THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAIR HOUSING ALLIANCE, *et al.*, *Plaintiffs*, v. BENJAMIN S. CARSON, SR., M.D., in his official capacity as Secretary of Housing and Urban Development, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-1076-BAH

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE JUDGMENT AND FOR LEAVE TO AMEND THE COMPLAINT

INTRODUCTION

Plaintiffs' Rule 59(e) motion seeking reconsideration of a final judgment, an extraordinary remedy, should be denied because the Court's August 17, 2018 Memorandum Opinion and Order granting Defendants' motion to dismiss were correct. In the underlying action, Plaintiffs challenged a decision by the Department of Housing and Urban Development (HUD) about how to administer its block-grant programs for local governments—specifically, the May 2018 withdrawal of an assessment tool issued pursuant to the Affirmatively Furthering Fair Housing (AFFH) Rule, 80 Fed. Reg. 42,272 (July 16, 2015). After extensive briefing and argument, the Court correctly concluded—in a comprehensive 77-page opinion—that Plaintiffs lacked Article III standing to seek this relief. Mem. Op., ECF No. 47. Plaintiffs are not local governments required to use the tool; rather, they are housing advocacy groups that disagree with HUD's choices about how to allocate the agency's resources. This Court correctly reasoned that

Plaintiffs lacked an organizational injury and that their arguments for the other two prongs of standing—causation and redressability—also failed. That conclusion was fully in accord with the applicable precedents from the Supreme Court and the D.C. Circuit, and the Court appropriately dismissed the case for lack of standing.

Plaintiffs now ask this Court to reconsider that judgment and reopen the case, asserting that this Court committed a clear error requiring correction to prevent a manifest injustice. Pls.' Mot. to Am. J. & for Leave to Am. Compl. ("Mot. to Am."), ECF No. 48. But Plaintiffs' motion for Rule 59(e) relief comes nowhere close to establishing the extraordinary circumstances necessary to set aside a final judgment. Indeed, Plaintiffs essentially seek to relitigate issues that the Court already has decided, quarrelling with the Court's application of case law. In an effort to clothe these arguments in the standards of Rule 59(e), Plaintiffs suggest that this Court made a more fundamental error by misunderstanding the standard of review for a Rule 12(b) motion. Needless to say, the Court did not make such a basic error. In any event, the Court could have dismissed the action for failure to meet the standing requirements at the summary-judgment stage, and there has been no manifest injustice in dismissing this action.

The Court should deny Plaintiffs' motion.

ARGUMENT

I. The Court Should Deny Plaintiffs' Motion to Alter the Judgment Because the Court's Ruling Was Correct.

A. Plaintiffs bear a heavy burden in seeking Rule 59(e) relief.

Motions for reconsideration under Rule 59(e) "are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Menoken v. McGettigan*, 323 F.R.D. 72, 74 (D.D.C. 2017) (quoting *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)); *see also, e.g.*, *Leidos, Inc. v. Hellenic Republic*, 881 F.3d

213, 217 (D.C. Cir. 2018). Reconsideration "lie[s] within the discretion of the Court." *AARP v. EEOC*, 292 F. Supp. 3d 238, 241 (D.D.C. 2017), and relief should not be granted unless the moving party satisfies a "stringent" standard. *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004); *see also, e.g.*, *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 17 (D.C. Cir. 2015). Specifically, the motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Foster v. Sedgwick Claims Mgmt. Servs., Inc.*, 842 F.3d 721, 735 (D.C. Cir. 2016) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)); *see also, e.g.*, *Ark v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014). "The strictness with which Rule 59(e) motions are viewed is justified by the need to protect both the integrity of the adversarial process . . . and the ability of the parties and others to rely on the finality of judgments." *Johnson v. District of Columbia*, 266 F. Supp. 3d 206, 211 (D.D.C. 2017) (quoting *CFTC v. McGraw Hill Cos.*, 403 F. Supp. 2d 34, 36 (D.D.C. 2005)).

