

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of

FRIENDS AND RESIDENTS OF
GREATER GOWANUS, VOICE OF
GOWANUS, LINDA MARIANO,
MARLENE DONNELLY, ANN KATHRIN
KELLY, and MARGARET MAUGENEST,

Petitioners,

Index No. 501178/2021

For Judgment Pursuant to Articles 63 and 78
of the Civil Practice Law and Rules,

(PROPOSED) BRIEF AMICI CURIAE

- against -

CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF CITY
PLANNING, and MARISA LAGO, in her
capacity as Director of the Department of City
Planning,

Respondents,

- and -

CITY PLANNING COMMISSION,

Nominal Respondent

**(PROPOSED) *AMICI CURIAE* BRIEF OF FIFTH AVENUE COMMITTEE, ARTS
GOWANUS, AND THE SOUTHWEST BROOKLYN INDUSTRIAL DEVELOPMENT
CORPORATION IN SUPPORT OF RESPONDENTS' OPPOSITION TO
PETITIONERS' ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of proposed amici curiae the Fifth Avenue Committee (“FAC”), Arts Gowanus, and the Southwest Brooklyn Industrial Development Corporation (“SBIDC”) in support of Respondents’ motion to dismiss. Amici are nonprofit community organizations serving the Gowanus community.

The outcome of this action will have tremendous implications on the missions and activities of these amici, as the Court is asked to decide whether to delay the Uniform Land Use Review Procedure (“ULURP”) for the proposed Gowanus Rezoning in violation of the Fair Housing Act as well as state and local civil rights laws. This delay and possible halt to the rezoning would disproportionately impact Black and Latinx residents by reducing affordable housing opportunities and would perpetuate residential racial segregation in New York City and threaten the creation of a thriving mixed-use community that is inclusive of a broad range of residents and businesses.

This brief was principally authored by the undersigned counsel for the amici. No party contributed money related to the preparation or submission of this brief.

The Fifth Avenue Committee, founded in 1978, is a nonprofit organization and NeighborWorks America chartered member with a mission to advance economic and social justice by building vibrant, diverse communities where residents have genuine opportunities to achieve their goals, as well as the power to shape the community's future. FAC’s work includes affordable housing development and management, commercial revitalization, adult education and literacy, workforce development, tenant advocacy, community organizing and advocacy, benefits access, and legal and financial counseling programs. Through its comprehensive set of community development programs, FAC serves over 5,500 low- and moderate-income New Yorkers annually. FAC has been the leading organizer of coalition efforts around the proposed

rezoning and has been responsible for engaging hundreds of residents to participate in meetings and hearings.

Arts Gowanus, founded in 1997, has been working to support, promote, and advocate for artists and a sustainable arts community in Gowanus. Arts Gowanus serves a population of over 400 working studio artists; hundreds of local businesses, community organizations, and residents; and an audience of some 7,000 art appreciators. Arts Gowanus is spearheading efforts to increase and retain affordable artist studios in Gowanus as well as the creation of community spaces for creative, artistic, and cultural endeavors.

The Southwest Brooklyn Industrial Development Corporation, founded in 1978 by local businesses, provides advocacy and services to help industrial businesses in the Sunset Park, Red Hook and Gowanus neighborhoods grow and create employment opportunities for local residents. SBIDC believes that the rezoning could foster more stability and resources for Gowanus industrial businesses to provide essential support to the local economy while creating strong career pathways for Gowanus residents facing significant barriers to employment.

PRELIMINARY STATEMENT

Amici curiae respectfully submit this brief to underscore the importance of the impending Gowanus rezoning process and what is at stake if the rezoning is postponed or halted altogether as a result of Petitioners' pretextual procedural challenges.

COVID-19 has upended daily life for all Americans, and nowhere is this more obvious than in New York City. The pandemic has killed over 400,000 Americans—over 26,000 in New York City alone—and has left countless more unemployed, chronically ill, and at risk of eviction. In attempts to halt the spread of the pandemic, governments and private entities have worked to transition public gatherings—court hearings, graduations, weddings, even a Presidential Inauguration—to a virtual format. New York City has been no stranger to the switch to virtual public hearings, with the City Council itself relying on the format. While virtual events may be wanting compared to in-person experiences in some respects, the marginal benefits of in-person gatherings simply cannot justify the risk of spreading the virus. This is especially true in recent months, as overburdened hospitals struggle to keep up with increasing hospitalization rates, and ultra-contagious variants take hold across the country.

