Crane Rental Company, Inc., a Delaware Corporation*, https://bit.ly/3AcIKPS (purchase deemed approved on June 6, 2016). The Department of General Services ("DGS") oversees the project's construction. *See* JA 140-47.

The new terminal is primarily designed to replace existing OSSE lots less than half a mile away along New York Avenue. JA 142, 150, 155. For many years, OSSE "has been seeking a long-term solution for its need for public school bus

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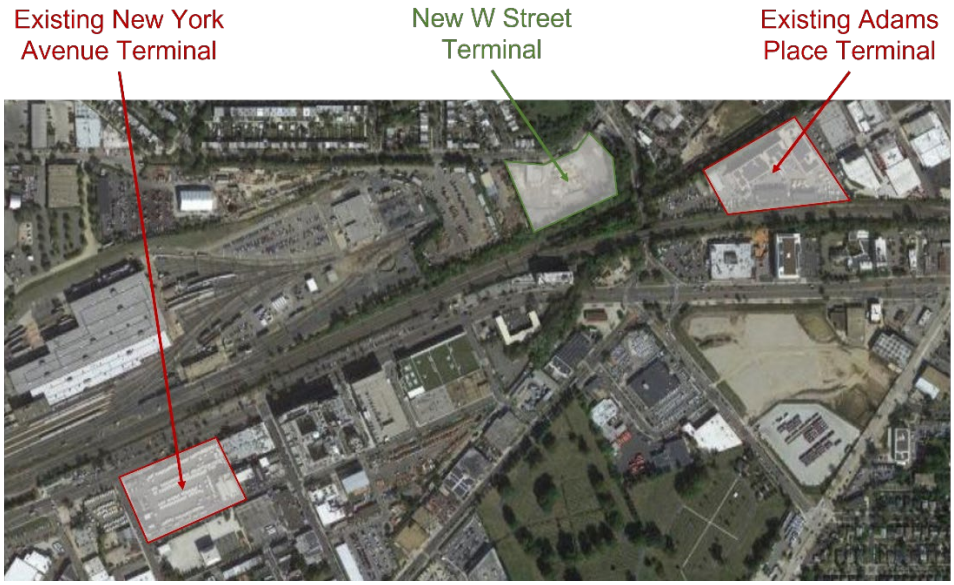
[2] As noted *infra* at 16, a court may consider matters outside the pleadings in deciding a Rule 12(b)(1) motion. And a court may take judicial notice of public records without converting a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010).

parking and maintenance" because its existing lots are on leased property (rather than property owned by the District) and do not include maintenance facilities. JA 142. Obtaining the land for the terminal was a challenge because of "the scarcity of real property in the District zoned for such use." JA 142. DGS determined that a new terminal at 1601 W Street NE was an "optimum solution" for OSSE because the land was competitively priced and properly zoned, and because its proximity to OSSE's existing terminals would minimize service disruptions. JA 142. DGS determined that no other suitable site existed for the terminal. JA 143. The following diagram illustrates the location of the new terminal, the New York Avenue terminal that it will replace, as well as OSSE's existing terminal on Adams Place:[3]



[3] The locations of the new and existing terminals are not subject to reasonable dispute, JA 150, 155, and the Court may properly take judicial notice of them on appeal. *See Bruno v. W. Union Fin. Servs., Inc.*, 973 A.2d 713, 716 n.3 (D.C. 2009).

In 2019, the District commissioned a traffic impact study for the project, which was published online. *Traffic Impact Study* (May 2019), https://bit.ly/3DEyaU1; *see* Br. 43 (referencing study). The study estimated that the project would generate no additional trips during morning peak hours and 82 additional trips per day during afternoon peak hours. *Traffic Impact Study* at 16. It concluded that all key intersections near the site were expected to continue to operate at acceptable traffic levels during peak periods. *Id.*

The District also published an air quality analysis for the proposed project. *Air Quality Analysis for the Proposed OSSE DOT Bus Terminal* (July 29, 2019), https://bit.ly/3Frnc5y. The analysis assessed current and estimated future levels of carbon monoxide (CO) in the area against the National Ambient Air Quality Standards ("NAAQS") established by the U.S. Environmental Protection Agency ("EPA"). *Id.* at 22. NAAQS establish maximum permissible concentrations of substances to protect public health, including sensitive populations. *See* JA 186; EPA, *Review of National Ambient Air Quality Standards for Carbon Monoxide*, 76 Fed. Reg. 54,294, 54,295 & n.1 (Aug. 31, 2011) (explaining NAAQS).

The air quality analysis concluded that the project would readily comply with the NAAQS for CO emissions. *Air Quality Analysis* at 22. Specifically, it estimated that the total maximum projected level of CO emissions in the area over a one-hour period would be 4.79 ppm, an increase of 0.38 ppm over the baseline concentration

of 4.41 ppm, and far below the NAAQS limit of 35.00 ppm. *Id.* Likewise, for the eight-hour metric, the report estimated a maximum of 2.61 ppm, an increase of 0.18 ppm over a baseline of 2.43 ppm and well under the NAAQS limit of 9.00 ppm. *Id.* In other words, the project was estimated to have a minimal impact on CO levels in the area, and even accounting for those additional emissions, the area would have a CO concentration at a fraction of the EPA's limit.

As Stephen Ours, Chief of the Air Quality Permitting Branch for the Department of Energy & Environment ("DOEE"), later testified, this analysis was performed in accordance with DOEE's then-existing procedures for a project of this type in analyzing only CO emissions. JA 184-85. The 2019 air quality analysis did not separately evaluate fine particulate matter ($PM_{2.5}$) emissions because at the time DOEE only required such an analysis for projects that intended to use diesel fuel. JA 185. The proposed terminal would serve only gasoline-fueled and, eventually, electric buses, neither of which produce significant quantities of $PM_{2.5}$. JA 185. Similarly, gasoline-fueled buses would not be expected to generate significant amounts of other types of pollutants such as sulfur dioxide, ozone, nitrogen dioxide, or lead. JA 185. Based on the conclusions of the air quality analysis, Mr. Ours testified that he believed at the time of the review that the project would not be expected to result in any "significant negative air quality effects," however, he also

stated that "further or revised information could require additional review of the project." JA 186.