Relief is not appropriate where a plaintiff merely disagrees with the Court's judgment. *See, e.g.*, *Habliston v. FINRA Dispute Resolution, Inc.*, 251 F. Supp. 3d 240, 244 (D.D.C. 2017). For example, Rule 59(e) motions "are not 'simply an opportunity to reargue facts and theories upon which a court has already ruled.'" *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 268 F. Supp. 3d 86, 88 (D.D.C. 2017) (quoting *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995)); *see also, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *Messina v. Krakower*, 439 F.3d 755, 758-59 (D.C. Cir. 2006). Nor is the motion a "vehicle to present a new legal theory that was available prior to judgment." *Patton Boggs, LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012); *see also, e.g.*, *Fox v. Am. Airlines*, 389 F.3d 1291, 1296 (D.C. Cir. 2004); *Kattan ex rel. Thomas v. District of Columbia*, 995 F.2d 274,

276 (D.C. Cir. 1993). "Rather, motions to alter or amend a judgment 'are intended to permit the court to correct errors of fact appearing on the face of the record, or errors of law.'" *Menoken*, 323 F.R.D. at 74 (quoting *Hammond v. Kempthorne*, 448 F. Supp. 2d 114, 118 (D.D.C. 2006)). "

Plaintiffs, as the party seeking reconsideration, bear the burden of meeting these stringent standards and establishing that relief is warranted. *Martin v. Omni Hotels Mgmt. Corp.*, 321 F.R.D. 35, 38 (D.D.C. 2017); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 226 (D.D.C. 2011). And "[i]n addressing the claims of a party on a motion for reconsideration, the Court is free to expand upon or clarify the reasons supporting its prior ruling." *Bristol-Myers Squibb Co. v. Kappos*, 891 F. Supp. 2d 135, 138 (D.D.C. 2012); *see also, e.g.*, *SmartGene, Inc. v. Advanced Bio. Labs., SA*, 915 F. Supp. 2d 69, 72 (D.D.C. 2013).

B. The Court's conclusion that Plaintiffs lack standing was correct.

The Court correctly concluded that it lacked jurisdiction over this action because Plaintiffs lacked Article III standing. "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* Here, the Court correctly reasoned that Plaintiffs had failed to meet their burden on all three elements of standing, and there is no flaw in the Court's decision to dismiss this action for lack of jurisdiction.

Plaintiffs were required to sufficiently demonstrate Article III standing to challenge HUD's administration of procedural fair-housing planning requirements for its local government grantees. As explained at length in the Court's opinion, recipients of HUD block grants have an obligation to affirmatively further fair housing, and HUD has long required its grantees to take

certain procedural steps in furtherance of this obligation—namely, conducting an analysis of impediments to fair housing choice (AI) and certifying that they will further fair housing goals. Mem. Op. at 7-11. In 2015, HUD promulgated the AFFH Rule and adopted a new procedural mechanism—the Assessment of Fair Housing (AFH)—that would, over time, replace the AI as the required procedure for grantees seeking to meet their AFFH obligations. *Id.* at 12-17. However, the requirement to conduct an AFH is contingent on HUD's publication of applicable Assessment Tools, including LG2017—the most recent iteration of the Assessment Tool for local governments. *Id.* at 18-19. In May 2018, HUD withdrew LG2017 and issued a notice reminding grantees that absent an operative tool, they must continue to comply with ongoing AFFH obligations, including by conducting an AI. *Id.* at 18-22.

The Court concluded that Plaintiffs do not have standing to seek relief from HUD's withdrawal of LG2017 and the concurrent notices. Mem. Op. at 31. As the Court explained, well-established standing precedent from the D.C. Circuit requires organizational plaintiffs to demonstrate that a challenged action perceptibly impaired their missions and led them to divert resources to counteract any harm caused by the action. *Id.* at 37-38. Plaintiffs had argued that the withdrawal of LG2017 harmed their ability to pursue their missions of promoting fair housing, including through advocacy, by depriving them of the benefits of the AFH process. *Id.* at 39-40. But as the Court explained, the withdrawal of LG2017 did not suspend the AFFH Rule or other planning requirements imposed by HUD, *id.* at 41-42, and in that context any impairments that might result from a shift from the AFH submission requirement to the AI requirement "seem[] difficult to measure, or, in other words are imperceptible." *Id.* at 42-43. In any event, Plaintiffs' assertions of harms to their daily activities were inadequate, given that they engaged in similar activities both before and after the withdrawal of LG2017—regardless

whether the AI or the AFH requirement was in place—and were able to pursue the same activities. *Id.* at 43-47. Similarly, Plaintiffs failed to satisfy the second prong of organizational injury, the incursion of expenses to counteract the supposed impairment. *Id.* at 47. Specifically, the Court explained that Plaintiffs had not set forth any increase in operational costs, and other budgetary choices did not support a claim of standing. *Id.* at 48-50.