In the midst of this pandemic that makes in-person gatherings a significant public health hazard, Petitioners try to delay the Gowanus Rezoning, claiming that virtual public hearings interfere with their procedural rights under the Due Process Clause and the New York City Charter. As explained *infra*, these claims are without merit. Nothing in the City Charter explicitly prohibits virtual public hearings. Even if it did, however, it is unlikely that such a requirement would be maintained during a pandemic. Due Process is not a rigid set of procedural steps, but a general promise of fairness, dependent on the costs and benefits specific to the circumstances and rights at stake. Undoubtedly, the risk of contracting a deadly disease would be

considered in this analysis, such that what is required of public hearings may be altered during a global pandemic.

More importantly, though, the Petitioners are incorrect in asserting that the virtual forum is less accessible than in-person hearings. The City, as it has done for City Council hearings and meetings convened by a range of city agencies, has already adapted its ULURP in response to the pandemic by creating an online portal – NYC Engage - to host public meetings. This gives both supporters and opponents of the rezoning sufficient opportunity to be heard. Residents can attend virtual meetings, accessible via computer, tablet, and telephone, and the City provides real-time sign language and interpretation services. This is buttressed by FAC's ongoing efforts to engage local residents and provide assistance to those impacted by the digital divide. If anything, this process will be *more* accessible and inclusive. Indeed, FAC, Arts Gowanus, and SBIDC have solicited input from myriad groups who are directly impacted by the potential rezoning at issue, including those without personal access to the internet platforms being used, industrial businesses and Gowanus-based artists and artisans who have been pushed out of the neighborhood in spite of their contributions to the neighborhood's character and culture. In this light, it is hard to see the Petitioners' concerns as anything other than a pretextual attempt to delay the Gowanus rezoning.

If the Petitioners were successful in demanding in-person hearings, the City would either 1) be forced to host the meetings in-person amidst skyrocketing cases, or 2) delay the hearings until it is safe to have public gatherings of this size again—likely not until late 2021, at the earliest.

The first scenario would put all attendees at risk of contracting COVID-19 and contribute to the spread of the virus. Given that the pandemic has disproportionately affected people of

color, both in terms of magnitude and severity, any events that contribute to the spread of the virus—including public hearings such as the one in question—would disproportionately harm Black and Latinx attendees and those they would return home to.

In the second scenario, the City would simply delay the hearings—what is presumably the Petitioners’ desired outcome. As Mayor Bill de Blasio has made large-scale rezonings a central tenet of his tenure, Petitioners (most likely correctly) assume that a future administration would be less committed to seeing the rezoning through. Without him in office to champion its completion, the fate of the rezoning would depend on the next administration. From Petitioners’ perspective, postponing the rezoning and waiting out the De Blasio administration is their best chance at ensuring its demise. They are intent on upholding the status quo and their own financial interests, and are opposed to rezoning policies that would increase access to affordable housing and better integrate the neighborhood.

But it is for these very reasons that the rezoning must take place. Indeed, a failure to do so would leave the City open to legal liability. Failure to rezone would render the City in violation of the Fair Housing Act, as well as state and local civil rights laws. Gowanus is a historically industrial section of South Brooklyn, bordering Carroll Gardens to the north, Park Slope to the east, Sunset Park to the south, and Red Hook to the west. Over time, the area has experienced significant gentrification and displacement to the point where it is now considerably higher income and more heavily white than New York City or Brooklyn as a whole. The City’s current zoning laws limit the development of affordable housing in disproportionately white neighborhoods, which are surrounded by a diverse but segregated metropolis, but the Gowanus Rezoning, if done right, would change that, including by allowing Gowanus Green, a proposed 950-unit 100% affordable housing development and the creation of thousands of units of

permanently affordable housing through the City's Mandatory Inclusionary Housing program, to go forward. In other words, if the rezoning is blocked, this would be a paradigmatic example of the exclusionary zoning policies that disparate impact liability exists to protect against. The need to rezone neighborhoods like Gowanus is only becoming more acute, as gentrification in historically Black and Latinx neighborhoods in Brooklyn and throughout New York City pushes out low-income residents. Likewise, declining to rezone would constitute a failure on the City's part to affirmatively further fair housing—which the City is required to do as a recipient of U.S. Department of Housing and Urban Development (HUD) grant funds.

The rezoning of Gowanus is in the best interests of all New Yorkers. It will contribute to the creation of fair housing and the integration of a City that prides itself on its diversity, and will benefit existing Gowanus residents by enhancing and enriching the neighborhood: the rezoning will provide opportunities and workspace for local artists, artisans, and light industrial businesses through the "Gowanus Mix" and creates publicly accessible open space through the Waterfront Action Plan to be used by all residents, and it will also create affordable housing through Mandatory Inclusion Housing (MIH) and the Gowanus Green project.