The District held a series of briefings in 2019 for the local Advisory Neighborhood Commission ("ANC") and the public. *See* JA 150-51 (March 2019 briefing for ANC), 152-66 (May 2019 briefing for the public), 167-83 (October 2019 briefing for the public). These briefings discussed the proposed project in detail, and the October 2019 briefing carefully reviewed the results of the traffic and air quality studies. JA 175-180. Because the anticipated increase in CO was "very minimal," the project was not expected to create any noticeable difference in air quality in the surrounding area. JA 175.

In January 2020, the Department of Consumer and Regulatory Affairs ("DCRA") notified the local ANC that it had accepted an application for a building permit for the construction of the new terminal. JA 210-12. In June 2021, it notified the ANC that a permit had been issued. JA 188-92. In July, the Council approved the construction contract with Consys, Inc. *See* JA 193-209. In August, the Council rejected (11-2) a proposed budget amendment seeking to "delay[] the completion of the construction project taking place at 1601 W Street NE in Ward 5 to Fiscal Year 2023." Memorandum from Councilmember Kenyan R. McDuffie to Chairman Phil Mendelson (Aug. 2, 2021), https://bit.ly/3gtIeGI (introducing amendment); B24-0275, *Fiscal Year 2022 Local Budget Act of 2021*, https://bit.ly/3gtaoBD (noting

rejection of amendment on August 3, 2021). Demolition of the site's existing structures began in the fall of 2021.

In February 2022, DGS prepared an Environmental Impact Screening Form ("EISF"), a tool used to determine whether a formal Environmental Impact Statement ("EIS") must be prepared for a particular project. JA 92-104. The EISF noted that the site contained seven abandoned underground tanks, some of which would likely need to be removed, and that all disturbed soil contaminated with petroleum would be remediated and backfilled as required by DOEE. JA 96, 103. The form also referenced and attached the previously prepared air quality analysis and traffic study. JA 100, 101.

2. Appellants Sue To Enjoin Construction Of The Terminal.

Appellants are three Brentwood residents who allege they have various underlying health conditions, including asthma. JA 25. They sued to enjoin construction of the terminal in October 2021. The complaint asserts four theories of liability:

First, the complaint contends that the placement of the terminal violates the D.C. Human Rights Act (DCHRA), D.C. Code § 2-1401.01 *et seq.*, because it discriminates based on protected characteristics, including "race, color, age, place of residence and source of income." JA 27. The complaint does not specify what provision of the DCHRA—which prohibits discrimination in, among other contexts,

employment, housing, and public accommodations—was allegedly violated. And although the complaint contains no specific allegations of discriminatory animus, it appears to contend that the location of the bus terminal will have a disparate impact based on the racial composition and socioeconomic background of the neighborhood. *See* JA 28-31. Several paragraphs of Count I of the complaint also reference the D.C. Administrative Procedure Act and the Equal Protection Clause of the Fourteenth Amendment, but the complaint does not actually contend that either provision was violated. *See* JA 28-30.

Second, the complaint alleges that the construction of the terminal violates the D.C. Environmental Policy Act of 1989 ("DCEPA"), D.C. Code § 8-109.01 *et seq.*, because it was undertaken without completion of an EIS. JA 31-33. An EIS was required, according to the complaint, because the terminal qualified as a "major action that is likely to have a substantial negative impact on the environment." JA 31 (citing D.C. Code § 8-109.03(a)). Although the complaint asserts that appellants "have offered ample evidence that this Project will have a significant impact on the environment," JA 32, the complaint does not specify what environmental impact the terminal is expected to have.

Third, the complaint alleges that the District violated D.C. Code § 1-309.10, part of the Advisory Neighborhood Commissions Act of 1975 ("ANC Act"), D.C. Code § 1-309.01 *et seq.*, by failing to provide adequate written notice of the project

to the local ANC. JA 33-35. It also alleges that the District violated the open meetings provision of the Home Rule Act, D.C. Code § 1-207.42, because unspecified decisions by OSSE and other unnamed District agencies were not made at public meetings. JA 35.

Fourth, the complaint raises a claim about zoning. It does not contend that the terminal fails to comply with any zoning laws, but rather that the District of Columbia Zoning Commission failed to consider the DCEPA when it completed the District-wide Zoning Regulations Review in 2016. JA 35-38. This purported failure, the complaint contends, is "causing ongoing harm" of an unspecified nature to appellants. JA 37.

The complaint includes two exhibits. First, it includes an October 20, 2021 letter to Mayor Bowser and the Council from a group of "health and environmental equity experts outlining potential negative impacts of the bus terminal." SA 7-12.[4] The letter acknowledges that the July 2019 air quality analysis concluded that the project would have a minimal impact on CO levels in the area (which would not exceed the NAAQS), but nonetheless argues that this impact is "significant." SA 7. The letter notes that fetal exposure to CO has been associated with lower birth

[4] Appellant's appendix includes a different version of this letter, bearing the same date but signed by a different group of experts. *See* JA 44-50. The appendix's table of contents incorrectly identifies this document as "Complaint Exhibits."

weights, slower growth, higher infant mortality, and long-term effects on math and language skills and school absenteeism. SA 7-8. The letter does not contend that the bus terminal is likely to increase the risks of any of these harms, nor does it directly link any of these harms to appellants.

The letter also contends that the "community can expect increases in $PM_{2.5}$, [volatile organic compounds], nitrogen oxides (NOx) and ozone (O_3)," although it does not cite any research or evidence for this assertion or even explain why such increases should be expected given that the terminal will merely replace an existing terminal in the same area. SA 7. Although the letter identifies various health effects associated with $PM_{2.5}$ exposure, it does not allege that the bus terminal will create such effects. SA 8-9.

The letter also acknowledges the findings of the May 2019 traffic impact study. SA 9. The letter asserts that environmental noise exposure can be associated with certain adverse health effects, although it does not allege that the terminal is likely to create any such harms. SA 9.

The second exhibit attached to the complaint is an undated, unsigned draft ANC 5C resolution titled "Justice for Brentwood." JA 89-90. In addition to expressing political opposition to the terminal project and critiquing the 2019 traffic impact study as insufficiently robust, the draft resolution contends that the District failed to keep the ANC properly informed of the project and that an EIS was legally

required. JA 89. The letter does not acknowledge the written notices or briefings provided to the ANC and the public about the project.