The Court further concluded that even if Plaintiffs had adequately established a cognizable Article III organizational injury, their arguments for causation and redressability failed. Mem. Op. at 50. Because Plaintiffs were not the actual subjects of HUD's action and claimed standing to sue based on the effects of HUD's action on third-party local governments, Plaintiffs' claims of standing were "too speculative," as "redress would largely be premised on the actions of third parties." *Id.* Established precedent from the D.C. Circuit makes clear that under these circumstances standing generally cannot be established to challenge government action, except where there is no doubt as to the causal relationship between a government action and the directly injurious third-party conduct. *Id.* 53-54. The Court correctly concluded that Plaintiffs' lawsuit does not present such a case, given the uncertainty evident in Plaintiffs' own submissions about the effect of reinstating LG2017. *See id.* at 54-55.

Thus, the Court ruled that Plaintiffs "failed to allege facts sufficient to satisfy any of the three elements of Article III standing as organizational plaintiffs." Mem. Op. at 55. Under these circumstances, "[t]he Court is without jurisdiction to micromanage agency choices on program implementation," and the Court appropriately dismissed for lack of jurisdiction. *Id.*

C. Plaintiffs have not established clear error.

Because the Court correctly decided the case, Rule 59(e) relief is not warranted. In any event, Plaintiffs have not established the extraordinary circumstances required to set aside a final

judgment. Plaintiffs do not identify "an intervening change of controlling law" and do not rest their motion on "the availability of new evidence." *Foster*, 842 F.3d at 735. Rather, Plaintiffs suggest that reopening the case is warranted based on a "need to correct a clear error or prevent manifest injustice." *Id.* As an initial matter, clear error under Rule 59(e) is a "very exacting standard" in which a court must have a "clear conviction of error." *Moses v. Dodaro*, 856 F. Supp. 2d 99, 103 (D.D.C. 2012) (quoting *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 422 (D.D.C. 2005)). In other words, "the 'final judgment must be dead wrong to constitute clear error.'" *Slate v. ABC, Inc.*, 12 F. Supp. 3d 30, 35 (D.D.C. 2013) (quoting *Lardner v. FBI*, 875 F. Supp. 2d 49, 53 (D.D.C. 2012)); *see also, e.g.*, *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) (explaining that to be clearly erroneous, a decision must strike the court "as wrong with the force of a five-week-old, unrefrigerated dead fish"). Plaintiffs have not met this exacting standard for relief.

1. The Court did not commit clear error in applying Rule 12(b).

The main thrust of Plaintiffs' clear-error argument is that the Court misunderstood the basic standard of review for motions under Rule 12(b) and "reached factual conclusions that are inconsistent with the complaint." Mot. to Am. at 9. Plaintiffs' arguments to this effect are essentially threefold. First, Plaintiffs contend that the Court made an improper factual finding "with regard to the effects of HUD's action on the AFFH Rule's continued effectiveness." *Id.* at 9-10. Second, Plaintiffs argue that the Court inappropriately "found that the community participation requirements of the Consolidated Plan process could make up for the loss of such requirements in the now-suspended AFH process." *Id.* at 10-11. And third, Plaintiffs suggest that the Court erred in assessing HUD's authority to review AFFH certifications following withdrawal of the Assessment Tool. *Id.* at 11-12. All three of these arguments fail both because

the Court reached legal conclusions, not factual findings, and because the Court's legal conclusions were not (and could not be) inconsistent with Plaintiffs' submissions.

First, Plaintiffs' argument that the Court made improper factual findings about the effect of HUD's withdrawal of the Assessment Tool on provisions of the AFFH Rule amounts to a category error. The legal import of a regulation is a question of law, not fact. The Court appropriately assessed the legal effect of the withdrawal by examining the relevant provisions of the AFFH Rule. *See* Mem. Op. at 22-24. Plaintiffs take issue with the Court's conclusion that the AFFH Rule's definitional provisions remain in effect, Mot. to Am. at 9, but as the Court made clear, the status of those definitions "is plain from the AFFH Rule" itself. Mem. Op. at 47. Although the requirement to submit an AFH is contingent on the publication of an Assessment Tool, the definitional provisions are not. *See id.* Plaintiffs complain that "[n]othing in the complaint or in the record before the Court compels [that] conclusion," Mot. to Am. at 9, but that point is simply irrelevant when assessing the legal effect of HUD's withdrawal of the Assessment Tool. Similarly, Plaintiffs quarrel with the Court's legal conclusions by offering a differing interpretation of the legal effect of one of HUD's May 2018 notices, *id.* (citing notice reminding grantees of the requirement to conduct an AI), but Plaintiffs again mistake legal analysis for factfinding. Tellingly, Plaintiffs cite to no "fact" found in the Court's opinion, instead offering an alternative reading of the law, and in any event do not explain how any such "fact" is inconsistent with Plaintiffs' complaint. *Id.* And perhaps most importantly, Plaintiffs already conceded this issue at argument. Mem. Op. at 41; Mot. Hr'g at 14:24-16:8 (stating "I think you are correct on that" in response to the Court's question on this issue).

