No. 25-

IN THE

Supreme Court of the United States

DR. MICHAEL FERNANDEZ, D.D.S., LTD., *et al.*,

Petitioners,

v.

STEPHEN C. BRICH, P.E., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is Appellants' non-zoning related equal protection claim based upon a "class-of-one theory" subject to the heightened pleading standard for similarly situated comparators as set forth in *SAS Assocs. 1, LLC v. City Council for City of Chesapeake, Virginia*, 91 F.4th 715 (4th Cir. 2024), which is applicable only to zoning cases?

CORPORATE DISCLOSURE STATEMENT

Appellant Dr. Michael Fernandez, DDS, LTD is a non-publicly held corporation. It has a parent corporation which is Atlantic Dental Care, PLC. No publicly held corporation or other publicly held entity owns 10% or more stock in Dr. Michael Fernandez, DDS, LTD.

RELATED CASES

- *Dr. Michael Fernandez, DDS, LTD. et. al. v. Stephen C. Brich, P.E., Commissioner of Highways, et. al.*, No. 2:23-cv-00069, U.S. District Court for the Eastern District of Virginia. Judgment entered June 24, 2024.

- *Dr. Michael Fernandez, DDS, LTD. et. al. v. Stephen C. Brich, P.E., Commissioner of Highways, et. al.*, No. 24-1658, U.S. Court of Appeals for the Fourth Circuit. Judgment entered August 4, 2025.

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JURISDICTIONAL STATEMENT

Appellants appeal the judgment of the U.S. Court of Appeals for the Fourth Circuit entered July 7, 2025 and the Court's denial of Appellants' petition for rehearing en banc, entered August 4, 2025. Appellants bring this appeal pursuant to 28 U.S.C. § 1254, which permits appellate review of decisions of courts of appeal via writ of certiorari.

PROVISIONS INVOLVED

- Fifth Amendment to the U.S. Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- Section 1, Fourteenth Amendment to the U.S. Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 49 C.F.R. § 24.207(b):

> Expeditious payments. The agency shall review claims in an expeditious manner. The claimant

shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

- 42 U.S.C. § 4621:

(a) Findings

The Congress finds and declares that—

(1) displacement as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance is caused by a number of activities, including rehabilitation, demolition, code enforcement, and acquisition;

(2) relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons;

(3) the displacement of businesses often results in their closure;

(4) minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities; and

(5) implementation of this chapter has resulted in burdensome, inefficient, and inconsistent compliance requirements and procedures which will be improved by establishing a lead agency and allowing for State certification and implementation.

(b) Policy

This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance. The primary purpose of this subchapter is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons.

(c) Congressional intent

It is the intent of Congress that—

(1) Federal agencies shall carry out this subchapter in a manner which minimizes waste, fraud, and mismanagement and reduces unnecessary administrative costs borne by States and State agencies in providing relocation assistance;

(2) uniform procedures for the administration of relocation assistance shall, to the maximum extent feasible, assure that the unique circumstances of any displaced person are taken into account and that persons in essentially similar circumstances are accorded equal treatment under this chapter;

(3) the improvement of housing conditions of economically disadvantaged persons under this subchapter shall be undertaken, to the maximum extent feasible, in coordination with existing

> Federal, State, and local governmental programs for accomplishing such goals; and
>
> (4) the policies and procedures of this chapter will be administered in a manner which is consistent with fair housing requirements and which assures all persons their rights under title VIII of the Act of April 11, 1968 (Public Law 90–284), commonly known as the Civil Rights Act of 1968 [42 U.S.C. 3601 et seq.], and title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.].

STATEMENT OF THE CASE

Appellant Fernandez was forced to relocate his dental practice as a result of a Virginia Department of Transportation ("VDOT") road project. Pursuant to 42 U.S.C. § 4601, *et seq.* and 49 C.F.R. § 24.1 *et seq.*, he is entitled to assistance and benefits from VDOT, including reimbursement of certain costs incurred in relocating his practice. *See also* J.A. 30. Appellee Brich is the Virginia Commissioner of Highways and the Chief Executive Officer of VDOT. Appellee Snider is the State Right of Way and Utilities Director for the Virginia Department of Transportation. Ms. Snider oversees all actions undertaken by VDOT with respect to right-of-way and utility acquisitions, which includes the use of eminent domain, and related activities pertaining to the relocation of displaced persons.

In 2017, Fernandez submitted to VDOT for reimbursement more than $500,000.00 in costs directly incurred in relocating his practice, along with several hundred pages of support and documentation. J.A. 1140,

J.A. 1254-1291. To date, VDOT has made a determination as to only $35,346.88 of those costs. J.A. 1141-1142, J.A. 1343-1355. Despite years of requests, VDOT and Appellees refuse to make any determinations as to the overwhelming majority of costs Fernandez has submitted. *E.g.*, J.A. 1145-1147, 1154-1156, 1489-1505. While trying to obtain a determination as to the outstanding costs, Fernandez was informed by counsel for VDOT and Appellees that he would have been reimbursed more had he not hired legal counsel to represent him. J.A. 1146. He was then later informed that VDOT and Appellees did not consider his claims a priority and that no final determination would be forthcoming. J.A. 1146-1147.

The applicable statutes and regulations governing relocation of displaced persons are not discretionary and do not permit Appellees and VDOT to withhold relocation assistance and benefits from a displacee because he hires legal counsel. *See* 42 U.S.C. § 4601, *et seq.* and 49 C.F.R. § 24.1, *et seq.* They further require state agencies to expeditiously review and provide determinations as to the submitted claims. *See* 49 C.F.R. § 24.207(b). Based on these actions and statements by VDOT and the Appellees, Fernandez brought suit in district court claiming that Appellees continue to violate his right to equal protection under the law by intentionally refusing to properly consider and issue a determination regarding the vast majority of the submitted costs, and that this refusal is based on discriminatory animus. J.A. 1156.

Specifically, Fernandez alleged that he was treated differently from other displaced persons and businesses who were forced to relocate by VDOT and Appellees for the same road project as well as other road projects. J.A.

1151, J.A. 1154-1156. He alleged that this treatment was based on discriminatory animus due to his hiring counsel to represent him, and that there was no rational basis for how he was treated. Fernandez did not, however, identify specifically by name any displaced persons or businesses in the proposed complaint.

The district court dismissed Fernandez's first amended complaint and then denied his motion to amend the complaint a second time on the grounds that the amendment would be futile and would not survive a motion to dismiss. J.A. 1542. The district court held that the proposed second amended complaint "fail[s] to identify similarly situated comparators," and therefore fails to state a claim for equal protection under the law. J.A. 1541. In doing so, the district court principally relied on the Fourth Circuit Court of Appeals' decision in *SAS Assocs. 1, LLC v. City Council for City of Chesapeake, Virginia*, 91 F.4th 715 (4th Cir. 2024). The Court held that Fernandez's allegations are too conclusory to show "that 'highly similar comparators received better treatment,'" apparently requiring comparators be identified by name. J.A. 1542, citing *SAS Assocs. 1, LLC*, 91 F.4th at 723. However, the Court's analysis in *SAS Assocs. 1, LLC* sets forth a higher standard of pleading for identifying similarly situated comparators in zoning cases, which is not applicable in this matter.

After oral argument, the Fourth Circuit issued an unpublished per curiam opinion stating it had "thoroughly reviewed the record and carefully considered the briefs and arguments of the parties," and affirmed the holding of the district court. Dkt. No. 41 (July 7, 2025). The panel provided no analysis or explanation for its decision.