3. The Superior Court Denies Appellants' Request For A Preliminary Injunction And Dismisses The Complaint For Lack of Standing.

Appellants moved for a preliminary injunction and the Superior Court held a hearing on February 8, 2022. The next day, the court issued an oral ruling denying the preliminary injunction. Appellants do not challenge that ruling on appeal.[5]

The District moved to dismiss the complaint for lack of standing and for failure to state a claim. As to standing, the District argued that the complaint failed to identify any concrete harm that appellants will imminently experience due to the terminal project. The District also explained that, even if appellants had standing, they failed to state any claim upon which relief could be granted. On their DCHRA claim, appellants failed to allege disparate impact based on race or another protected characteristic because the proposed terminal will replace an existing terminal in the same neighborhood. Appellants failed to allege a violation of the DCEPA because an EIS is required only for a "major action that is likely to have substantial negative

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[5] To the extent appellants' brief takes issue with the Superior Court's denial of a preliminary injunction, *see, e.g.*, Br. 37-40, the Court should disregard these passages. Appellants did not order a transcript of the Superior Court's oral ruling denying a preliminary injunction or of the hearing itself. By failing to establish a record of the preliminary injunction decision capable of this Court's review, appellants have waived any challenge to that ruling. *See* D.C. App. R. 10(b)-(c); *Cobb v. Standard Drug Co.*, 453 A.2d 110, 111-12 (D.C. 1982).

impact on the environment," and the complaint does not identify any substantial negative environmental impact the project is likely to have. Appellants did not allege a violation of the statute requiring written notice to the local ANC because DCRA provided the ANC written notice of the permitting process and the complaint does not allege that any additional notice would have affected the permitting decision. Nor does the complaint identify any formal action taken at a non-public meeting. Finally, appellants' zoning-related claim failed because, among other reasons, there was no change to the zoning of the area, which was already zoned to allow for transportation infrastructure like the bus terminal.

The Superior Court granted the District's motion to dismiss for lack of standing. The court found that the complaint and other documents presented by appellants "fail to establish with any degree of certainty that [appellants] have or will suffer an injury as a result of the Project." JA 128. The only analysis of the project's environmental impacts cited in the complaint, the court noted, was the 2019 air quality analysis. That study found that the project "would not likely result in significant negative air quality effects even when operating at maximum capacity and under worst case conditions." JA 128. Having done no competing analysis, appellants' concerns about potential environmental harms were based on "sheer speculation that is at odds with data and information in the record." JA 129. The court also rejected appellants' contention that the EISF's findings of existing soil

contamination at the site (which the project would remediate) plausibly alleged environmental harm to appellants. JA 129. As to any traffic-related harms, the court noted that the only data available on traffic impacts is the traffic study that concluded the project would not overburden existing traffic patterns. JA 130. Because appellants had not alleged an injury in fact that is "immediate and concrete," the court dismissed for lack of standing. JA 131.

Because the court dismissed the complaint for lack of standing, it did not address the District's alternative arguments that the complaint failed to state a claim upon which relief could be granted. Appellants timely brought this appeal. They did not seek an injunction pending appeal or other interim relief.

4. Following Dismissal, The District Conducts A New Air Quality Study And Continues Construction On The Terminal.

Since the dismissal of appellants' complaint, construction on the terminal has continued, and it is expected to be completed by mid-2023. One feature of the new terminal will be infrastructure to support electric buses, and OSSE plans to begin a pilot program once the terminal is operational. OSSE, *Responses to Fiscal Year 2021 Performance Oversight Questions* 285 (Feb. 18, 2021), https://bit.ly/3huRivv. In October 2022, the District received $7.6 million in rebates from the EPA to acquire 25 electric school buses. *See* EPA, *Biden-Harris Administration Announces Nearly $1 Billion from EPA's Clean School Bus Program for 389 School Districts* (Oct. 26, 2022), https://bit.ly/3WjNxb8.

In September 2022, the District commissioned a revised air quality analysis for the terminal, which was posted online for the public's review. *Air Quality Analysis (Final Submission)* (Sept. 16, 2022), https://bit.ly/3zCBtsl. That analysis, like the analysis completed in 2019, found that the project would have no significant impact on CO concentrations in the area, which would remain well below the NAAQS. *Id.* at 24. Unlike the 2019 analysis, the 2022 analysis also examined fine particulate matter ($PM_{2.5}$) emissions based on updated guidance from DOEE. *Id.* at 3. The analysis estimated that the terminal would have no measurable effect on concentrations of $PM_{2.5}$ in the area. *Id.* at 24. For both CO and $PM_{2.5}$, the modeled concentrations attributable to the bus terminal rounded to zero. *Id.* Total concentrations in the area were projected to remain constant or decrease on all metrics and stay well below the relevant NAAQS. *Id.*

STANDARD OF REVIEW

This Court reviews de novo a trial court's dismissal of a complaint for lack of jurisdiction or failure to state a claim. *Grayson v. AT & T Corp.*, 140 A.3d 1155, 1161 (D.C. 2011). Although not an Article III court, this Court still applies Article III's standing requirement in "every case," looking to both constitutional and prudential aspects of federal standing jurisprudence. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002).

The plaintiff bears the burden of establishing standing. *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015). When (as here) a defendant makes a factual attack on a plaintiff's standing, the court may consider "facts outside the pleadings that are undisputed by the plaintiff," *id.*, and "conduct an independent review of the evidence submitted by the parties, including affidavits, to resolve factual disputes concerning whether subject-matter jurisdiction exists," *Matthews v. Automated Bus. Sys. & Servs., Inc.*, 558 A.2d 1175, 1179 (D.C. 1989); *see Heard v. Johnson*, 810 A.2d 871, 877-78 (D.C. 2002) (differentiating factual from facial attacks on standing). "When the jurisdictional challenge is thus expanded, the plaintiff bears the burden of proof without the benefit of any presumption that the allegations of the complaint are true." *Vining v. Exec. Bd. of D.C. Health Benefit Exch. Auth.*, 174 A.3d 272, 281 (D.C. 2017).