Second, Plaintiffs' arguments about the community participation requirements for HUD grantees again mistake legal conclusions for findings of fact. *See* Mot. to Am. at 10-11. The

Court's discussion of the community participation issue is rooted in a detailed analysis of the requirements of the AFFH Rule. Mem. Op. at 15-17. And again, the requirements of a regulation are a matter of law, not fact. In assessing the legal effect of HUD's May 2018 notices, the Court concluded that "many components of the AFFH Rule remain in effect," and specifically noted that "the community participation, consultation, and coordination requirements" adopted in the AFFH Rule apply to Consolidated Plans. *Id.* at 22-23 (citing 24 C.F.R. § 5.158). In evaluating the argument that the withdrawal of LG2017 deprived Plaintiffs of opportunities to participate in local governments' planning processes, the Court thus looked to the AFFH Rule and concluded that it "includes new community participation requirements that remain active even without use of the AFH process and Assessment Tools" through the Consolidated Plan process. *Id.* at 41; *see also, e.g.*, *id.* at 42.[1] Plaintiffs appeared to agree on this point at the motions hearing. *See, e.g.*, Mot. Hr'g at 17:6-17:25 (stating "it's an active requirement" with respect to community participation definitions in the AFFH Rule). The Court further looked to the AFFH Rule in concluding that the relevant AFH participation requirements "were not mandatory." *Id.* at 44. Thus, the Court's conclusions as to the legal sufficiency of Plaintiffs' allegations of harm on this front were rooted in an analysis of the opportunities to participate laid out in the regulatory regime, not any given fact. Plaintiffs may disagree with the Court's legal conclusions, but that does not convert legal analysis into factfinding.

Third, Plaintiffs contend that the Court erred in its discussion of HUD's review of AFFH certifications when an AFH submission requirement is not in effect, but Plaintiffs overstate the

[1] Plaintiffs emphasize that "the Consolidated Plan is a distinct document, part of a separate process" from the AFH. Mot to Am. at 10 n.3. That is of course the case, and the Court of course understood this very basic point about the operation of HUD's grant programs. *See, e.g.*, Mem. Op. at 7, 13. That these processes are distinct is of no moment in assessing whether the Court incorrectly engaged in factfinding.

import of the Court's analysis. *See* Mot. to Am. at 11-12. Plaintiffs rested their claims to standing in part on arguments related to HUD's review of AFH submissions. *See* Mem. of Points & Auths. in Opp. to Defs.' Mot. to Dismiss ("Pls.' MTD Opp.") at 6, ECF No. 40. Setting aside the propriety of that argument as a basis for standing, Plaintiffs suggest that the Court improperly made factual findings when noting that HUD is still empowered to review AFFH certifications under the AFFH Rule. To the contrary, the Court merely described the regulatory framework that provides for AFFH certification review and noted the effect of the AFFH Rule on that authority. Mem. Op. at 44. Indeed, the Court went no further than what was discussed with counsel at the motions hearing. Mot. Hr'g. at 52:8-54:10. The Court's opinion did not rest on any factual finding about HUD's actual review of AFFH certifications, and Plaintiffs point to no such finding in this brief section of the Court's opinion. Thus, Plaintiffs have identified no clear error in the Court's application of the Rule 12(b) standard of review sufficient to establish the extraordinary circumstances necessary to set aside the judgment.[2]

2. The Court did not commit clear error in analyzing standing.

In addition to arguing that the Court misapplied Rule 12(b), Plaintiffs revisit the Court's standing analysis and contend that the Court erred in concluding that Plaintiffs failed to adequately allege (1) a perceptible impairment to Plaintiffs' missions, Mot. to Am. at 12-15; (2)