ARGUMENT

I. New York City Can Provide Area Residents with Adequate Notice and Opportunities to Be Heard through a Well-Designed Virtual Community Engagement Process.

Petitioners are seeking to stall the start of the ULURP for the proposed Gowanus Rezoning, claiming that virtual meetings violate their procedural rights under the Due Process Clause and the New York City Charter because they are allegedly inferior to in-person meetings and inaccessible to individuals who do not have internet access and persons with vision disabilities. These arguments demonstrate both a misinterpretation of due process and pretextual arguments designed to maintain racial and economic segregation. Notice and the opportunity to be heard are the hallmarks of procedural Due Process, and the Supreme Court has held that, in order to satisfy those requirements, a public entity's procedures must be "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). The COVID-19 pandemic, with its racially disparate impact as discussed *supra*, clearly bears on what procedures are appropriate in the present instance.

No provision in the New York City Charter explicitly prohibits virtual public hearings. The City Council and various city agencies have been holding virtual public hearings since the beginning of the pandemic. Moreover, a myriad of courts and states and local governments have switched from in-person to remote hearings, including the U.S. Supreme Court. Yet by the logic of Petitioners' spurious Due Process claim, none of these proceedings have afforded litigants or members of the public whose rights are at stake notice and an opportunity to be heard. The consequences of accepting Petitioners' position could be far reaching and could undermine a broader range of public processes beyond ULURP.

ULURP's procedural requirements are codified in Section §197-c(e)(1) of the New York City Charter. *See* New York City Charter § 197-c(e)(1). It states "each affected community board shall, not later than sixty days after receipt of [a certified application] (a) notify the public of the application in a manner specified by the [City Planning Commission]...and (b)...conduct a public hearing." *Id.*; *see also* Rick Hills, *Brooklyn NIMBYs' Trumpian Tactics: How Insistence on In-Person Hearings Privileges Older, Wealthier Homeowners*, PrawfsBlawg (Jan. 24, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/2021/01/brooklyn-nimbys-trumpian-tactics-how-insistence-on-in-person-hearings-privileges-older-wealthier-hom.html>. The Charter does not have language excluding virtual public hearings. The Department of City Planning is following the procedures set forth above.

The New York City Department of City Planning resumed the public review process for ULURP virtually on September 14, 2020, six months after Mayor de Blasio signed Emergency Executive Order 100 which in part suspended the ULURP and all relevant public hearings due to COVID-19. *Dep't of City Planning*, NYC Planning (last visited Jan. 25, 2021), <https://www1.nyc.gov/site/planning/index.page>; N.Y. Exec. Order. No. 100 (March 16, 2020), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>. To ensure community participation, New York City created a portal, New York City Engage, a multimedia platform which advertises and hosts all public meetings and maintains recordings of each meeting. Meetings can be accessed by computer, tablet, and telephone. Closed captioning and real-time sign language and language interpretation services are available, thus going a long way

toward addressing concerns of access by persons with limited English proficiency and people with disabilities.¹

FAC, Arts Gowanus, and SBIDC and other members of the Gowanus Neighborhood Coalition for Justice (GNCJ) who are advocating for a just, equitable and inclusive Gowanus Rezoning, have successfully engaged hundreds of local residents during the Gowanus Rezoning process, including public housing residents and community organizations. FAC has also taken steps to ensure that virtual meetings are inclusive to those without access to the internet or computers and telephones. FAC purchased audiovisual equipment to host safe hybrid in-person/virtual meetings at their offices for those without equipment or who are more comfortable meeting in person with proper screening and precautions. FAC has also purchased and distributed tablets, WiFi hotspots, and provided training on how to utilize the equipment and participate in virtual meetings via Zoom to more than a dozen local residents thus far who are impacted by the digital divide. With these efforts, since the pandemic began FAC has successfully held multiple hybrid in-person (with proper safety protocols) and virtual meetings with over 40 local participants attending, including with City officials.

The Petitioners argue that virtual hearings are inferior to in-person hearings and are inaccessible to individuals who do not have internet access and individuals with vision disabilities. *See* Pet'rs.' Compl. at p. 24; Petr's.' Memo at p. 7; Some of the complaints are utterly without merit, such as the contention that Petitioners are deprived of the ability to be heard because they are unable to bring posters to public hearings and wear t-shirts and buttons conveying opposition to the rezoning. The City has taken steps as outlined below to address

¹ Further, this Court should not take at face value the contention that Petitioners' preferred alternative of holding in-person public hearings is more accessible or even as accessible for persons with limited English proficiency and persons with disabilities than what the City's course of action currently is.

more plausible concerns, and FAC and its partners have also provided recommendations for further improvements to the process. It is clear that a virtual public hearing process can satisfy the intent of the New York City Charter and provide area residents whose rights are at stake notice and an opportunity to be heard, consistent with the Due Process Clause.