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Grayson*, 140 A.3d at 1162 (internal quotation marks omitted). Although the Court must accept as true all factual allegations contained in the complaint, it need not accept legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

SUMMARY OF ARGUMENT

1. The Court should affirm the dismissal of appellants' complaint because they failed to allege an injury-in-fact sufficient to give them standing. To qualify as an injury-in-fact, the harm to appellants must be "concrete and particularized" and "actual or imminent," not merely hypothetical. Here, appellants appear to contend that the proposed school bus terminal might have some unspecified impact on the environment that could injure them in the future. But the complaint does not allege that the project will create any specific environmental risks, and appellants do not explain how it could harm them personally. In their brief, appellants focus on evidence that the project will *remediate* preexisting soil pollution, but do not describe how this will cause a concrete, imminent harm to the environment or to their health.

The efforts by appellants and their amicus to minimize the injury-in-fact requirement in environmental cases lack merit. The D.C. Circuit and other courts have repeatedly stressed that plaintiffs in such cases must connect the challenged action to a concrete risk that will affect them personally and explain how enjoining the project would reduce the probability of that harm occurring. Living in close proximity to a construction site is not enough to create standing unless there is a "substantial" risk that the plaintiff will suffer some injury as a result. Appellants have not shown as much here, so dismissal was warranted.

2. Even if appellants had standing, they failed to state a claim upon which relief could be granted. Appellants' primary contention is that the decision to grant a construction permit for the project violated the DCEPA because the District did not first complete an EIS. But an EIS is required only if a project qualifies as a "major action that is likely to have substantial negative impact on the environment." D.C. Code § 8-109.03(a). Appellants have never identified what "substantial negative impact" the bus terminal is "likely" to have. The 2019 air quality analysis (which appellants themselves cited in the letter attached to the complaint) concluded that the project was likely to have no significant impact on air quality. The updated study completed in 2022 was even more comprehensive and estimated that the project's effects on CO and $PM_{2.5}$ levels in the area would be too small to be measurable. And the 2019 traffic study (again referenced in an attachment to the complaint) found the project would not significantly affect traffic patterns in the neighborhood. Since appellants have not articulated how the project is "likely" to have a "substantial negative impact" on the environment—an allegation that would be at odds with the evidence they cite—they have not plausibly alleged that the District was required to prepare an EIS or otherwise violated the DCEPA.

Appellants' remaining claims are similarly without merit. The complaint does not state a claim under the DCHRA because the proposed bus terminal is not a restriction on access to a government service subject to D.C. Code § 2-1402.73.

Moreover, the terminal will replace an existing terminal in the same neighborhood, so it cannot have a disparate impact based on the neighborhood's demographic composition. Appellants have not alleged a violation of the ANC notice requirements in D.C. Code § 1-309.10 because the ANC was indisputably notified of the project and there is no allegation that any additional notice would have changed the outcome of any decision related to the project. There was no violation of the open meeting requirement in D.C. Code § 1-207.42 because appellants have not identified any decision made at a non-public meeting. Finally, to the extent appellants are continuing to press a zoning-related claim, it necessarily fails because the parcel at issue was already zoned to permit its use as a bus terminal, so there was no violation of zoning laws or any zoning-related decision susceptible to legal challenge.

ARGUMENT

I. The Superior Court Correctly Dismissed Appellants' Complaint Because They Failed To Allege An Injury-In-Fact.

The Superior Court correctly dismissed this case because appellants have failed to establish that they will suffer an injury-in-fact sufficient to create standing. To demonstrate standing, a party must show that (1) they have suffered or will suffer an injury-in-fact, (2) there is a causal connection between the injury and the conduct of which the party complains, such that the alleged injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely

speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Padou v. D.C. Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013). An injury-in-fact requires an invasion of a legally protected interest which is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Friends of Tilden Park*, 806 A.2d at 1207 (quoting *Lujan*, 504 U.S. at 560). Alleged harms "shared in substantially equal measure by all or a large class of citizens" are not particularized injuries; they are generalized grievances that do not "warrant exercise of jurisdiction." *Padou*, 70 A.3d at 212 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

A. Appellants do not allege that the terminal will cause them any cognizable injury-in-fact.

Appellants acknowledge that the District's decision to build the OSSE bus terminal has not caused them any "actual" injury to date; instead, they contend that the terminal's operation threatens to cause "probabilistic injuries" sometime in the future. Br. 36. In other words, they assert that there is a *chance* the terminal will negatively affect the surrounding environment, thereby increasing the *possibility* that they will eventually suffer some harm. But this chain of hypotheticals is unsupported by the complaint and insufficient to show that appellants are at risk of "imminent" harm. Appellants have not articulated any injury that is adequately concrete to take their concerns out of the realm of conjecture.

Increased health risks due to a project's environmental impacts satisfy the imminence requirement of an injury-in-fact only under certain conditions. Because "[e]nvironmental and health injuries often are purely probabilistic," plaintiffs must "demonstrate a 'substantial probability' that they will be injured." *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 6-7 (D.C. Cir. 2006) (statistical evidence that two to four members of an organization would develop cancer as a result of a particular governmental action was adequate to support standing). As then-Judge Kavanaugh explained, courts have found standing in increased-risk-of-harm cases "when there was at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007). "[T]he proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm—such as death, physical injury, or property damage from car accidents—as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes." *Id.* at 1298.

Here, the complaint does not identify any specific "ultimate alleged harm." The body of the complaint, although replete with allegations that Brentwood residents are *already* more likely than other District residents to be afflicted by certain health conditions, *see, e.g.*, JA 2-4, contains scant allegations about the

effects of the proposed terminal. Indeed, the body of the complaint does not allege that the terminal will affect the environment *at all*, much less that it will create a downstream risk of harming nearby residents.