[2] Separately, Plaintiffs criticize the Court for discussing issues that purportedly were not briefed by Defendants. Specifically, Plaintiffs claim that the Court improperly addressed (1) the contours of the AI process where an AFH submission requirement is not in effect and (2) opportunities to participate in the Consolidated Plan process where an AFH requirement is not in effect. Mot. to Am. at 11. As an initial matter, Defendants briefed both of these issues. *See, e.g.*, Mem. in Supp. of Mot. to Dismiss ("MTD Br.") at 11, 15, 20 (discussing participants' continued obligation to conduct an AI), ECF No. 38; *id.* at 13-14 (discussing citizen participation in the Consolidated Plan independent of the AFH process). But regardless, Article III courts "have an affirmative obligation" to confirm their own subject-matter jurisdiction, Mem. Op. at 27 (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996)), and "may consider materials outside the pleadings" when assessing jurisdiction on a Rule 12(b)(1) motion. *Id.* at 28 (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

a consequent drain on Plaintiffs' resources, *id.* at 16-17; and (3) causation and redressability, *id.* at 17-20. To the extent Plaintiffs' arguments on these points rest on the premise that the Court improperly engaged in factfinding, they fail for the reasons outlined above; the Court properly applied Rule 12(b) and committed no clear error in ruling on the relevant legal issues presented in the case. To the extent Plaintiffs also accuse the Court of committing clear error by "constru[ing] certain binding precedents regarding organizational standing in a manner that is incorrect and was not suggested by HUD," *id.* at 1, Plaintiffs impermissibly seek "an opportunity to reargue facts and theories upon which a court has already ruled" in the vehicle of a Rule 59(e) motion. *Friends of the Capital Crescent Trail*, 268 F. Supp. 3d at 88.

In light of the D.C. Circuit's "admonition against reconsideration of prior rulings absent extraordinary circumstances," arguments that "largely parallel" those made in the motion practice underlying the challenged judgment are insufficient to warrant reconsideration. *Nat'l Sec. Counselors v. CIA*, 206 F. Supp. 3d 241, 253 (D.D.C. 2016); *see also, e.g.*, *Wannall v. Honeywell Int'l, Inc.*, No. 10-cv-351 (BAH), 2013 WL 12321549, at *2 (D.D.C. Oct. 24, 2013) ("[L]itigants may not use Rule 59(e) . . . to repeat unsuccessful arguments[.]"). Yet here, Plaintiffs seek to relitigate the proper application of relevant standing precedents to their claims. Plaintiffs do not suggest, for example, that the Court blatantly misstated the holding of a relevant precedent; rather, Plaintiffs simply think that the Court got the analysis wrong. But mere disagreement with a Court's ruling can be no basis for Rule 59(e) relief, lest every disappointed party seek to reopen judgments in pursuit of a favorable outcome. *Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4, 8 (D.D.C. 2005) ("Rule 59 was not intended to allow a second bite at the apple.").

Here, taking each issue in turn illustrates why Plaintiffs' motion fails to meet the exacting standards for reconsideration under Rule 59(e). First is the Court's conclusion that Plaintiffs

failed to adequately allege a perceptible impairment to their missions, the first prong of organizational injury. Mot. to Am. at 12. Plaintiffs begin by again suggesting that the Court "weigh[ed] the evidence," *id.*, but the Court simply assessed whether Plaintiffs' submissions were sufficient to meet Article III standards. Mem. Op. at 39-47.[3] Otherwise, Plaintiffs' arguments amount to little more than a reiteration of points already raised in previous briefing. To wit, Plaintiffs' contend that the Court misapplied two D.C. Circuit precedents, *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), and *PETA v. U.S. Department of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015), but both of these cases were discussed at length in Plaintiffs' opposition to HUD's motion to dismiss. *See* Pls.' MTD Opp. at 5, 7-9, 15-16. Plaintiffs suggest that "[t]he Court's reasoning was erroneous" in analyzing these cases, Mot. to Am. at 13, but there "is not a valid argument for reconsideration" where a movant "has accused the court with an error of reasoning, not of apprehension." *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 102 (D.D.C. 2005). In other words, disagreement on how to read a case is not evidence of clear error.