Contrary to Petitioners' allegations, virtual community engagement has actually increased public participation in the Gowanus Rezoning process when compared to in-person meetings. Last year, in-person meetings related to the Gowanus Rezoning proposal averaged between 150 and 200 attendees while during the October 22, 2020 virtual meeting more than 350 people logged on. Additionally, another 250 participants attended a November 2020 presentation about the proposed Gowanus Green development.

Although there remain concerns about ensuring adequate notice and opportunity to engage all stakeholders virtually, the Department of City Planning can readily address these concerns and satisfy Due Process if it adheres to recognized best practices in remote community engagement. FAC, through its participation in GNCJ , has also provided concrete recommendations in a letter dated October 28, 2020 to the Department of City Planning and Brooklyn Community Board 6 on how to improve local engagement by public housing residents in developments near Gowanus and other local residents who may be challenged by a virtual public meeting format. Gowanus Neighborhood Coal. for Justice, *GNCJ Response to Oct. 22 Meeting*, Squarespace, (last visited Jan. 25, 2021), <https://static1.squarespace.com/static/5c6d8675348cd920dcfbda27/t/5fa4388d2afc506494ce0f42/1604597901562/GNCJ+response+to+Oct+22+meeting.pdf>.

GNCJ's recommendations are straightforward and easily implementable. They include increased transparency that allows attendees to see other participants, know the names and

affiliation of speakers, have access to all questions during and after the meetings, have a process to sign-up to speak, and have sufficient time in the agenda for those who wish to participate.

Petitioners are using ULURP virtual meetings as a pretext for traditional Not In My Backyard opposition to a development that would include a significant number of affordable housing units. There is no doubt that they are opposed to the Gowanus Rezoning, or in their words, “Massive Rezoning Project.” Their goal is to delay the ULURP long enough so that the process transitions to the next mayor, who may be less supportive, thereby nullifying the extensive efforts of area residents and stakeholders who support the rezoning, with conditions, to participate in the process and be heard.

II. Requiring Hearings to Take Place in Person Will Disproportionately Harm People of Color.

By mid-March, 2020, New York City had become the epicenter of the United States’ COVID-19 outbreak. Jesse McKinley, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, N.Y. TIMES, Mar. 22, 2020 available at <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html>. Since then, COVID-19 has killed over 26,000 residents of New York City. As of mid-January, 2021, positivity rates in New York are the highest they have been since the peak of the epidemic in March and April 2020. *See* Sharon Otterman, *54 ZIP Codes in New York City Have Positive Test Rates Over 10%*, N.Y. TIMES, Jan. 22, 2021, available at <https://www.nytimes.com/2021/01/22/nyregion/nyc-coronavirus-zip-codes.html>.

Public health experts knew early on that limiting public gatherings is key to stopping the spread of COVID-19—this has only become clearer as we learn more about the disease. *See e.g.*, Shahul H. Ebrahima & Ziad A. Memish, *COVID-19 – The Role of Mass Gatherings*, 34 J.

TRAVEL MED. & INFECTIOUS DISEASE, 101617 (2020) available at

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102534/>.

What has also become clear is that COVID-19 disproportionately harms people of color. *See infra*, pt. IA. Accordingly, forcing public hearings for the Gowanus Rezoning to take place in person would worsen COVID-19 in New York City, and in turn, cause harm to communities of color.

A. COVID-19 Disproportionately Harms People of Color.

While COVID-19 did not create race-based inequities in our health system, it has undoubtedly magnified the existing inequalities, as the impacts of COVID-19 have disproportionately fallen on Black and Latinx people. *See, e.g.*, Cent. for Disease Control, *Health Equity Considerations & Racial & Ethnic Minority Groups* (last updated July 24, 2020) (“CDC Health Equity”). One report found that Black Americans—accounting for just 13% of the US population—make up 30% of COVID-19 cases. *See* U.S. Dep’t of Health and Hum. Serv., Substance Abuse and Mental Health Serv. Admin., *Double Jeopardy: COVID-19 and Behavioral Health Disparities for Black and Latino Communities in the U.S.*, available at <https://www.samhsa.gov/sites/default/files/covid19-behavioral-health-disparities-black-latino-communities.pdf> (undated) (last visited October 7, 2020).

New York City is no exception to this general trend. New York City zip codes with the highest concentrations of people of color have consistently had the highest prevalence of COVID-19. *See* Nat’l Cent. for Disaster Preparedness, *Racial Disparities and Covid-19*, EARTH INST., COLUMBIA UNIV., on May 13, 2020 available at <https://ncdp.columbia.edu/ncdp-perspectives/racial-disparities-and-covid-19/>.