The October 2021 letter attached to the complaint hints at some possible risks associated with the project, but it too is devoid of any specifics suggesting appellants face an imminent, concrete harm. For instance, the letter argues that fetal CO exposure is associated with certain adverse health outcomes in infants and children, citing research concluding that "[i]ncreases in ambient CO as low as 1.4 ppm for mothers in their first trimester impact pregnancy outcomes, with lower birth weights and slower growth." SA 8. But this assertion has no relevance to this case. No appellant alleges that they are pregnant or likely to become pregnant, and no one has alleged that the proposed terminal will increase ambient CO levels by 1.4 ppm. The 2019 air quality analysis's highest estimate for the project's effect on CO concentrations was 0.38 ppm, and the more fulsome analysis prepared in 2022 estimated that the project would have zero effect on CO concentrations. Both analyses concluded that the overall concentration of CO in the area would remain at a fraction of the limits set by the EPA to protect even vulnerable populations from adverse effects. The letter's suggestion that exposing pregnant individuals to a CO concentration more than triple the maximum that the project is estimated to produce does not allege that appellants face a substantial risk of harm from this project.

The October 2021 letter also identifies a variety of health problems linked to increased concentrations of fine particulate matter ($PM_{2.5}$), but it fails to link those problems to the bus terminal or any of the appellants. *See* SA 8-9. Although the letter claims that the community "can expect increases in $PM_{2.5}$," it does not clearly explain why that would be so, nor does it make any attempt to quantify the level of increase that should be expected. SA 7. Mr. Ours's declaration explained why a bus terminal serving gasoline-fueled (and eventually, electric) buses would *not* be expected to generate pollutants like $PM_{2.5}$ in sufficient quantities to cause a significant negative impact on air pollution: because $PM_{2.5}$ is primarily associated with the combustion of diesel fuel and emitted in much lower levels from gasoline combustion. JA 185. The 2022 air quality analysis confirms that view, predicting that the project is likely to have no measurable effect on $PM_{2.5}$ levels. *Air Quality Analysis (Final Submission)* at 24.

In their brief in this Court, appellants focus on preexisting soil contamination identified in the EISF that the project would remediate. *See* Br. 36-37. The complaint does not contain any allegations related to the EISF (which was published after the complaint was filed but before the District moved to dismiss), and appellants never sought to amend their complaint to add any allegations about soil contamination. *See* Super. Ct. Civ. R. 15(a)(1)(B). In any event, nothing in the EISF suggests appellants have an injury-in-fact. Although the screening form noted that

the project site contained underground tanks that were presumed to contain petroleum, it explained that part of the construction plan was to remove those tanks and any contaminated soil. JA 96, 103. That is, the proposed project would *eliminate* the environmental contaminants that were already present. A proposal to clean up pollution that already exists—absent any allegation that the remediation itself will create some other environmental harm—does not create an injury-in-fact. Appellants have made no attempt to link this remediation to any environmental or health risk whatsoever, thereby falling short of what is needed to establish standing.

Finally, as to traffic, appellants do not identify any imminent harm they are likely to suffer. The 2019 traffic study found the project would not overburden existing traffic patterns and would result in a minimal number of new daily trips during afternoon peak hours, *Traffic Impact Study* at 16, which is little surprise given that the project replaces an existing bus terminal in the same neighborhood. Appellants have never linked this anticipated minimal change in neighborhood traffic to any health (or other) risks that they are likely to suffer. The letter attached to the complaint notes that environmental noise exposure is associated with certain adverse health effects, but it does not attempt to quantify those effects, nor does it allege that the terminal will generate enough traffic to substantially change the risk of such harms to appellants. Thus, appellants have not plausibly alleged that the project will create substantial risks relating to traffic congestion.

In short, the complaint makes no effort to link the terminal project to a specific, concrete health risk to appellants or show that the marginal or overall risks to their health are substantial. At best, appellants have made speculative assertions that the project may affect the environment or traffic, without specifying what those effects are or what risks they pose to appellants. That is insufficient to establish that appellants are threatened with harm that is "concrete" and "imminent," as opposed to hypothetical or conjectural.

B. Appellants' and amicus's arguments to the contrary lack merit.

Appellants argue that the Court should not apply the standard for probabilistic harms adopted in *Natural Resources Defense Council* and *Public Citizen*, but instead hold that any allegation of a "small probability" of injury is enough to create standing. Br. 33, 36 n.10. In support, they cite the Seventh Circuit's decision in *Village of Elk Grove Village v. Evans*, which noted in dicta that "even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability." 997 F.2d 328, 329 (7th Cir. 1993). But *Elk Grove* aligns with the D.C. Circuit's test and does not support appellants here. The plaintiffs in *Elk Grove* alleged that building a proposed radio tower in a local floodplain would increase the risk of flooding to their town. *Id.* Thus, they identified a clear, concrete "ultimate alleged harm" (flooding), and the court noted that they

would have standing only if enjoining the project would "reduce the probability" of that harm occurring. *Id.*[6] That is fully consistent with the D.C. Circuit's requirement that the challenged action create a "substantial probability" of actual injury in order to qualify as both "concrete" and "imminent." *Nat. Res. Def. Council*, 464 F.3d at 6. Here, appellants have not identified any ultimate harm, much less shown that the terminal would substantially increase the risk of that harm manifesting.

Amicus Empower DC tries a different argument, but that too lacks merit. It contends that because the complaint asserts a procedural harm under the DCEPA (namely, the alleged failure to prepare an EIS), appellants automatically have standing because they live in the same neighborhood as the proposed terminal, citing *Friends of Tilden Park*, 806 A.2d at 1208. Empower Br. 2-10. This argument overreads *Friends of Tilden Park*, which did not suggest that a bare procedural violation, divorced from any concrete harm, confers standing. And such a holding would be plainly contrary to Supreme Court precedent. *E.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2213 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

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[6] *Elk Grove*'s standing discussion was dicta because the court ultimately dismissed the case as moot after the developer decided not to pursue the radio tower project. *Id.* at 331-32.

Rather, *Friends of Tilden Park* emphasizes the importance of identifying "a separate concrete interest" before a plaintiff can challenge an alleged procedural failure. 806 A.2d at 1211. The plaintiff in *Friends of Tilden Park* was a neighborhood organization seeking to block construction of an apartment building that it contended required an EIS. *Id.* at 1203-04. The construction site adjoined a federal park and the complaint asserted that the building would cause erosion to the parkland, damage groundwater sources, and destroy dozens of mature trees. *See id.* at 1205 n.2. Those consequences, this Court explained, would be sufficient to give nearby residents standing to challenge the decision not to require an EIS if those individuals alleged that they "recreate in and enjoy the benefits of" the nearby park. *Id.* at 1208. But the plaintiff organization did not have any such members, so the organization could not establish associational standing. *Id.* at 1208-10.