Fernandez then requested a rehearing en banc, which was denied. Fernandez now respectfully requests this Court grant his Petition for Writ of Certiorari on the grounds that the lower courts improperly relied on an inapplicable pleading standard set forth in *SAS Assocs. 1, LLC* and that doing so is in conflict with this Court's decision in *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000) and *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591 (2008)

ARGUMENT

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 127 S. Ct. 1955, 1964–65, 167 L. Ed. 2d 929 (2007) (internal citations and quotations omitted). Importantly, a complaint must allege sufficient facts to state that a belief is plausible on its face. *Id.* This plausibility standard, however, does not equate to a probability requirement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 1950 (2009

Fernandez's claim is based upon a "class-of-one theory of equal protection" which requires a party to allege that

he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000). In order to survive a motion to dismiss, Fernandez need not effectively prove his claim, but must only "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678—79 (2009) (noting that the pleadings must demonstrate enough facts to show the claim is plausible and that plausibility does not equate to probability).). He must show that he has been "irrationally singled out as a so-called 'class of one.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008).

A. The Lower Courts Applied a Heightened Pleading Standard Not Applicable to this Matter

The Court of Appeals erred when it affirmed the district court's reliance on *SAS Assocs. 1, LLC v. City Council for City of Chesapeake, Virginia*, 91 F.4th 715 (4th Cir. 2024) in finding that Fernandez did not sufficiently identify similarly situated comparators in his proposed Second Amended Complaint. The holding in *SAS Assocs. 1, LLC* discussed the necessity of specifically identifying similarly situated persons under a heightened standard applicable specifically to zoning cases. The Court of Appeals even recognized in *SAS Assocs. 1, LLC* that it was applying a heightened pleading requirement. The Fourth Circuit cited *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602 (2008), and noted that prior decisions analyzing the treatment of classes of one were faced with the "existence of a clear standard against which departures,

even for a single plaintiff, could be readily assessed. *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602, 128 S. Ct. 2146, 2153, 170 L. Ed. 2d 975 (2008). It went on to hold that, "In contrast, discretionary zoning decisions such as the one here are generally not governed by [such a standard]. To establish a class-of-one claim, a person complaining of a zoning decision must therefore "show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *SAS Assocs. 1, LLC v. City Council for City of Chesapeake, Virginia*, 91 F.4th 715, 721–22 (4th Cir. 2024)

In that case, SAS Assocs. 1, LLC identified 10 "comparable" properties to support its contention that the City of Chesapeake had discriminated against it in the application of zoning ordinances; but the Court of Appeals found that none of the properties were "sufficiently similar" as nine out of ten were constructed over a period of 49 years and the tenth was more than one mile away from the subject property. The Court of Appeals noted that the proposed properties were not similar comparators because, *especially in zoning cases*, "Comparators lose their force through the passage of time." *SAS Assocs. 1, LLC*, 91 F.4th at 722. "These dissimilarities, as the district court recognized, are fatal. It is fundamental to equal protection law that those differently situated may be treated differently. *Id.* The developers' claims that "the alleged comparator properties are similar is just the type of 'naked assertion' that requires 'further factual enhancement' to 'nudge' a claim 'across the line from conceivable to plausible,' such that it passes muster under Rule 12(b)(6)." *Id.* at 733 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1966 (2007)).

Here, Fernandez's allegations clearly cross the threshold from conceivable to plausible. He points to displaced parties who were relocated as a result of the very same road project. While zoning ordinances and demographics may change significantly over a period of almost 50 years, those who were forced to relocate for the same project and at the same time as Fernandez were entitled to the same relocation benefits. *See* 42 U.S.C. § 4601, *et seq.* The holding in *SAS Assocs. 1, LLC* was based upon the degree of similarity between the potential comparators and not whether they were identified by name. The district court ignored this distinction in its analysis and failed to even address how others displaced for the same road project are dissimilar. Fernandez did not simply allege that there are others similarly situated with no further support, he specifically alleged that they are similar because they were relocated under the exact same conditions.

Unlike zoning decision cases, such as *SAS Assocs. 1, LLC*, Fernandez's matter **is** "governed by a clear standard against which departures, even for a single plaintiff, c[an] be readily assessed." *Id*. The statutes governing relocation assistance are not discretionary and are to be administered uniformly and equally. *See* 42 U.S.C. § 4621. They do not permit a state agency to discriminate against a displaced person and withhold benefits simply because they engaged legal counsel and attempted to enforce their rights. *See e.g.* 42 U.S.C. § 4601 *et seq.* Neither do the statutes permit VDOT and Appellees to withhold providing a determination on Fernandez's claims simply because they do not consider him a priority. *See* 49 C.F.R. § 24.207(b). Appellees' departure from the requirements of these statutes can be readily assessed,

as they have no discretion to withhold benefits for the reasons alleged in the Second Amended Complaint. Nor have Appellees claimed that their actions alleged by Fernandez in his complaint are permissible under the relocation requirements. Fernandez's proposed Second Amended Complaint therefore contains sufficient facts to demonstrate "a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

B. Other Circuit Courts Have Applied a Less Stringent Standard for Pleading With Regard to Similarly Situated Comparators

Other Circuit Courts have recognized a lower threshold than the district court applied in this matter. In analyzing the degree of similarity required for comparators, the Eleventh Circuit Court of Appeals has noted that the comparators "must be *prima facie* identical in all relevant respects." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006). This is substantially different from the "extremely high degree of similarity" which the Fourth Circuit found in SAS Associates 1, LLC and the district court applied to Fernandez. The Fourth Circuit's standard is much more stringent than the requirements the Eleventh Circuit has recognized. Fernandez identified as similarly situated comparators others who have been displaced for the same road project. These comparators are therefore displacees subject to the same relocation rules and regulations as Fernandez. There are no other respects which are relevant to Fernandez's claim. All displaced businesses are entitled to a determination of the claims they have submitted and Appellees are not entitled to withhold such determinations for the discriminatory reasons alleged by Fernandez. Therefore, under the

Eleventh Circuit's precedence, Fernandez has sufficiently alleged the existence of similarly situated comparators and the Fourth Circuit's reliance on *SAS Associates 1, LLC* is in direct contravention of this standard.

Similarly, the First Circuit Court of Appeals has applied a much less stringent pleading requirement for class-of-one equal protection claims. It has held, "Although an [e]xact correlation is not required, class-of-one plaintiffs must demonstrate that the comparators have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile." *Back Beach Neighbors Comm. v. Town of Rockport*, 63 F.4th 126, 130–31 (1st Cir. 2023) (citations omitted). *See also Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010) ("To be similarly situated for purposes of a class-of-one equal-protection claim, the persons alleged to have been treated more favorably must be identical or directly comparable to the plaintiff in all material respects.").

Again, Fernandez has met these pleading requirements in his proposed Second Amended Complaint. Those displaced for the same road project are clearly engaging in the same activity and there is no distinguishing or mitigating circumstances to "render the comparison inutile." Being a displaced person is the only relevant criteria to the analysis in this matter. Once required to relocate, all displacees are entitled to have their claims determined in an expeditious manner. State agencies are not permitted to exercise discretion in providing relocation assistance based on whether a displaced person obtains legal counsel or not.

As such, Fernandez has properly identified similarly situated comparators who are "*prima facie* identical in all relevant respects." They are involved in the same government activity and, as plead by Fernandez, were treated differently from him due to discriminatory animus. Fernandez's Second Amended Complaint therefore demonstrates that he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Contrary to the district court's and the Circuit Court's findings, he has met the pleading requirements of Rule 8 and would survive a motion to dismiss pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Fernandez's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1658

DR. MICHAEL FERNANDEZ, D.D.S., LTD., A DIVISION OF ATLANTIC DENTAL CARE, PLC; DR. MIGUEL FERNANDEZ, D.D.S.,

Plaintiffs-Appellants,

v.