Next, Plaintiffs suggest that the Court erred in concluding that they had failed to allege a cognizable diversion of resources to counteract the withdrawal of LG2017, the second prong of organizational injury. Mot. to Am. at 16-17. This argument rests on "largely the same reasons" as Plaintiffs' objections to the Court's conclusion about the perceptible-impairment prong. *Id.* Plaintiffs suggest that this conclusion infected the Court's analysis of the second prong, notwithstanding the Court's express conclusion that Plaintiffs "failed to satisfy the second

[3] In this section of their brief, Plaintiffs seem to suggest that a Court can never resolve a question of Article III injury at the motion-to-dismiss stage in a suit challenging agency action because "[w]hether a party is injured by agency action 'is a question of fact.'" Mot. to Am. at 12. (quoting *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 969 (D.C. Cir. 2000). That contention misses the point; even where standing rests on questions of fact, Plaintiffs still must set forth sufficient facts to survive a motion to dismiss, and Plaintiffs failed to do so.

prong" of organizational standing "[e]ven if the necessary impairment were established." Mem. Op. at 47. Regardless, Plaintiffs argue that the Court misapplied relevant precedents, including *Equal Rights Center v. Post Properties, Inc.*, 633 F.3d 1136 (D.C. Cir. 2011), and *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995). But again, Plaintiffs "appear[] merely to disagree with the analysis of the cases, which is insufficient to trigger reconsideration." *United States v. Nelson*, 59 F. Supp. 3d 15, 20 (D.D.C. 2014).

Lastly, Plaintiffs quarrel with the Court's conclusion that they failed to establish causation and redressability. Mot. to Am. at 17-20. Plaintiffs begin by suggesting that the Court overlooked a central holding of *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), but this case is discussed at length in the Court's opinion and was raised in Defendants' motion to dismiss. *See* Mem. Op. at 36-37, 50-55; MTD Br. at 20, 22. Plaintiffs also take issue with the Court's conclusion that Plaintiffs' theory of causation and redressability was too speculative given that "redress would largely be premised on the actions of third parties." Mem. Op. at 50. Ignoring the body of case law marshaled in the Court's opinion, Plaintiffs suggest that the Court reached this conclusion because it "rejected Plaintiffs' causation allegations based on HUD's account of the number of jurisdictions that initially submitted AFHs that did not meet the Rule's requirements." Mot to Am. at 18. The Court did no such thing. Rather, the Court assessed—and extensively cited—Plaintiffs' own submissions, which failed to adequately establish that the relief sought would redress Plaintiffs' asserted injuries. Mem. Op. at 52, 54 (citing Plaintiffs' declarations).

In any event, all of Plaintiffs' arguments center on the Court's reasoning, with which they disagree, rather than identifying any clear error of judgment. This Court should reject Plaintiffs' efforts to relitigate this case through a Rule 59(e) motion.

D. The Court's ruling is not manifestly unjust.

Even if Plaintiffs were correct that this Court misapplied the basic Rule 12(b) standard—it did not—this Court had the power to dismiss this action regardless, and no manifest injustice will result from denying Plaintiffs' motion for reconsideration. *See, e.g.*, *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 247 F. Supp. 3d 76, 92 (D.D.C. 2017) (explaining that manifest injustice requires a result that is fundamentally unfair in light of governing law); *Smith v. Lynch*, 115 F. Supp. 3d 5, 12 (D.D.C. 2015) (explaining that manifest injustice "is an exceptionally narrow concept in the context of a Rule 59(e) motion"). After filing the amended complaint, Plaintiffs filed a motion for a preliminary injunction and a motion for expedited summary judgment. *See* P.I. Mot. These motions were filed and briefed before Defendants filed their motion to dismiss, and the Court resolved these pending motions together. *See* Mem. Op. Plaintiffs go to great lengths to criticize the Court's application of Rule 12(b) in granting Defendants' motion to dismiss, but fail to account for the fact that the Court was permitted to look beyond the allegations in the amended complaint and dismiss the case for lack of standing in resolving Plaintiffs' motions for a preliminary injunction and summary judgment.

The party invoking the Court's jurisdiction bears the burden of establishing the elements of Article III standing, and because these elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the summary judgment stage, a plaintiff "must support each element of its claim to standing 'by affidavit or other evidence.'" *Ams. for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). Specifically, a plaintiff's "burden of proof is to show a 'substantial probability' that

it has been injured, that the defendant caused its injury, and that the court could redress the injury." *Id.* (quoting *Sierra Club*, 292 F.3d at 899); *see also, e.g.*, *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 40, 46 (D.D.C. 2012). And where "a plaintiff seeks a preliminary injunction, 'the plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment.'" *AARP v. EEOC*, 226 F. Supp. 3d 7, 15 (D.D.C. 2016) (quoting *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 176 (D.D.C. 2015)); *see also, e.g.*, *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 907 n.8 (1990).