And among residents that did contract COVID-19, people of color have been more likely to have serious cases. Renelus, *et al.*, *Racial Disparities in COVID-19 Hospitalization and In-hospital Mortality at the Height of the New York City Pandemic*. J. RACIAL AND ETHNIC HEALTH DISPARITIES 2020, available at <https://doi.org/10.1007/s40615-020-00872-x>. One study, from May 2020, found that Black New Yorkers are twice as likely as white residents to require hospitalization for COVID-19, while Latinx residents are more likely to experience in-hospital mortality. *See id.* Other studies have shown that the mortality rates for Black New Yorkers are double that of any other racial group in the United States. Nichole Tucker, *COVID-19 Death Toll in NYC Calls Attention to Racial Disparities*, TARGETED ONCOLOGY, Jul. 2, 2020, available at <https://www.targetedonc.com/view/covid-19-death-toll-in-nyc-calls-attention-to-racial-disparitie>.

The sheer prevalence of COVID-19 among people of color is a byproduct of longstanding systemic and economic injustices. As one expert explained, “African Americans, Hispanics, and Latinos were hit so hard by COVID in NYC, and many of these reasons are related to sociodemographics and exposure to viral load. These minority population subsets account disproportionately for our essential workers that kept the city going during the shutdown, such as hospital workers and employees of transportation and public service systems.” *Id.* This was compounded by the fact that “African Americans and Hispanic/Latino individuals are more likely to share multigenerational homes or to live in the housing environments that are less well equipped to comply with social distancing policies. Also, importantly, these minority population subsets are more likely to receive their health care in safety-net hospitals that are financially and resource-constrained.” *Id.* Racial disparities in seriousness of COVID-19 infections is also attributable to longstanding inequities in health outcomes: comorbidities such as obesity, hypertension, and cardiovascular disease—often themselves a function of poverty—

are disproportionately common in Black and Latinx communities. *Id.*; *see also* Gupta, *et al.*, *Higher Comorbidities and Early Death in Hospitalized African-american Patients with Covid-19*, 21 J. BMC INFECTIOUS DISEASE., 78 Jan. 18, 2021, available at doi:10.1186/s12879-021-05782-9. As is well-documented by now, those with preexisting conditions are at a higher risk of negative COVID-19 outcomes. *Id.*

B. Public Gatherings Exacerbate the Spread of COVID-19.

That public gatherings contribute to the spread of COVID-19, is at this point, a truism. *See e.g.*, Ebrahima *supra*, note 3. Though policy-makers' understanding of the virus has evolved since the earliest days of the pandemic, one fact has remained constant; social distancing is the surest way to stop the spread of COVID-19. Nina Bai, *Why Experts Are Urging Social Distancing to Combat Coronavirus Outbreak*, UNIV. CAL. S.F., Mar. 14, 2020 available at <https://www.ucsf.edu/news/2020/03/416906/why-experts-are-urging-social-distancing-combat-coronavirus-outbreak>. In response to the initial outbreak, New York Governor Andrew Cuomo implemented a ban on public gatherings on March 22, 2020, which has, with some variation, remained in effect since its implementation. Jesse McKinley & Michael Gold, *Ban on Large Gatherings in N.Y. as Coronavirus Cases Rise Sharply*, N.Y. TIMES, Mar. 12, 2020 available at <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-nyc-event-ban.html>. While governments did ease restrictions on gathering during the summer months as cases dropped, the skyrocketing of cases in the fall once again necessitated more stringent limits. Ben Guarino, *New York's Block-by-Block Lockdowns are Curbing Covid-19*, WASH. POST, Nov. 8, 2020 available at <https://www.washingtonpost.com/health/2020/11/08/nyc-covid-targeted-lockdowns/>.

Indoor gatherings are, of course, of particular concern. *See e.g.*, Karin Brulliard, *At Dinner Parties and Game Nights, Casual American Life Is Fueling the Coronavirus Surge as*

Daily Cases Exceed 150,000, WASH. POST, Nov. 12, 2020 available at

<https://www.washingtonpost.com/health/2020/11/12/covid-social-gatherings/>. Even with proper distancing and masking, indoor gatherings can spread COVID-19. *See e.g.*, George Citroner, *What Is the Risk of Getting COVID-19 While Shopping?*, HEALTHLINE, Dec. 3, 2020 available at <https://www.healthline.com/health-news/what-is-the-risk-of-getting-covid-19-while-shopping#Low-income-areas-most-affected>.

This is only more true of the emerging strains, which are far more contagious than the original variant. Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases*, N.Y. TIMES, Jan. 19, 2021 available at <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html>.