STEPHEN C. BRICH, P.E., COMMISSIONER OF HIGHWAYS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; LORI A. SNIDER, STATE RIGHT OF WAY & UTILITIES DIRECTOR, VIRGINIA DEPARTMENT OF TRANSPORTATION, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, Senior District Judge. (2:23-cv-00069-RAJ-RJK)

Argued: March 20, 2025 Decided: July 7, 2025

Before KING, RUSHING, and BENJAMIN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Appendix A

PER CURIAM:

This civil action on appeal from the Eastern District of Virginia relates to the forced relocation of a dentist office to make way for a highway expansion. The plaintiffs, Dr. Michael Fernandez, D.D.S., Ltd., and Dr. Miguel Fernandez, D.D.S., have alleged a variety of claims against the defendant officials of the Virginia Department of Transportation ("VDOT"), Commissioner of Highways Stephen C. Brich and State Right of Way and Utilities Director Lori A. Snider. By their appeal, the plaintiffs contest the district court's rulings only with respect to one claim — their Fourteenth Amendment equal protection claim — and only insofar as that claim is asserted against the defendants in their official capacities.

After initiating this civil action in February 2023, the plaintiffs filed their operative amended complaint in the district court on April 12, 2023. *See Dr. Michael Fernandez, D.D.S., Ltd. v. Brich*, No. 2:23-cv-00069 (E.D. Va. Apr. 12, 2023), ECF No. 12 (the "Operative Complaint"). In support of the official-capacity equal protection claim, the Operative Complaint alleges that the plaintiffs were subjected to disparate treatment and discriminatory animus when the defendants denied them relocation benefits that were provided to similarly situated persons — what is known as a "class of one" equal protection claim. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). The defendants

thereafter moved to dismiss the official-capacity equal protection claim for lack of jurisdiction and failure to state a claim upon which relief can be granted, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

By its Memorandum Opinion and Order of December 18, 2023, the district court dismissed the official-capacity equal protection claim under Rule 12(b)(1) for lack of jurisdiction, on the ground that the claim does not qualify for the *Ex parte Young* exception to Eleventh Amendment immunity. *See Dr. Michael Fernandez, D.D.S., Ltd. v. Brich*, No. 2:23-cv-00069, at 23-24, 2023 U.S. Dist. LEXIS 225264 (E.D. Va. Dec. 18, 2023), ECF No. 25 (the "First Opinion"); *see also generally Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The First Opinion explained that the Operative Complaint "do[es] not allege an ongoing violation of [the plaintiffs'] equal protection rights, but rather that their equal protection rights were violated at one time or over a period of time in the past." *See* First Opinion 24 (internal quotation marks omitted); *see also DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999) (explaining that the *Ex parte Young* exception applies only where violations are ongoing, can be cured by prospective relief, and have not "occurred entirely in the past").

On January 15, 2024, the plaintiffs moved for leave to file an attached second amended complaint, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure. *See Dr. Michael Fernandez, D.D.S., Ltd. v. Brich*, No. 2:23-cv-00069, 2024 U.S. Dist. LEXIS 111043, ECF No. 27-1 (the "Proposed Complaint"). Pertinent to the official-capacity equal protection claim, the Proposed Complaint realleges that the plaintiffs were told by a Virginia Deputy Attorney

General that "had [the plaintiffs] not hired attorneys to represent them, had not filed suit against VDOT, and had not tried to enforce their rights, VDOT would have paid more in relocation assistance and benefits." *See* Proposed Complaint ¶ 78. The Proposed Complaint also newly alleges that the plaintiffs are facing an ongoing threat of injury from the defendants' discriminatory treatment because they are still making payments on financing, including interest, obtained to cover the cost of the move. *Id.* ¶¶ 84-89, 150.

By its Memorandum Opinion and Order of June 24, 2024, the district court denied leave to file the Proposed Complaint as futile. *See Dr. Michael Fernandez, D.D.S., Ltd. v. Brich*, No. 2:23-cv-00069, 2024 U.S. Dist. LEXIS 111043, ECF No. 30 (the "Second Opinion"); *see also Save Our Sound OBX, Inc. v. N.C. DOT*, 914 F.3d 213, 228 (4th Cir. 2019) ("A proposed amendment is . . . futile if the claim it presents would not survive a motion to dismiss."). The court relied on a deficiency in the Proposed Complaint that the defendants had raised — but the court did not reach — as to the Operative Complaint: that the plaintiffs have failed "to identify similarly situated comparators" for purposes of their official-capacity equal protection claim. *See* Second Opinion 9. As such, the court recognized that the claim as alleged in the Proposed Complaint "fails the Rule 8 pleading standard and would not survive a Rule 12(b)(6) motion to dismiss." *Id.*

In the Second Opinion, the district court also addressed the plaintiffs' contention that, by not previously dismissing the official-capacity equal protection claim for lack of adequate allegations of comparators, the court had implied in the First Opinion that the Operative

Complaint's allegations are sufficient. *See* Second Opinion 9. The court rejected that contention, explaining that — because the First Opinion dismissed the official-capacity equal protection claim as being foreclosed by the Eleventh Amendment — the court "had no proper occasion to decide whether [the Operative Complaint] sufficiently ple[ads] [such] equal protection claim." *Id.* Meanwhile, the court did not address in the Second Opinion whether the official-capacity equal protection claim as alleged in the Proposed Complaint is barred by Eleventh Amendment immunity.

On appeal, the plaintiffs challenge both the First Opinion and the Second Opinion with respect to their rulings on the official-capacity equal protection claim. We review de novo the First Opinion's 12(b)(1) dismissal of that claim as barred by Eleventh Amendment immunity and the Second Opinion's denial of amendment as futile. *See SAS Assocs. 1, LLC. v. City Council for City of Chesapeake*, 91 F.4th 715, 719 (4th Cir. 2024) (de novo review of 12(b)(1) dismissal); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) (de novo review of denial of motion to amend as futile). Having thoroughly reviewed the record and carefully considered the briefs and arguments of the parties, we discern no error in the First or Second Opinion. Accordingly, we affirm the judgment of the district court.[*]

AFFIRMED

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[*] In the circumstances, we need not reach and resolve the parties' dispute on appeal as to whether the Proposed Complaint's allegations concerning the statements of the Deputy Attorney General demonstrate discriminatory animus.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED JUNE 24, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:23-cv-69

DR. MICHAEL FERNANDEZ, D.D.S., LTD., *et al.*,

Plaintiffs,

v.

STEPHEN C. BRICH, P.E., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is the Plaintiffs' Motion for Leave to Amend their Amended Complaint ("Motion to Amend") and proposed Second Amended Complaint ("Proposed SAC"). ECF No. 26 ("Mot."); ECF No. 27 ("Pls.' Mem. Supp."); ECF No. 27-1 ("Proposed SAC"). Defendants oppose the Motion to Amend. ECF No. 28 ("Defs.' Mem. Opp'n"). Having reviewed the parties' filings, the Court finds that a hearing on this Motion is not necessary, and this matter is now ripe for judicial determination. *See* E.D. Va. Local Civ. R. 7(J). For the reasons stated herein. Plaintiffs' Motion to Amend is **DENIED**.

Appendix B

I. FACTUAL AND PROCEDURAL HISTORY

In February 2023, Dr. Michael Fernandez, D.D.S., Ltd., a Division of Atlantic Dental Care, and Dr. Miguel Fernandez, D.D.S. (collectively, "Plaintiffs") sued Stephen C. Brich, P.E., Commissioner of Highways for the Commonwealth of Virginia, and Lori A. Snider, State Right of Way and Utilities Director of the Virginia Department of Transportation (collectively, "Defendants") for alleged violations of their federal statutory and constitutional rights. ECF No. 1 ("CompL"). Plaintiffs later filed an Amended Complaint as of right in April 2023. ECF No. 12 ("Am. Compl."); *see* Fed. R. Civ. P. 15(a)(1)(B). Defendants filed a motion to dismiss the Amended Complaint, which the Court granted on December 18, 2023. *See* Mem. Op. & Order, ECF No. 25 ("Order"); Dr. Michael Fernandez, D.D.S., LTD v. Brick, No. 2:23-cv-69, 2023 U.S. Dist. LEXIS 225264, 2023 WL 8719440 (E.D. Va. Dec. 18, 2023).