The Court then turned to whether the organization itself could establish standing on its own behalf based on a procedural injury. The Court explained that, assuming an EIS was legally required, the organization was deprived of the opportunity afforded by D.C. Code § 8-109.03(b) to publicly comment on the EIS. *Friends of Tilden Park*, 806 A.2d at 1211. But this alleged procedural failure was not enough to create standing because a plaintiff must also allege some "discrete injury flowing from that failure." *Id.* (quoting *Lujan*, 504 U.S. at 572); *accord Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) ("[A]

plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest."). Because the organization could not articulate such an injury, the Court held it lacked standing to maintain the suit. *See Friends of Tilden Park*, 806 A.2d at 1212-13.

To be sure, the Court emphasized that individuals who reside in close proximity to a construction project will often be able to identify a discrete injury sufficient to confer standing—but not always. A reviewing court "must examine whether the demonstrably increased risk of serious environmental harm shown actually threatens the plaintiff's particular interests before that plaintiff may have a particularized injury sufficient for standing." *Id.* at 1211 (quoting *Fla. Audubon Soc'y*, 94 F.3d at 667). Thus, residents can establish standing if they show that (1) failure to prepare an EIS creates "a risk that serious environmental impacts will be overlooked," and (2) they have a "sufficient geographical nexus to the site of the challenged project" such that they can expect "to suffer whatever environmental consequences the project may have." *Id.* at 1208 (quoting *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 674 (5th Cir. 1992)).

The second step of this formulation does not mean that anyone living within walking distance of a construction project automatically has standing to challenge it. Rather, plaintiffs must articulate the particular environmental risk created by the

project and explain how that risk would personally affect them. For instance, in *Friends of Tilden Park*, the court did not just assume that anyone living near the project would have standing; instead, it discussed residents who asserted that their use and enjoyment of the property and adjoining park would be damaged by the removal of mature trees and increased risk of soil erosion and groundwater damage. *See* 806 A.2d at 1205 & n.2, 1208. Other cases finding standing based on potential environmental harms (including all those cited by amicus) have similarly made clear that there was a concrete risk of harm to plaintiffs themselves. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (plaintiffs recreated in polluted river); *Wong v. Bush*, 542 F.3d 732, 736 (9th Cir. 2008) (challenged action physically blocked recreational users of harbor); *Sabine River Auth.*, 951 F.2d at 675 (substantial risk of water shortage); *Animal Lovers Volunteer Ass'n, Inc. v. Carlucci*, 849 F.2d 1475 (9th Cir. 1988) (aesthetic harms and increased risk of rodents); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61 (D.D.C. 2018) (use of lake for ceremonial and other purposes). Where risks are purely abstract, plaintiffs cannot establish that they are "actually threaten[ed]" by the project. *Friends of Tilden Park*, 806 A.2d at 1211; *see Padou*, 70 A.3d at 212 (finding no standing where plaintiff did not allege how project "will disrupt the peace, order, and quiet of his home located well over a mile away").

Appellants have not identified any "serious environmental impact" that has been overlooked that could affect them personally. As discussed *supra* at 19-26 and *infra* at 31-36, appellants have not alleged that the terminal creates a risk of any particular harm to the environment. Moreover, appellants have not explained how any environmental effects the project might create could affect *them* in a concrete, personal way. They have never asserted any sort of aesthetic interest of the type discussed in *Friends of Tilden Park*. Appellants do not contend, for instance, that they recreate in or near 1601 W Street NE, which was previously a collection of abandoned warehouses and parking lots. *See* JA 151, 158-59, 169-70. And although appellants live approximately half a mile from the proposed terminal, they have raised only hypothetical concerns about the environment, making it far from clear that they are likely to suffer any "environmental consequences" from the project. *Friends of Tilden Park*, 806 A.2d at 1208. They accordingly have failed to demonstrate standing, and the Superior Court's dismissal of their claims should be affirmed.

II. Alternatively, The Court Should Affirm Because The Complaint Fails To State A Claim Upon Which Relief Could Be Granted.

Even if appellants have standing, the Court should affirm dismissal on the alternate ground that the complaint fails to state a claim under any legal theory. This Court "'may affirm a judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court,' so long as

doing so would not be procedurally unfair." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1020-21 (D.C. 2013) (quoting *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 n.10 (D.C. 2013)); *see, e.g.*, *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 250-57 (D.C. 2013) (disagreeing with trial court's dismissal for lack of standing but affirming based on failure to state a claim). Affirming the Superior Court's dismissal based on appellants' failure to state a claim would work no procedural unfairness because appellants had the opportunity to—and did—brief the issues both below and in their opening brief to this Court. *See* Br. 21-33, 41-49 (arguing legal sufficiency of their claims).

A. Appellants fail to allege a violation of the DCEPA.

Appellants contend that the construction of the new terminal violates the DCEPA because no EIS was prepared as part of the permitting process. Br. 27-28. However, the DCEPA requires preparation of an EIS only for a "major action that is *likely* to have *substantial* negative impact on the environment." D.C. Code § 8-109.03(a) (emphases added). Appellants have not plausibly alleged that the new terminal triggers this requirement, so they have not alleged a DCEPA violation.

The DCEPA establishes a multi-step process for evaluating the environmental impact of a proposed development project. First, if a major action "may" have a "significant" impact on the environment, an EISF is required. 20 DCMR § 7201.1. The governing regulations identify sixteen types of risks that could trigger an EISF.

20 DCMR § 7201.2. The reviewing agency will then evaluate the EISF to determine whether the project is "*likely* to have *substantial* negative impact on the environment" and thus requires a full EIS. 20 DCMR § 7205.1 (emphases added). If the reviewing agency determines that an EIS is required, it will publish that determination. 20 DCMR § 7205.4. The EIS will be subject to a public comment period, and under certain conditions, a public hearing. *See* 20 DCMR §§ 7208-7209. If the agency reviewing the EIS ultimately concludes that "the public health, safety, or welfare is imminently and substantially endangered," the project may not proceed without mitigating measures. 20 DCMR § 7210.3.