C. In-Person Public Hearings Will Disproportionately Harm People of Color.

Given the impact that COVID-19 has on people of color, it is inevitable that any policy decisions that accelerate the spread of COVID-19—like forcing public hearings to take place in-person—will disproportionately harm communities of color or lead people of color not to participate for fear of contracting the virus. But those harms are even more acute when the public gathering in question implicates the rights of Black and Latinx New Yorkers. For Black and Latinx residents of Gowanus, Brooklyn, and New York City more broadly, the stakes of the impending rezoning are incredibly high. As explained in greater detail *supra*, the failure to rezone Gowanus would violate the Fair Housing Act and perpetuate existing segregation by cutting off access to this high opportunity section of New York City. Forcing the hearings to take place in-person puts people of color with an interest in the rezoning in an impossible position: risk their health or face housing discrimination. Even if actual attendance of the meeting puts attendees at equal risk of contracting COVID-19, the aftereffects will not be so indiscriminate.

Low-income attendees fighting for the rezoning are more likely to return to multi-generational homes or jobs in essential services, putting their families and co-workers at risk. This group, of course, is disproportionately made up of Black and Latinx residents. In comparison, those opposing the rezoning, intent on protecting the status quo and their financial interests, will more frequently take refuge in less crowded dwellings, comfortably avoiding further interactions as they work from home. Accordingly, the last-ditch effort to oppose the rezoning, though frivolous in their merits, are not so frivolous in their potential for harm, and should be dismissed accordingly.

III. Non-Approval of the Gowanus Rezoning by the City Would Violate the Fair Housing Act and State and Local Civil Rights Laws and Could Jeopardize Hundreds of Millions of Dollars in Federal Grants.

A. Blocking the Gowanus Rezoning Would Have a Disparate Impact on Black and Latinx New Yorkers and Would Perpetuate Segregation in Violation of the Fair Housing Act and State and Local Civil Rights Laws.

Although the primary focus of Petitioners' challenge is procedural and would not automatically block the Gowanus Rezoning from occurring in the future, their clear intent is to stop the rezoning from taking place. Additionally, if Petitioners were successful, the City would be in violation of the Fair Housing Act as well as state and local civil rights laws. 2021 is an election year in New York City, and the Gowanus Rezoning is part of outgoing Mayor Bill de Blasio's broader housing plan, which is one of his Administration's signature initiatives. N.Y. City, *Housing New York*, (last visited Jan. 25, 2021), <https://www1.nyc.gov/site/housing/about/our-plan.page>. At the same time, as discussed *infra*, the COVID-19 pandemic is out of control, with reported per capita daily case rates well above what they were in the spring of 2020. It is highly doubtful that it will be safe to hold in-person public

hearings with enough time remaining in the present mayor's term to complete the remaining steps of the rezoning process. That means that, if Petitioners prevail, the future of the Gowanus Rezoning – and indeed the SoHo/NoHo Rezoning, which is the City's only other planned rezoning of a higher opportunity area – would rest in the hands of the next administration. Whether that administration would follow through on the Gowanus Rezoning, is speculative at best. If the City abandons the Gowanus Rezoning, as is the goal of this lawsuit, it would be in violation of the Fair Housing Act and other civil rights laws.

Policies and practices that cause or predictably will cause unjustified discriminatory effects, such as by disproportionately denying housing on the basis of race or national origin or by perpetuating patterns of residential racial segregation, violate the federal Fair Housing Act. *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 617-20 (2d Cir. 2016); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988); *see also* 24 C.F.R. § 100.500(a) (2013) (defining “discriminatory effect”).² Challenges to land use and zoning policies with disparate and segregative effects, which also prevent the development of affordable housing in disproportionately white areas in diverse but segregated metropolitan regions lie at the “heartland” of discriminatory effects liability under the Fair Housing Act. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, 576 U.S. 519, 539-40 (2015). Moreover, unjustified policies and practices that result in the disproportionate displacement of people of color from a community violate the Fair Housing Act. *Mount Holly Gardens Citizens in Action v. Twp. of Mount Holly*, 658 F.3d 375, 382-83 (3d Cir. 2011).

² The U.S. Department of Housing and Urban Development recently issued a regulation altering the standard for discriminatory effects claims under the Fair Housing Act, but the U.S. District Court for the District of Massachusetts has issued a nationwide injunction with respect to that regulation. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sep. 24, 2020); *Massachusetts Fair Housing Center v. U.S. Department of Housing & Urban Development*, 2020 WL 6390143, *8 (D. Mass. 2020).