Plaintiffs now seek leave to amend the Amended Complaint. Because the alleged facts in the Proposed SAC are substantially similar to those in the Amended Complaint, the Court offers an abbreviated summary of the allegations in the Proposed SAC.[1] *See also* Order at 1-9; Am. Compl. The Court will discuss newly alleged, relevant facts in the discussion section below when deciding whether to grant leave to amend.

1. The factual summary is stated in the light most favorable to Plaintiffs. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Appendix B

In 2016, VDOT forced Dr. Fernandez to relocate his dentistry practice to make way for an interstate improvement project for which VDOT received federal financial assistance. *See* Proposed SAC ¶¶ 14-22, Ex. A.[2] After a lengthy and contentious process of finding a new, suitable location for the practice, Plaintiffs submitted a claim for over $567,000 in relocation benefits to VDOT in the fall of 2017. *Id.* ¶¶ 23-3, Exs. B-K. Plaintiffs and VDOT corresponded for several months as VDOT requested additional information and clarification on Plaintiffs' claims, which Plaintiffs provided to the extent possible. *Id.* ¶¶ 44-50, Exs. L-T.

In a letter dated June 15, 2018, VDOT informed Plaintiffs that it was "unable to proceed any further" in reviewing Plaintiffs' relocation benefit claims until it received certain information it had previously requested. *Id.* ¶¶ 51-52, Ex. U. VDOT also advised Plaintiffs of their right to appeal "any determinations made by [VDOT]" within 90 days and attached a copy of VDOT's appeal process regulations. *Id.* ¶ 54, Ex U. The letter only approved a $255 reimbursement for Dr. Fernandez's time spent searching for a new location, but it did not make any determination on Plaintiffs' other benefit claims. *Id.* ¶¶ 51, 55-64, Exs. U-V. Later that month, Plaintiffs sued Commissioner Brich in state court seeking reimbursement of their moving costs. *Id.* ¶ 65. The court dismissed the suit, and the Supreme Court of Virginia affirmed in June

2. Citations to exhibits refer to those attached to Plaintiffs' Proposed SAC, which together are labeled as Exhibit 1 to Plaintiffs' Brief in Support of the Motion for Leave to Amend. *See* ECF No. 27-1 at 31-374 (containing Proposed SAC Exhibits A through HH).

2020. *See id.; Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, 298 Va. 616, 842 S.E.2d 200 (2020).

In December 2020, Plaintiffs asked Commissioner Brich whether he intended to make a final determination on their relocation benefit claims. Proposed SAC § 66, Ex. W. Commissioner Brich responded that the June 15, 2018, letter constituted a final determination and that Plaintiffs failed to appeal within the 90-day period. *Id.* ¶ 67, Ex. X. Plaintiffs disputed that conclusion, and in April 2021, they requested a final determination on their relocation benefit claims from Ms. Snider. *Id.* ¶¶ 68-69, Exs. Y-Z. After corresponding with Plaintiffs for several months, Ms. Snider eventually stopped responding to Plaintiffs' letters in the spring of 2022, and no final determination was ever made. *Id.* ¶¶ 70-77, Exs. AA-HH.

In the fall of 2022, Plaintiffs learned from the Virginia Attorney General's office—speaking on behalf of VDOT—that they would have received more relocation benefits if they had not hired attorneys and pursued their claims in court, that their claim was "not a priority for VDOT," and that no final determination would be forthcoming. *Id.* ¶¶ 78-82. Plaintiffs continue to pay interest on financing that was necessary to facilitate their relocation. *Id.* ¶ 84-88.

In Count I of the Proposed SAC, Plaintiffs allege that Defendants violated their equal protection rights under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution in two ways. First, Defendants denied or failed to award them relocation

benefits pursuant to the Uniform Relocation Act ("URA"), 42 U.S.C. § 4601 *et seq.*, and the Virginia Relocation Assistance Act ("VRAA"), Va. Code § 25.1-400 *et seq. See* Proposed SAC ¶¶ 96, 116, 133-34. Second, Defendants failed to make a final determination on their relocation benefit claims and thereby foreclosed Plaintiffs' ability to appeal the denial of benefits. *Id.* ¶¶ 96, 116, 149. In Count II, Plaintiffs seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, claiming that Defendants' failure to award benefits and render a final determination violates the URA, VRAA, and their implementing regulations. *Id.* ¶¶ 152-53, 159. Plaintiffs ask the Court to declare that Defendants denied them of equal protection of their federal statutory and constitutional rights, order Defendants to provide them with a final determination on their outstanding benefit claims, and award them appropriate compensatory damages and attorneys' fees and costs. *Id.* at 28-29.

II. LEGAL STANDARD

A. Rule 15(a): Amending Pleadings Before Trial

Federal Rule 15(a) governs amendments to pleadings prior to trial. The Rule authorizes a party to file an amended complaint once as a matter of course within 21 days after service of process or service of a responsive pleading. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Courts "should freely give leave when justice so requires." *Id.* However, leave to amend may be denied

for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). The decision is committed to the sound discretion of the district court. *See Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377, 390 (4th Cir. 2008).

"A proposed amendment is futile when it is 'clearly insufficient or frivolous on its face' . . . [or] if the claim it presents would not survive a motion to dismiss." *Save Our Sound OB, X Inc. v. N.C. Dep't of Transp.*, 914 F.3d 213, 228 (4th Cir. 2019) [quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986)). "[D]istrict courts are free to deny leave to amend as futile if the complaint fails to withstand Rule 12(b)(6) scrutiny." *In re Triangle Cap. Corp. Sec. Litig*, 988 F.3d 743, 750 (4th Cir. 2021)).

B. Rule 12(b)(6): Failure to State a Claim upon Which Relief Can be Granted

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of actions that fail to state a claim upon which relief can be granted. For the purposes of a Rule 12(b)(6) motion, courts may only rely upon the complaint's allegations and those documents attached as exhibits or incorporated by reference. *Megaro v. McCollum*, 66 F.4th 151, 157 (4th Cir. 2023). Courts will favorably construe the allegations of the complainant and assume that the facts

alleged in the complaint are true. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). However, a court "need not accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc., v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000).

Federal Rule of Civil Procedure 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quotations omitted). A complaint need not contain "detailed factual allegations" to survive a motion to dismiss, but the complaint must incorporate "enough facts to state a belief that is plausible on its face." *Id.* at 555, 570. This plausibility standard does not equate to a probability requirement, but it entails more than a mere possibility that a defendant has acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Accordingly, the plausibility standard requires a plaintiff to articulate facts that, when accepted as true, demonstrate that the plaintiff has stated a claim that makes it plausible he is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557). To achieve factual plausibility, plaintiffs must allege more than "naked assertion[s] . . . without some further factual enhancement." *Twombly*, 550 U.S. at 557. Otherwise, the complaint will "stop[] short of the line between possibility and plausibility of entitlement to relief" *Id.* (quotation omitted).

Appendix B

III. DISCUSSION

Defendants challenge that Plaintiffs have had multiple opportunities in state and federal court to state a valid claim and that amendment would be futile. Although Plaintiffs sought a declaratory judgment in state court ordering Commissioner Brich to award relocation benefits under the VRAA, that claim was entirely under state law and thus different than the federal claims Plaintiffs have asserted in this Court. *See Fernandez*, 842 S.E.2d at 617. The Court thus declines to hold Plaintiffs' state suit and first Amended Complaint—filed by right—against them at this stage. However, the Court finds that leave to amend would be futile because the Proposed SAC would not survive a motion to dismiss.