Plaintiffs can claim no manifest injustice from being held to their burden to establish standing at the summary-judgment (or preliminary-injunction) stage. Plaintiffs repeatedly insisted that the record was sufficient for the Court to issue final judgment—*expedited* summary judgment, no less—and conclusively resolve the case by entering a permanent injunction. *See, e.g.*, P.I. Mot. ("[T]here is no genuine issue of disputed material fact and [Plaintiffs] are entitled to judgment as a matter of law."); Mem. in Supp. of Pls.' Renewed Mot. for P.I. & Summ. J. ("P.I. Mem.") at 45, ECF No. 19-11 ("This Court . . . should grant summary judgment to Plaintiffs and enter final judgment in Plaintiffs' favor."); Reply Mem. in Supp. of Pls.' Renewed Mot. for P.I. & S.J. at 25 ("Pls.' Reply"), ECF No. 37 ("Summary judgment is appropriate at this time."). Indeed, Plaintiffs argued that there was nothing lacking in the record in order to reach the merits, suggesting that their moving papers warranted treatment akin to a Rule 65(a)(2) consolidation of a preliminary injunction and a trial on the merits. Pls.' Reply at 25. Plaintiffs have consistently taken the position that final judgment under the summary-judgment standard—or, at the very least, a preliminary injunction—was appropriate on the record before the Court. *See, e.g.*, Mot. Hr'g at 5:16-23 (stating summary judgment was "appropriate" and discussing sufficiency of record to "get[] a final order" because "HUD has had the opportunity to put into

the record anything that it thinks is relevant"); *id.* at 6:11-14 (suggesting separate consideration of preliminary and permanent injunction called for only "if HUD wants to drag this out and put more documents in the record"); *id.* at 13:4-8 (describing "the voluminous record").

Plaintiffs now take the opposite position, claiming that further development of the record is required before the Court can issue judgment. *See, e.g.*, Mot. to Am. at 4 (arguing that the Court improperly held that Plaintiffs lacked Article III standing based on the "current, incomplete record"); *id.* at 21 (asserting that standing "cannot be resolved until after the production of the administrative record and other opportunities for Plaintiffs to make a record supporting their allegations"). In Plaintiffs' view, then, it's heads I win, tails you lose—so long as the Court ruled for Plaintiffs, the record was adequate and there were no disputes of material fact; when the Court ruled for Defendants, that suddenly was no longer the case.

When a plaintiff moves for summary judgment (or a preliminary injunction) but fails to meet its burden to establish standing, the Court may appropriately dismiss the case for lack of jurisdiction. *See, e.g.*, *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240, 246 (D.C. Cir. 2015) (dismissing appeals and directing dismissal in district court for failure to meet standing burden at summary-judgment stage); *Food & Water Watch*, 79 F. Supp. 3d at 206, *aff'd*, 808 F.3d 905 (D.C. Cir. 2015) (preliminary-injunction stage). And here, Defendants argued that Plaintiffs failed to meet their burden to establish Article III standing in their opposition to Plaintiffs' motion for a preliminary injunction and summary judgment. Mem. in Opp. to Pls.' Mot. for P.I. & Exp. S.J. ("P.I. Opp.") at 15-22, ECF No. 33; *see also, e.g.*, Mem. Op. at 31 ("HUD challenges the plaintiffs' standing in opposing the plaintiffs' motion for a preliminary injunction[.]"). Plaintiffs seem to have understood as much, citing to the declarations they submitted in support of their motion for relief, not the allegations in their amended complaint, when responding to

Defendants' standing arguments. *See, e.g.*, Pls.' Reply at 20. And in their Rule 59(e) motion, Plaintiffs acknowledge that their motions "required greater evidentiary consideration." Mot. to Am. at 1; *see also, e.g.*, *id.* at 4 (noting that these motions "required examination of record evidence and a determination of whether Plaintiffs were likely to prove their allegations"). Yet Plaintiffs nowhere reckon with their failure to meet their burden to establish standing at that stage of the litigation, given the relief they sought.

In short, Plaintiffs would have this Court ignore the higher burden to establish standing that they invited when moving for a preliminary injunction and expedited summary judgment. *See, e.g.*, Mot. to Am. at 1 n.1; *id.* at 4 n.2 (contending that Plaintiffs' motions "are not at issue here"). But Plaintiffs cannot undo the effect of the motions they chose to file and ask this Court to reconsider its ruling by selectively looking only to the resolution of a motion with a lower burden for standing. The Court need not accept Plaintiffs' invitation to put on blinders and ignore the realities of the motion practice before the Court. Regardless whether at the motion-to-dismiss, preliminary-injunction, or summary-judgment stage, the Court was well within its authority to dismiss the case for want of jurisdiction. No manifest injustice will result if the court denies Plaintiffs' motion for reconsideration.