Additionally, both the New York City Human Rights Law and the New York State Human Rights Law prohibit housing discrimination. N.Y.C. Admin Code § 8-107(5)(a); N.Y. Exec. Law § 296(2-a); N.Y. Exec. Law § 296(5). The U.S. Department of Housing and Urban Development (HUD) has found that the New York State Human Rights Law is substantially equivalent to the federal Fair Housing Act, which means that the law provides the same protections as the nondiscrimination provision of the Fair Housing Act, including its prohibition on policies and practices with unjustified discriminatory effects. *Fair Housing Assistance Program (FHAP) Agencies*, HUD.GOV (last visited Jan. 24, 2021), https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies#NY; 24 C.F.R. § 115.204(a)(5). Federal and state civil rights laws provide a floor beneath which the protections of the New York City Human Rights Law may not sink. *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009). Accordingly, both state and local law also prohibit the aforementioned types of policies and practices.

New York City's rezoning policies straddle these two types of Fair Housing Act violations. If the Gowanus Rezoning does not go forward, whether because of an affirmative denial or inaction amounting to a pocket veto, the City's policy will be tantamount to the classic exclusionary zoning more commonly associated with suburbs like Garden City and Huntington, in Long Island in New York. According to 2014-2018 American Community Survey 5-Year Estimates, Brooklyn Community Board District 6, which includes Gowanus, has a population that is 64.1% white (non-Hispanic) and of which only 9.6% of residents live in poverty. Cmty. Board Dist. Profiles, Brooklyn Cmty. Dist. 6, NYC PLANNING (last visited Jan. 24, 2021), <https://communityprofiles.planning.nyc.gov/brooklyn/6>.³ Additionally, 73.0% of residents 25

³ The New York City Department of City Planning adjusts the federal government's poverty threshold to account for the high cost of living, certain public benefits, and certain costs.

years of age or older have attained a bachelor's degree or higher. *Id.* By contrast, citywide, 32.1% of residents are white (non-Hispanic), 19.8% residents live in poverty, and just 37.4% of adults 25 years of age or older have attained a bachelor's degree or higher. *Id.* It is not by accident that the area including Gowanus is *both* disproportionately white *and* disproportionately affluent. Comprehensive Housing Affordability Study (CHAS) derived by HUD from 2013-2017 American Community Survey 5-Year Estimates shows that 53.2% of Latinx households and 45.6% of Black households in New York City have incomes at or below 50% of the Area Median Income (AMI), as compared to 38.6% of all households. U.S. DEP'T OF HOUS. AND URBAN DEV., 2013-2017 Comprehensive Housing Affordability Strategy, Table 1, (last downloaded Jan. 24, 2021), <https://www.huduser.gov/portal/datasets/cp/2013thru2017-160-csv.zip>. Income eligibility for affordable housing is typically based on whether a household's income is at or below a particular percentage of the AMI, adjusted for household size. It is clear that Black and Latinx New Yorkers are disproportionately income-eligible for affordable housing, are priced out of Gowanus under the status quo, and would have greater access to housing in the area after the rezoning, through developments like the proposed 950-unit, 100% affordable Gowanus Green, for which amicus Fifth Avenue Committee is a developer and through permanently affordable housing created via Mandatory Inclusionary Housing as a result of the rezoning.

The Gowanus Rezoning is particularly needed because the City's recent past rezonings have raised serious fair housing concerns in a different way. Through the Bay Street, Downtown Far Rockaway, East Harlem, East New York, Inwood, and Jerome Avenue Rezonings, the City has already adopted and begun implementing policies that are likely to result in the displacement

of many thousands of Black and Latinx New Yorkers.⁴ That is because rezoning functions very differently in New York's affluent neighborhoods than it does in poor and working class communities. In the former, like Gowanus, rezoning predictably fosters integration by increasing the supply of affordable housing in areas where it is scarce and does not lead to significant amounts of displacement because the unsubsidized housing in which existing residents – who tend to be able to afford high rents – live is already expensive. Michelle de la Uz et al., *Opinion: How the Gowanus Rezoning Could Push NYC Forward on Racial Equity*, CITY LIMITS (Sep. 21, 2020), <https://citylimits.org/2020/09/21/opinion-how-the-gowanus-rezoning-could-push-nyc-forward-on-racial-equity/>. In the latter, like East New York, rezoning incentivizes the demolition of existing, lower-cost housing; attracts new residents who bid up rents through increased service and retail amenities; and produces income-restricted housing that is routinely too expensive for long-time lower income neighborhood residents despite its purported affordability. Renae Widdison et al., *Flawed Findings Part I: How NYC's Approach to Measuring Residential Displacement Risk Fails Communities*, PRATT CTR. FOR CMTY. DEV. (2018), https://prattcenter.net/uploads/200002/1587837747778/Flawed_Findings_Full_Report_FINAL.pdf. The de Blasio Administration itself has recognized this problematic duality in belatedly working towards the Gowanus and SoHo/NoHo Rezoning. This lawsuit must not be the vehicle for obstructing long overdue changes that are necessary to ensure the City's compliance with the Fair Housing Act and other civil rights laws.