A. Proposed Count I: Equal Protection Claim

Plaintiffs seek leave to amend their equal protection claim. Mot. Amend, at 4. In the first Amended Complaint, Plaintiffs alleged that Defendants violated their equal protection rights by denying their relocation benefit claims and by arbitrarily and capriciously stating that VDOT's June 15, 2018, letter constituted a final determination of their claims. *See* Order at 23 (citing Am. Compl. ¶¶ 107, 134-35, 138, 142, 144; Am. Compl. Ex. U). The Court dismissed this claim for two reasons. First, Plaintiffs failed to allege an ongoing violation of their equal protection rights and request prospective relief, meaning the Eleventh Amendment barred their official-capacity claim against Defendants. Order at 24. Second, Plaintiffs failed to allege that Defendants violated a clearly established right with sufficient particularity to overcome Defendants' qualified

immunity, barring Plaintiffs' individual-capacity claim. Order at 29-30.

Plaintiffs now allege that Defendants are violating Plaintiffs' equal protection rights by failing to award relocation benefits to Plaintiffs and failing to issue a final determination on Plaintiffs' benefit claims, neither of which Defendants denied to similarly situated persons. Proposed SAC ¶ 116. Plaintiffs clarify that VDOT's June 15, 2018, letter is not a final determination because it only approved a $255 reimbursement for the time that Dr. Fernandez spent planning the move but provided no determination on the approximately $567,000 in other reimbursable expenses they submitted to VDOT. Proposed SAC ¶¶ 55-57, Ex. U. Plaintiffs maintain that VDOT admitted the letter was not a final determination on those outstanding claims because the letter itself said VDOT cannot review Plaintiffs' claims further and because VDOT sent other letters requesting more information. *Id.* ¶ 55-64 (citing Exs. M, R, S, T, U, V, BB); *see* Pls.' Mem. Supp. at 5.

Plaintiffs also allege new facts regarding their communications with the Virginia Attorney General's office to demonstrate that they face an ongoing violation of their equal protection rights caused by discriminatory animus. Pls.' Mem. Supp. at 2. Plaintiffs reallege that they held a phone call with Virginia Deputy Attorney General Leslie Haley, where she "informed Plaintiffs that had Plaintiffs not hired attorneys to represent them, had not filed suit against VDOT, and had not tried to enforce their rights, VDOT would have paid more in relocation assistance and benefits." Proposed SAC ¶ 78; Am. Compl.

66. Plaintiffs now add that after the phone call, they continued to seek assistance from the Virginia Attorney General to obtain a final determination. Proposed SAC ¶ 79. Counsel for Plaintiffs met with Chief Deputy Attorney General Charles Slemp and Deputy Haley in January 2023, who said they would review the matter with VDOT personnel and follow up. *Id.* ¶ 81. But the following month, Chief Deputy Slemp said VDOT told him that Plaintiffs' matter "was not a priority for VDOT" and that no final determination would be forthcoming. *Id.* ¶ 82. Plaintiffs argue that VDOT thus admitted that it treated Plaintiffs differently than similarly situated persons simply because they hired legal counsel. Pls.' Reply at 6.

Finally, Plaintiffs allege that they are facing an ongoing threat of injury from Defendant's discriminatory treatment because they are still making payments on financing, including interest, obtained to cover the cost of the move. Proposed SAC ¶¶ 84-89, 150. Plaintiffs allege they would be able to immediately pay off their loan and interest once Defendants render a final determination awarding them the relocation benefits they have claimed. *Id.* ¶ 89.

Defendants contend that Plaintiffs fail to state a valid equal protection claim because they do not identify any similarly situated persons who received relocation benefits or a final determination. Defs.' Mem. Opp'n 8-9. Instead, Defendants argue, Plaintiffs imply that because the Virginia Attorney General's office said their claim was not a priority to VDOT and that they would have received greater reimbursements if they had not hired counsel,

there must be other benefit applicants who did not hire lawyers but received more relocation benefits, or at least a final determination on their benefit claims. *See id.; see also* Proposed SAC ¶¶ 78-82, 116, 133-34, 137, 141-42. Defendants insist that this implication is insufficient to state a class-of-one equal protection claim.

Plaintiffs acknowledge that they have not attempted to identify specific comparators in their Proposed SAC. Pls.' Reply at 5-6. They argue instead that the Court did not dismiss their equal protection claim for lack of adequate alleged comparators, implying that their claim would have survived that defense. *Id.* But the Eleventh Amendment and qualified immunity foreclosed Plaintiffs' equal protection claim against Defendants in their official and individual capacities altogether, meaning the Court had no proper occasion to decide whether Plaintiffs sufficiently pled an equal protection claim in the original Amended Complaint. *See* Order at 23-24, 29-30. The Court's dismissal on those two grounds does not mean that Plaintiffs' equal protection claim must survive the sufficiently-specific-comparators challenge that Defendants now raise for the third time.[3]

Because Plaintiffs fail to identify similarly situated comparators, their equal protection claim fails the Rule 8 pleading standard and would not survive a Rule 12(b)(6) motion to dismiss.[4] The Equal Protection Clause of the

3. Defendants raised this same argument in both of their prior motions to dismiss. ECF No. 8 at 24-26; ECF No. 19 at 25-27.

4. Additionally, Plaintiffs do not explain how their amended equal protection claim overcomes Defendants' qualified immunity

Fourteenth Amendment states, "No State shall. . . deny to any person within its jurisdiction the equal protection of laws." U.S. Const, amend. XIV, § 1. "[T]o survive a motion to dismiss on an equal protection claim, a plaintiff must plead sufficient facts to demonstrate plausibly that he was treated differently from others who were similarly situated and that unequal treatment was the result of discriminatory animus." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011) (citing *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). "The Fourteenth Amendment countenances 'equal protection claims brought by a "class of one," but such claims are successful only 'where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Stem Corp. v. Mayor and City Council of Rockville, Md.*, 873 F.3d 456, 466 (4th Cir. 2017) (quoting *Village of Willow brook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam)). In other words, "[a] class-of-one claim requires a showing that highly similar comparators received better treatment." *SAS Assocs. 1. LLC v. City Council for City of Chesapeake, Va.*, 91 F.4th 715, 723 (4th Cir. 2024).

Plaintiffs allege that they are "similarly situated" to others "who have been relocated as a result of the same road project. . . [and] as a result of other projects which VDOT constructs," but they do not identify any specific persons or businesses in this group that VDOT treated

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defense. *See* Order at 29-30. Amendment is therefore futile insofar as Plaintiffs attempt to sue Defendants in their individual capacities for equal protection violations.

differently.[5] Proposed SAC ¶ 116; *see also id.* 132-33. These allegations are too conclusory to show that "highly similar comparators received better treatment." *SAS Assocs. 1*, 91 F.4th at 723; *see Siena Corp.*, 873 F.3d at 466 (affirming dismissal of class-of-one equal protection claim where plaintiff could not identify a similarly situated competitor); *Henderson v. Clarke*, No. 1:2lev 672 (TSE/JFA), 2022 U.S. Dist. LEXIS 206610, 2022 WL 16922818, at *10 (E.D. Va. Nov. 14, 2022) (dismissing class-of-one claim where plaintiff failed to identify a similarly situated inmate that was treated differently); *Wilson v. Town of Mt. Jackson*, No. 5:21-cv-00055, 2022 U.S. Dist. LEXIS 47678, at *35 (E.D. Va. Mar. 17, 2022) (dismissing equal protection claim where plaintiff made "blanket allegations that he was treated worse than others similarly situated"). Thus, Plaintiffs' amended equal protection claim is futile.[6]

B. Proposed Count II: APA Review of URA Violations

Plaintiffs also seek leave to amend to raise a new claim under the APA. Plaintiffs allege B. that Defendants'

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5. Plaintiffs' blanket allegation that VDOT has a "policy and custom" of denying relocation benefits also weakens their claim that they were treated differently than other benefit applicants or displaced persons. Proposed SAC ¶ 114.