Appellants have not alleged any facts showing that the proposed bus terminal is likely to have a substantial negative impact on the environment. The EISF that was prepared does not identify any significant environmental concerns. The air quality and traffic analyses that were prepared before the project was permitted did not find that the project was likely to have any significant impact on air quality or traffic congestion. *See supra* at 5-7. Appellants acknowledge those studies in the complaint but do not allege any facts that plausibly suggest the terminal's impact on the environment is "likely" to be both "substantial" and "negative." Accordingly, no EIS was required, and the decision to grant a construction permit without one was not "arbitrary, capricious, or otherwise an abuse of discretion and not in accordance

with the law." *McCamey v. D.C. Dep't of Emp. Servs.*, 947 A.2d 1191, 1196 (D.C. 2008) (en banc).

Appellants assert (at 23-26) that an "EJScreen Assessment" was "conducted by the U.S. Environmental Protection Agency" and found that additional review was required for the bus terminal project, pointing to JA 105-07. But those pages of the appendix do not contain any analysis of the project performed by the EPA or anyone else. Instead, they contain a list of environmental indicators that can create environmental or health concerns, such as lead paint or proximity to a superfund site. Nowhere does this document purport to analyze the bus terminal project, much less conclude that any of these indicators are present.

Amicus Empower DC raises several arguments in support of the DCEPA claim, but all of them lack merit. First, Empower argues (at 14) that an action is "likely" to have a significant impact on the environment if it meets certain of the criteria listed in 20 DCMR § 7201.2, implying that these criteria trigger the EIS requirement. That is incorrect. The criteria listed in Section 7201.2 are those that "may" have a significant impact on the environment, which is why they trigger the requirement to prepare an *EISF*, not an EIS. The distinction between an EISF and an EIS is important. An EISF is merely a screening tool used to determine whether a project requires an EIS, and the threshold for when a project will require an EIS ("likely" to have a "substantial negative impact" on the environment) is much higher

than those that must go through the EISF screening process. Certainly not all projects that involve the use of gasoline-fueled vehicles will cross that threshold, since virtually any project that converts a vacant parcel of land to productive use will increase gasoline-powered vehicular traffic to some degree. *See Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 171, 179 (D.D.C. 2014) (increased traffic congestion, standing alone, does not require an EIS), *aff'd*, 815 F.3d 36 (D.C. Cir. 2016). In short, Section 7201.2 has no relevance to this case, where it is undisputed that the District prepared an EISF.

Empower also argues (at 14) that the project "involves the use of petroleum, a hazardous substance," and thus requires an EIS under 20 DCMR § 7201.4. Again, Section 7201 addresses projects that require an EISF (which has already been prepared), not an EIS. Moreover, the section only requires an EISF if the project involves "the use, production or disposal" of a hazardous substance "*in violation of* federal or District environmental regulations." 20 DCMR § 7201.4(e) (emphasis added). Neither Empower nor appellants allege that the terminal would use, produce, or dispose of petroleum in violation of federal or District law, so this provision is inapplicable.

Empower contends (at 16) that the air quality analysis cited in the EISF was "inappropriately limited" because it did not evaluate other pollutants like $PM_{2.5}$, volatile organic compounds, nitrogen oxides, or ozone. But this does not mean that

the decision to authorize construction without a full EIS was arbitrary and capricious. Neither Empower's brief, the complaint, nor the letter attached to the complaint contends that the terminal is likely to produce any such substances at a level that is likely to have a substantial negative impact on the environment. As Stephen Ours, DOEE Chief of Air Quality Permitting testified, it was DOEE's standard practice to evaluate only CO emissions for a project that does not use diesel fuel. JA 185. Gasoline-fueled school buses would not be expected to produce substantial quantities of other pollutants like $PM_{2.5}$, sulfur dioxide, ozone, nitrogen dioxide, or lead. JA 185. Moreover, the revised air quality analysis performed in 2022 *did* evaluate the project's expected $PM_{2.5}$ output and estimated it to be zero. *Air Quality Analysis (Final Submission)* at 24.

Empower also argues (at 17) that the District failed to consider alternatives, such as the use of electric school buses, citing 20 DCMR § 7200.2. But 20 DCMR § 7200.2 does not impose an independent obligation to consider alternatives before approving a permit; it merely notes that the process of preparing an EISF (and, if necessary, an EIS) should begin as early as possible in the planning process "when the widest range of feasible alternatives is open for consideration." And the relevant decision being challenged is not the decision to use gasoline-fueled buses, but the decision to permit construction of the terminal at 1601 W Street NE to replace the existing terminal already in the neighborhood. Even if the District were not

permitted to construct the new terminal, OSSE will still need to operate its fleet of gasoline-powered school buses to transport the District's students with disabilities. In any event, OSSE is already in the process of transitioning from gasoline-powered to electric school buses, *see supra* at 14, so Empower's proposed "alternative" is already being implemented. That transition in part depends on the infrastructure that will be built at the new W Street terminal, *see supra* at 14, so halting construction on the terminal would only delay the switch to electric buses.

Finally, Empower contends (at 17) that the EISF should have been prepared earlier, prior to approving the construction permit. Although it is not clear from the record, it appears that an EISF was not prepared prior to permit approval because the project was originally misclassified as being within an economic development zone, which would have exempted it from the EISF requirement. *See* 20 DCMR § 7202.2(*l*). Regardless, the EISF now has been prepared, and the 2019 air quality and traffic studies upon which it relied were publicly available during the permitting process. Empower does not identify any environmental concerns identified in the EISF that suggest a permit would not have been granted had the EISF been prepared earlier, making any error harmless. *See Foggy Bottom Ass'n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 73 n.21 (D.C. 2002) ("[F]ailure to conduct an EIS review before approving an application is harmless error when the subsequent EIS review finds no significant environmental impact.").

B. Appellants fail to allege a violation of any other law.

The complaint asserts a variety of other legal theories as well, but none states a plausible claim for relief.