B. Blocking the Gowanus Rezoning Would Violate New York City's Duty to Affirmatively Further Fair Housing and Jeopardize Hundreds of Millions of Dollars

⁴ Staten Island Community Board District 1, which includes Bay Street, is 37.7% white (non-Hispanic); Queens Community Board District 14, which includes Downtown Far Rockaway, is 34.2% white (non-Hispanic); Manhattan Community Board District 11, which includes East Harlem, is 13.7% white (non-Hispanic); Brooklyn Community Board District 5, which includes East New York, is 3.7% white (non-Hispanic); Manhattan Community Board District 12, which includes Inwood, is 18.9% white (non-Hispanic); and Bronx Community Board District 4, which includes Jerome Avenue, is 2.0% white (non-Hispanic). Community Board District Profiles, NYC PLANNING (last visited Jan. 25, 2021), <https://communityprofiles.planning.nyc.gov/>.

in Federal Grants.

Federal civil rights law does not merely prohibit New York City from adopting policies that result in unjustified discriminatory effects; New York City has a duty as a recipient of HUD grant funds to affirmatively further fair housing. *See* 42 U.S.C. § 5304(b)(2); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (holding that the duty to affirmatively further fair housing placed on the Secretary of HUD by 42 U.S.C. § 3608(e)(5) attached to HUD grant funds and therefore applied to the New York City Housing Authority as a grantee). The *Otero* court held that the duty requires HUD grantees to take action “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation.” *Id.* at 1134.⁵ In furtherance of its compliance with this duty, New York City recently published *Where We Live NYC*, a fair housing plan that specifically identified the Gowanus and SoHo/NoHo Rezonings as strategies for advancing fair housing by increasing neighborhood diversity. N.Y. City Dep’t of Hous. Pres. and Dev., *Where We Live NYC* (2021) available at <https://www1.nyc.gov/assets/hpd/downloads/pdfs/wwl-plan.pdf>. If a local government’s affirmatively furthering fair housing certification is invalid, HUD may disapprove its Consolidated Plan. 24 C.F.R. § 91.500(b)(3). An approved Consolidated Plan is a precondition for the receipt of HUD funds. *See, e.g.*, 24 C.F.R. § 570.304. Thus, if Petitioners are successful in achieving their goal of using this lawsuit to prevent the Gowanus Rezoning from

⁵ In the late days of the Trump Administration, HUD issued a regulation purporting to define the duty to affirmatively further fair housing in a way that ignored the Fair Housing Act’s focus on integration and was otherwise contrary to all legal authority. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020). President Joe Biden committed to restoring HUD’s prior Affirmatively Furthering Fair Housing rule in his campaign housing plan. The Biden Plan for Investing in Our Communities through Housing, BIDEN FOR PRESIDENT (last visited Jan. 24, 2021), <https://joebiden.com/housing/>.

going forward at any point, the City would be at risk of losing hundreds of millions of dollars worth of federal grants, which are critically needed during the COVID-19 pandemic.⁶

CONCLUSION

The City's decision to make the ULURP meetings virtual was an appropriate and necessary response to the COVID-19 pandemic. The Petitioners' procedural concerns, misguided under any circumstances given that the virtual comment period has actually been *more* inclusive, are especially ludicrous in light of the threat that large public gatherings pose. Their claims, if taken seriously, would result in the City hosting the meetings immediately, putting all attendees at risk, or postponing—potentially permanently—the process of rezoning that is necessary to the City's compliance with the Fair Housing Act and its state and local counterparts. Neither of these outcomes is acceptable. Amici ask that this Court deny Petitioners' Order to Show Cause for a Temporary Restraining Order Preliminary Injunction.

Dated: January 26, 2021

/s/

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⁶ For Fiscal Year 2020, New York City's allocations of HUD formula grant funds were as follows: \$173,693,281 through the Community Development Block Grant program, \$74,633,261 through the HOME Investment Partnerships Program, \$43,641,387.86 through the Housing Opportunities for Persons with AIDS program, and \$14,647,037 through the Emergency Solutions Grant program. FY 2020 Formula Allocations, HUD.GOV (last visited Jan. 24, 2021), <https://www.hud.gov/sites/dfiles/CPD/documents/fy2020-formula-allocations-AllGrantees.xlsx>. This is aside from the City's supplemental allocations of COVID-19 relief funds distributed through these programs.