6. Because Plaintiffs' proposed equal protection claim fails on 12(b)(6) grounds, the Court need not analyze whether Plaintiffs allege an ongoing equal protection violation and request prospective relief for purposes of § 1983 and the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10(1989, 109 S. Ct. 2304, 105 L. Ed. 2d 45).

failure to provide a final determination is a violation of the URA and is judicially reviewable under the APA as a final agency action. Proposed SAC ¶¶ 152, 156, 161, 166, 175, 178. Defendants counter that an APA claim may only be brought against a federal entity, not state officials. Defs.' Mem. Opp'n at 10. But Plaintiffs maintain that the APA allows federal courts to review URA violations by state officials where the state agency receives federal funding to implement the URA's provisions. Pls.' Mot. at 6-7 (citing *Clear Sky Car Wash, LLC v. City of Chesapeake, Va.*, 910 F. Supp. 2d 861 (E.D. Va. 2012); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 753 (4th Cir. 2019)).

The text of the APA only subjects federal agencies to judicial review, not state agencies. The APA makes judicial review available to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "Agency" is defined as "each authority of the Government of the United States." § 701(b)(1); *see also* § 551(1). Thus, the APA's text does not authorize federal judicial review of actions taken by non-federal entities, such as state officials. *See also S.C. Wildlife Fed'n V. Limehouse*, 549 F.3d 324, 331 n.5 (4th Cir. 2008) ("[B]y its terms, the APA applies only to federal agencies.") (citing *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1296-98, 374 U.S. App. D.C. 420 (D.C. Cir. 2007); *Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1035-36 (6th Cir. 1999)); *Appalachian Power Co. v. EPA*, 579 F.2d 846, 852 n.8 (4th Cir. 1978) ("Of course, the proceeding involved in this challenge was before a state agency and was not controlled by the

Administrative Procedure Act."); *Dep't of Transp. & Dev. of La. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973, 101 S. Ct. 383, 66 L. Ed. 2d 234 (1980) (Rehnquist, J., dissenting from denial of certiorari) ("[T]he APA is of course not applicable to state agencies.")

Even if the APA's text were not dispositive, Supreme Court and Fourth Circuit precedent confirm that neither Defendants nor VDOT are "federal entities" and thus are not subject to the APA. In *Kerpen v. Metropolitan Washington Airports Authority*, 907 F.3d 152 (4th Cir. 2018), the Fourth Circuit held that failure to establish a defendant as a "federal entity" under the Supreme Court's two-pronged test in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), is "fatal" to an APA claim. *Kerpen*, 907 F.3d at 152. Under the *Lebron* test, an entity must be "both created and controlled by the federal government [to] be considered [a] federal entit[y]." *Id.* at 158. An entity is "created" by the federal government when it is "created by a special statute, explicitly for the furtherance of federal governmental goals." *Id.* (quoting *Lebron*, 513 U.S. at 397). An entity is "controlled" by the federal government when its "operations are 'controlled' by federal government appointees." *Id.* (quoting *Lebron*, 513 U.S. at 396). "Temporary control" or "[m]ere influence" as an "influential stakeholder" are insufficient; "the federal government must be the 'policymaker' for the entity." *Id.* (citing *Lebron*, 513 U.S. at 398-99).

Kerpen held that the Metropolitan Washington Airports Authority ("MWAA") met neither *Lebron* prong.

As a creation of Virginia and District of Columbia laws with only three federally appointed members on its seventeen-member Board of Directors, MWAA was neither created nor controlled by the federal government. *Id.* at 159. That MWAA leased property from the federal government, contracted with the federal government, faced federal oversight by the Secretary of Transportation, and received conditional federal funding were insufficient to turn MWAA into a federal entity. *Id.* at 159-60 (citations omitted). And because MWAA was a non-federal entity, the APA had "little relevance" to MWAA since it only applies to "authorit[ies] of the Government of the United States." *Id.* at 160 (quoting 5 U.S.C. § 551(1)).

Plaintiffs cannot establish Defendants or VDOT as federal entities under the *Lebron* test. Plaintiffs explicitly allege that VDOT is a "State agency" that receives federal funding to provide displaced persons with relocation benefits.[7] Proposed SAC ¶ 14 (citing 42 U.S.C. § 4601(3), (11)). Yet state agencies still carry out their federally funded relocation programs "in accordance with State laws." 42 U.S.C. § 4604(a); *see also Norfolk Rede v. & Hous.*

7. The URA defines "State agency" as "any department, agency, or instrumentality of a State or of a political subdivision of a State, any department, agency, or instrumentality of 2 or more States or of 2 or more political subdivisions of a State or States, and any person who has the authority to acquire property by eminent domain under State law." 42 U.S.C. § 4601(3). "Displacing agency" is defined as any Federal agency carrying out a program or project, and any *State, State agency*, or person carrying out a program or project with Federal financial assistance, which causes a person to be a displaced person." § 4601(11) (emphasis added); *see also* Proposed SAC ¶ 14 (alleging VDOT is a "State ageney" and "displacing agency").

Auth. v. Chesapeake & Potomac Tel. Co. of Va., 464 U.S. 30, 32, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983) ("The [URA] by its terms binds only federal agencies ... In order to qualify for federal funds,... many states, such as Virginia, have adopted legislation modelled on the [URA]." (citing 42 U.S.C. § 4630)); *Fernandez*, 842 S.E.2d at 619 n.* (same). Congress does not "create" state agencies or the state laws under which they operate through the URA, nor does it "control" state agencies by granting federal funding. *See Kerpen*, 907 F.3d at 159-60. Therefore, Defendants are not federal entities under *Lebron*, and *Kerpen* forecloses Plaintiffs' proposed APA claim. *See Potomac Constr. Co. v. Wash. Metro. Area Transit Auth.*, No. GLS-21-193, 2021 U.S. Dist. LEXIS 73840, 2021 WL 1516058, at *11 ("[Bjecause WMATA does not satisfy both prongs of *Lebron*, it is not a federal entity. It follows, *a fortiori*, that WMATA is not an 'authority of the Government of the United States' within the meaning of § 701(b)(1) of the APA.").

Plaintiffs rely on *Clear Sky Car Wash, LLC v. City of Chesapeake, Va.*, 910 F. Supp. 2d 861 (E.D. Va. 2012), for its holding that "the APA is the exclusive remedy for alleged violations of" the URA. *Clear Sky*, 910 F. Supp. 2d at 884; *see also id.* at 879-80. Yet *Clear Sky* does not hold that the APA authorizes federal judicial review of non-federal entity action.

In relevant part, the *Clear Sky* plaintiffs sued the City of Chesapeake, the City's Right of Way Manager, VDOT, and the United States Department of Transportation ("USDOT") for alleged violations of the URA's relocation

reimbursement policies.[8] *Clear Sky*, 910 F. Supp. 2d at 866, 869; *see* 42 U.S.C. § 4621 *et seq.* The plaintiffs sought judicial review under the APA but conceded that they never applied for relocation benefits, which meant they failed to exhaust their administrative remedies and no agency action occurred. *Clear Sky*, 910 F. Supp. 2d at 881, 883- 84. Without an agency action to evaluate, the district court held it had no jurisdiction under the APA to consider the claim.[9] *Id.* at 881 (citing 5 U.S.C. § 704). *Clear Sky* not hold that the APA provides a federal court with jurisdiction to consider URA violation claims against state officials; it simply never reached that analysis because it dismissed the claim for other jurisdictional flaws.[10]

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8. That *Clear Sky* included USDOT as a federal defendant also distinguishes it from Plaintiffs' case. The URA authorizes USDOT to promulgate rules and regulations to implement its statutory provisions. *See* 42 U.S.C. § 4633(a)(1); Memorandum for the Heads of Executive Departments and Agencies, 50 Fed. Reg. 8953 (Feb. 27, 1985) (designating USDOT as lead agency under URA); 49 C.F.R. § 24.1. Although the district court in *Clear Sky* did not explicitly cabin its APA analysis to USDOT, the fact that the plaintiffs sued the federal agency responsible for implementing the URA made their APA claim relevant to at least one defendant. Here, Plaintiffs do not propose to add any federal entities as defendants, let alone USDOT.