DCHRA. The complaint does not state a claim under the DCHRA. The DCHRA applies to allegations of discrimination in (among other contexts) employment, access to public accommodations, and housing. Although one of its provisions, D.C. Code § 2-1402.73, prohibits the District government from "limit[ing] or refus[ing] to provide any facility, service, program, or benefit to any individual" based on a protected characteristic, this provision does not create a general cause of action for enjoining government projects that have a disparate impact on particular neighborhoods. *See Kingman Park Civic Ass'n*, 27 F. Supp. 3d at 166-67 (explaining that the statute prohibits selectively denying benefits to certain persons based on place of residence while providing those benefits to others). Approving a building permit for a school bus terminal is not a "limit[ation] or refus[al]" subject to D.C. Code § 2-1402.73. Indeed, reading the DCHRA to apply to public construction projects would be untenable because all new buildings will disproportionately affect the surrounding neighborhood, potentially running afoul of the prohibition on discrimination based on place of residence.

Even if there were a cause of action that could be implicated here, the complaint does not plausibly allege a disparate impact based on any protected

characteristic. The bus terminal will replace an existing terminal in the same neighborhood less than half a mile away. Because the comparator population (the neighborhood containing the existing terminal) is the same as the allegedly disadvantaged population (the neighborhood containing the new terminal), there can be no disparate impact based on any protected characteristic such as race or place of residence. *Cf. McFarland v. George Wash. Univ.*, 935 A.2d 337, 346-47 (D.C. 2007) (rejecting claim of employment discrimination under DCHRA because favored employee was "a member of the same protected class" as plaintiff, and thus plaintiff had not "rais[ed] an inference of purposeful discrimination").

ANC Act. The complaint does not state a violation of the ANC Act, which generally requires 30 days' notice be provided to the local ANC before the District acquires real property or grants a license or permit. D.C. Code § 1-309.10(b)-(c). To sustain a claim based on a failure to provide adequate ANC notice, the complaint must plausibly allege that compliance with the notice requirement likely would have resulted in a different outcome. *See Shiflett v. D.C. Bd. of Appeals & Rev.*, 431 A.2d 9, 11 (D.C. 1981) (failure to provide written notice of permit to ANC was harmless where petitioners failed to show that it was likely the permit would not have been issued had there been compliance with the provision). Here, appellants have never disputed that the local ANC has had actual notice of the project since 2016 and was specifically notified of the building permit application in January 2020, JA 210-12,

a year and a half before the permit was issued in June 2021, JA 188-92. Indeed, any suggestion that the ANC lacked notice is inconsistent with appellants' separate contention that the local ANC expressed its opposition to the project (although the draft resolution attached to the complaint indicating the ANC's opposition is unsigned and undated). *See* JA 89-90.[7] Despite that alleged opposition, the project has proceeded. And after the construction permit was issued, the Council overwhelmingly defeated a proposed amendment that would have delayed the project. *Supra* at 7-8. Thus, appellants have not plausibly alleged that further written notice to the ANC would have changed the outcome of any decision related to the project.

Open Meeting Requirement. Appellants do not plausibly allege a violation of the open meeting requirement in D.C. Code § 1-207.42. That provision of the Home Rule Act requires government meetings to be open to the public if "official action" is taken. Appellants do not identify any "official action" related to the terminal that was made at a non-public meeting. *See* Br. 31-33 (failing to specify what official

[7] As part of their request for a preliminary injunction, appellants submitted an affidavit from ANC 5C05 Commissioner Darlene Oliver. JA 121-23. Although that affidavit is outside the pleadings, Ms. Oliver acknowledges that she has been aware of the terminal project since shortly after becoming a commissioner in early 2019. JA 121. Nowhere in the affidavit does she dispute that she was informed of the permit application in January 2020. *See* JA 210 (listing Ms. Oliver among recipients).

action was purportedly taken at a non-public meeting); JA 35 (same). Absent such an allegation, there can be no violation of Section 1-207.42.

Zoning. Appellants appear to have abandoned their zoning-related claim by failing to brief it to this Court. *DC Pres. League v. Mayor's Agent for Historic Pres.*, 236 A.3d 373, 385 (D.C. 2020) (noting that the Court ordinarily does not consider arguments not raised in an opening brief). In any event, the complaint does not allege a violation of any zoning law. *See* JA 35-38.

The parcel of land the District acquired for the bus terminal was already zoned to permit this use—indeed, this is one of the main reasons the District chose the site in the first place—so there was no zoning-related decision that appellants could challenge. *See* JA 142 (noting "the scarcity of real property in the District zoned for such use"). There is no dispute that the land is zoned for "Production, Distribution, and Repair." *See* 11-J DCMR § 100.1(a). As a matter of right, this zoning permits the use of this land by OSSE for "government uses," motor-vehicle repair, parking, and transportation infrastructure. *See* 11-U DCMR § 801.1(m), (r), (t), (aa). This includes using the property for school bus parking and maintenance. 11-B DCMR § 200.2(v) (defining "motor vehicle-related" to include maintenance facilities), (x) (defining "parking"), (ff) (defining "transportation infrastructure" to include bus depots). No change was made to the land's zoning classification, and thus there is no zoning decision that could be subject to legal challenge.

In their complaint, appellants vaguely contended that the 2016 Zoning Regulations Review performed by the Zoning Commission was unlawful because it "failed and refused to consider" the DCEPA. JA 36. But the complaint fails to explain what relevance this allegation has to the decisions at issue in this case, let alone articulate how the Zoning Commission violated the DCEPA. The 2016 Zoning Regulations Review was a comprehensive revision of the District's zoning regulations and maps that took effect on September 6, 2016. *See, e.g.*, *Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1220 n.8 (D.C. 2018). The District acquired the parcel at issue here several months *before* the Zoning Commission's changes went into effect, and appellants do not allege that the Commission changed anything about how this land was zoned. *See* JA 142 (noting that the parcel was already zoned to permit use as a bus terminal). Any challenge to the 2016 Zoning Regulations Review is therefore irrelevant.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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December 2022

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.
2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Jeremy Girton
Signature

22-CV-303
Case Number

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CERTIFICATE OF SERVICE

I certify that on December 15, 2022, this brief was served through this Court's electronic filing system to:

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