II. Plaintiffs' Request for Leave to File a Second Amended Complaint Should Be Denied Regardless.

The Court also should deny Plaintiffs' motion for leave to file a second amended complaint. Unless the Court grants Plaintiffs' Rule 59(e) motion for reconsideration, the request for leave to amend is moot. *Mohammadi*, 782 F.3d at 18; *Ciralsky*, 355 F.3d at 673. In other words, entry of final judgment precludes the Court from granting leave to amend unless that judgment is first set aside. *Firestone*, 76 F.3d at 1208; *see also Ciralsky*, 355 F.3d at 673. Thus, where plaintiffs "have failed to meet Rule 59(e)'s more stringent standard, their motion for leave

to file an amended complaint must be denied on that basis alone." *Habliston*, 251 F. Supp. 3d at 247. Here, Plaintiffs have not met the Rule 59(e) standard, and so their request for leave to amend should be denied on that basis.

Even if the Court were to grant reconsideration, leave to amend nonetheless should be denied. "While leave to amend a complaint should be freely granted when justice so requires, the Court may deny a motion to amend if such amendment would be futile." *Metro. Life Ins. Co. v. Blyther*, 964 F. Supp. 2d 61, 68 (D.D.C. 2013) (citation omitted). "An amended complaint would be futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss." *Id.* (quoting *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002)). Plaintiffs' proposed second amended complaint would be futile for two reasons: because it would not cure the defects in Plaintiffs' standing and because it would not cure the defects the Court already has identified in their claims on the merits.

First, Plaintiffs' complaint adds a number of allegations, but these new allegations do not help their claim of standing. Many of these new allegations merely cite to or describe HUD's AFFH and Consolidated Plan regulations and the notices issued in May 2018, public documents that already were before the Court or otherwise available in resolving the motions decided in its August 2018 opinion. *See, e.g.*, Proposed Second Am. Compl. ¶¶ 10-11, 34-35, 39, 56, 66, 74, 79-85, 104, 112-16, 118-28, ECF No. 48-2. Alleging the existence of a regulation or a passage in the Federal Register introduces no relevant factual matter to the case; Plaintiffs could have raised these points in furtherance of their claims under the first amended complaint. Other allegations offer conclusory assertions of standing or elaborate on allegations in Plaintiffs' first amended complaint without any meaningful distinction for purposes of standing analysis. *See,*

e.g., *id.* ¶¶ 15, 148-54, 156-66, 168, 181-83, 186-88. Line-editing the complaint to elaborate on theories of standing that the Court already has rejected as inadequate or overly speculative will not lead to a different result, and the only truly new standing allegations are in line with the allegations in the first amended complaint. *See, e.g.*, *id.* ¶¶ 192-98.

In any event, the Court already has had an opportunity to pass upon the merits of Plaintiffs' claims and concluded that they were unlikely to succeed. First, the Court concluded that HUD was not required to engage in notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. § 553, before withdrawing LG2017. Mem. Op. at 55-62. Because this is a purely legal question, nothing in the proposed second amended complaint would affect this conclusion, and this claim would not survive a motion to dismiss. Second, the Court concluded that Plaintiffs were unlikely to succeed on the merits of their claim that the withdrawal of LG2017 was arbitrary and capricious. Mem. Op. at 62-68. Nothing in the proposed second amended complaint would affect this Court's review of the agency's decision-making, and Plaintiffs have made clear their view that no further record is necessary to decide this claim beyond the record that the Court already concluded did not support their merits claim. P.I. Mot. at 1; P.I. Mem. at 45; Pls.' Reply at 25. And lastly, the question whether HUD is violating the Fair Housing Act also would not be affected by the filing of this proposed second amended complaint. Mem. Op. at 68-71. There is no reason to believe that this litigation would proceed any differently if the Court permitted Plaintiffs to file this complaint and moved into summary judgment, and the Court should deny leave to amend as futile.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to amend the Court's judgment and for leave to file a second amended complaint.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

/s/ Daniel Halainen
DANIEL HALAINEN (MA Bar 694582)
Trial Attorney, Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street NW
Washington, DC 20005
(202) 616-8101 (office)
(202) 616-8470 (fax)
daniel.j.halainen@usdoj.gov

Counsel for Defendants