9. On appeal, the *Clear Sky* plaintiffs pursued their APA claim against USDOT for failing to enforce certain URA policies, but the Fourth Circuit held that the plaintiffs never properly pled an APA claim at all. *Clear Sky Car Wash LLC v. City of Chesapeake, Va.*, 743 F.3d 438, 445 (4th Cir. 2014). Therefore, Plaintiffs' argument that the district court's jurisdictional analysis supports applying the APA to state and local entities is even less persuasive here.

10. The other cases that *Clear Sky* cites which hold that the APA is the exclusive vehicle to pursue URA violations also do not support

APA review of actions by non-federal entities. *See Ackerley Commc'ns of Fla., Inc. v. Henderson*, 881 F.2d 990 (11th Cir. 1989) (dismissing URA claim brought under § 1983 against state official because APA is exclusive jurisdictional vehicle to review URA violations, but not stating whether APA review of the state official's actions would be available); *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 723 (N.D. 111. 2003) (dismissing URA claim because plaintiffs brought action under § 1983 and failed to allege a claim under the APA); *Ledesma v. Urb. Renewal Agency of City of Edinburg, Tex.*, 432 F. Supp. 564, 565-67 (S.D. Tex. 1977) (reviewing denial of relocation benefit claim by United States Department of Housing and Urban Development and holding that one of the Department's key decisions was not based on substantial evidence); *Barnhart v. Brinegar*, 362 F. Supp. 464, 472-73 (W.D. Mo. 1973) (finding no judicial review available under the APA over URA real property acquisition practices because the URA expressly eliminates rights and liabilities under that section, meaning nobody can be adversely affected or aggrieved by agency action under that section of the URA).

The Court is aware of two cases applying APA review to state or local entity denials of URA benefits without including a federal-entity defendant. *See Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cnty.*, 286 F.3d 382, 387 (6th Cir. 2002) (finding the district court "properly applied the [APA's] arbitrary or capricious standard of review" to a "quasi-municipal entity ['s]" denial of URA relocation benefits); *Supreme Oil Co. v. Metro. Transp. Auth.*, 157 F.3d 148, 150-51 (2d Cir. 1998) (applying APA's arbitrary and capricious standard to denial of URA relocation benefits by local entities). These cases still do not persuade the Court that Plaintiffs may obtain judicial review of Defendants' actions under the APA. Neither *Kroger* nor *Supreme Oil* analyzed whether the APA applied to local entity actions. Both cases appear to assume that because the local entities administered relocation programs or grants pursuant to the URA, their actions were subject to APA review. *See Kroger*, 286 F.3d at 385-87; *Supreme Oil*, 157 F.3d at 150-51. But these acts alone are insufficient to qualify as a "federal entity" under *Lebron*,

Plaintiffs further contend that the Fourth Circuit reviewed state agency action pursuant to the APA in *Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 753 (4th Cir. 2019). Yet in *Appalachian Voices*, the petitioner's cause of action and the Court's jurisdiction came not from the APA, but the Natural Gas Act, which explicitly grants jurisdiction to review orders or actions of state administrative agencies. 912 F.3d at 752; 15 U.S.C. § 717r(d)(1) ("The United States Courts of Appeals . . . shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency . . . *or State* administrative agency acting pursuant to Federal law . . (emphasis added)). Indeed, the Fourth Circuit applied the APA's arbitrary and capricious standard of review over the state respondents' objection that the APA did not apply to them. *Appalachian Voices*, 912 F.3d at 754, n.1. But the Fourth Circuit explicitly declined to resolve the objection because petitioners' claim would have failed under the states' preferred "substantial evidence" standard of review, just as it failed arbitrary and capricious review. *Id.* at 754 n.1, 759; *see also Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 403 n.13 (4th Cir. 2018) (declining to resolve the same objection in an NGA case for the same reason). Given the Fourth Circuit's distinct NGA jurisdiction and its declination to resolve the states' APA objection, the Court does not read *Appalachian Voices* to authorize judicial review under the APA in this case. The APA's text and other Fourth Circuit precedent make clear that the APA does not give federal

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and *Kerpen* holds that such failure is "fatal" to an APA claim. *See Lebron*, 513 U.S. at 397-98; *Kerpen*, 907 F.3d at 158-60. This Court must follow *Kerpen's* instructions.

courts jurisdiction to hear claims against non-federal entities. *Limehouse*, 549 F.3d at 330 (citing 5 U.S.C. § 701); *Kerpen*, 907 F.3d at 160.

Finally, Plaintiffs argue that Congress provided for judicial review of federal or state agency actions under the URA. Pls.' Reply at 7. Plaintiffs cite an implementing regulation promulgated by USDOT, however, and they do not identify any URA provisions entitling them to judicial review. *Id.* (citing 49 CFR § 24.10(g)). Additionally, that regulation does not authorize federal judicial review over state agencies, but rather directs agencies—federal or state—to decide appeals submitted by benefit applicants and to "advise" applicants of their right to judicial review of those agency appellate decisions.[11] 49 C.F.R. § 24.10(g); *see also* § 24.2 (defining "Agency" as "the Federal Agency, State, State Agency, or person that acquires real property or displaces a person"). Further, although the Virginia Administrative Process Act and the regulations implementing the VRAA provide for state judicial review of VDOT's benefit determinations, neither authorizes federal judicial review, even when read alongside the URA's implementing regulations. *See* 24 V.A.C. § 30-41-90; Va. Code §§ 2.2-4026, -4029.

Because neither Defendants nor VDOT are "authorit[ies] of the Government of the United States,"

11. "Promptly after receipt of all information submitted by a person in support of an appeal, the Agency shall make a written determination on the appeal.... If the full relief requested is not granted, the Agency shall advise the person of his or her right to seek judicial review of the Agency decision." 49 CFR § 24.10(g).

the Court has no jurisdiction under the APA to review the Defendants' alleged denial of relocation benefits or failure to issue a final determination.[12] 5 U.S.C. § 701(b)(1). Granting leave to amend to add Plaintiffs' proposed APA claim would be futile.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Amend (ECF No. 26) is **DENIED**.

The Court **DIRECTS** the Clerk to provide a copy of this Memorandum Opinion and Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
June 24, 2024

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

12. Without Jurisdiction, the Court need not analyze whether Plaintiffs exhausted their administrative remedies or whether exhaustion would have been futile.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED DECEMBER 18, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:23-cv-69

DR. MICHAEL FERNANDEZ, D.D.S., LTD., *et al.*,

Plaintiffs,

v.

STEPHEN C. BRICH, P.E., *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is Stephen C. Brich, P.E., and Lori A. Snider's ("Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint and a Supporting Memorandum of Law. ECF No. 16 ("Mot. Dismiss"); ECF No. 17 ("Defs.' Mem. Supp."). Defendants move to dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot. Dismiss. Having reviewed the parties' filings in this case, the Court finds that a hearing on this Motion is not necessary, and this matter is now ripe for judicial determination. *See* E.D. Va. Local Civ. R. 7(J); Mot. Dismiss; Defs.' Mem. Supp.;

ECF No. 19 ("Pls.' Opp'n"); ECF No. 20 ("Defs.' Reply"). For the reasons stated herein, Defendants' Motion to Dismiss is **GRANTED IN PART, DENIED IN PART, and DISMISSED IN PART** as moot. Plaintiffs' Amended Complaint, ECF No. 12 ("Am. Compl."), is **DISMISSED** in full.

I. FACTUAL AND PROCEDURAL HISTORY

On February 22, 2023, Dr. Michael Fernandez, D.D.S., Ltd., a Division of Atlantic Dental Care, and Dr. Miguel Fernandez, D.D.S. ("Plaintiffs") filed a Complaint against Defendants. ECF No. 1 ("Compl."). Plaintiffs later filed an Amended Complaint on April 12, 2023. Relevant to Defendants' Motion to Dismiss and stated in the light most favorable to Plaintiff, the following facts are drawn from the Amended Complaint and attachments thereto. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Defendant Stephen C. Brich, P.E., is the Commissioner of Highways for the Commonwealth of Virginia and Chief Executive Officer of the Virginia Department of Transportation. Am. Compl. ¶ 8. Defendant Lori A. Snider is the State Right of Way and Utilities Director of the Virginia Department of Transportation. *Id.* ¶ 9. The Virginia Department of Transportation ("VDOT") is an agency of the Commonwealth of Virginia. *Id.* ¶ 11. VDOT acts as the "State agency" and "displacing agency" for the Interstate 264 Improvements Project ("the Project") as defined in 42 U.S.C. § 4601(3) and (11). *Id.* ¶ 11. VDOT received federal financial assistance for the Project. *Id.* ¶ 75.

Appendix C

Dr. Miguel Fernandez is a dentist who has operated his practice, Dr. Michael Fernandez, D.D.S., Ltd. ("the Practice"), in Virginia Beach, Virginia. *Id.* ¶ 7. For several years, Dr. Fernandez operated the Practice at 5121 Greenwich Road, Suite 102 ("Greenwich Road Office") in Virginia Beach. *Id.* ¶ 15. Plaintiffs leased the premises for the Greenwich Road Office with the most recent lease term running from August 1, 2007, to July 31, 2017, plus a five-year option to lease until July 31, 2022. *Id.* ¶ 16.

In a December 2015 letter, VDOT informed Dr. Fernandez that Plaintiffs would be required to relocate the Practice from the Greenwich Road Office because VDOT planned to purchase a right of way for the Project. *Id.* ¶ 17; Ex. A.[1] The letter stated Plaintiffs were "eligible for relocation benefits as specified by law." Ex. A; Am. Compl. ¶ 18.

In January 2016, O.R. Colan Associates ("O.R. Colan"), an agent of VDOT, sent Plaintiffs listings for potential new office locations. Am. Compl. ¶ 19; Ex. B at 2. O.R. Colan noted that the listings "may or may not be suitable for the operation of your business" and said Plaintiffs were "*solely responsible* for verifying" the suitability of proposed relocation sites for the Practice. Ex. B at 2; Am. Compl. ¶ 20. None of the locations provided were suitable for a dental practice. Am. Compl. ¶¶ 21, 26. O.R. Colan sent Plaintiffs additional listings in February 2016, but again none were suitable for the Practice. *Id.* ¶¶ 22-23, 26; Ex. C.

1. Citations to exhibits refer to those attached to Plaintiffs' Amended Complaint. The Court employs the pagination assigned by the CM/ECF docketing system.

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On April 14, 2016, VDOT recorded a Certificate of Take and acquired defeasible title to the Greenwich Road Office. Am. Compl. ¶ 24. Ms. Snider signed the Certificate of Take on behalf of VDOT. *Id.* On April 18, 2016, VDOT sent Plaintiffs a letter instructing them to vacate the Greenwich Road Office within 30 days. *Id.* ¶ 25; Ex. D. The letter was signed by Randy S. Friedland, Regional Right of Way Manager and subordinate to Ms. Snider. Am. Compl. ¶ 25; Ex. D.

After Dr. Fernandez conducted an extensive but unsuccessful search for suitable locations for the Practice on his own, he engaged a real estate broker for assistance and eventually located a new space for the Practice ("New Office"). Am. Compl. ¶¶ 26-28. The New Office was not built for use as a dental office and required significant work to make it suitable for the Practice. *Id.* ¶ 29. While the Greenwich Road Office measured approximately 1,600 square feet and had many building code requirements "grandfathered," the New Office was approximately 3,200 square feet and required additional costs to comply with building codes and Americans with Disabilities Act regulations. *Id.* ¶ 37. Dr. Fernandez engaged Patterson Dental to design the layout of the New Office; Waller Todd & Sadler Architects to implement the new layout and plan necessary renovations; John W. Fowler, P.E., to oversee construction; and Campo Construction Company to build out the New Office, after determining that Campo Construction Company was the lowest of several bidders for the job. *Id.* ¶¶ 30-31; Exs. E–H.

Despite the significant work necessary to make the New Office suitable, VDOT would not allow Plaintiffs

to remain in the Greenwich Road Office until the New Office was complete. Am. Compl. ¶ 32. On behalf of VDOT, Commissioner Brich sought to evict Dr. Fernandez from the Greenwich Road Office. *Id.* ¶ 33. Dr. Fernandez filed defenses against the eviction and requested a hearing on the matter. *Id.* Commissioner Brich sought summary judgment, which Plaintiffs allege was done "to deny Dr. Fernandez an opportunity to be heard." *Id.* ¶ 33. The trial court denied the request for summary judgment, and Plaintiffs remained in the Greenwich Road Office until the New Office was complete in March 2017, at which time Plaintiffs moved into the New Office and began seeing patients. *Id.* ¶¶ 34, 36.

Prior to Plaintiffs' move, VDOT preapproved reimbursement of the "costs to be incurred in moving personal property not included in the specialty of the Practice in the amount of $1,987.18 based on a low bid from a moving company. Ex. I; Am. Compl. ¶ 35. VDOT told Plaintiffs that a check would be ordered for reimbursement after "receipt of the [Moving Cost Payment] claim form, a bill or receipt from the moving company, and [VDOT's] inspection of the vacated property." Ex. I.

Plaintiffs incurred costs for moving computers, telephones, personal property, and specialty dental equipment; disconnecting and reconnecting alarm, computer, network, server, and phone systems; modification of utilities; substitute property; and painting and flooring. Am. Compl. ¶ 38; Ex. J. In a September 13, 2017 letter to VDOT, Plaintiffs claimed a total reimbursement amount of $567,278.87 and provided supporting documentation.

Am. Compl. ¶ 38; Ex. J at 2-10. In November 2017, Plaintiffs revised their total reimbursement claim upward to $567,793.87 and provided additional supporting documentation. Ex. K.

VDOT responded a few days later, saying it would "expeditiously and carefully review these many documents so that we can make an informed determination of any reimbursements available to Dr. Fernandez, the displaced person." Ex. L; Am. Compl. ¶ 40. VDOT noted it had "a couple of questions and concerns that were brought to [Plaintiffs' counsel's] attention, to which [Plaintiffs' counsel] advised [he] would look into and get back with [VDOT]." Ex. L. VDOT further stated it would "inform [Plaintiffs' counsel] in writing once a determination has been made." *Id.*

In December 2017, VDOT requested additional information and clarification on Plaintiffs' claims. Am. Compl. ¶ 40; Ex. M. Plaintiffs responded in March 2018 with additional documentation. Am. Compl. ¶ 41; Ex. N. On March 13, 2018, Plaintiffs requested payment on their outstanding claims, including the "cost of moving the personal property, reestablishment costs, and cost to move computers, phones, etc." Ex. 0; Am. Compl. ¶ 41. On March 19, 2018, VDOT responded to Plaintiffs' March 13 letter stating VDOT was "in the process of reviewing submitted claims." Ex. P; Am. Compl. ¶ 42. VDOT noted the parties had discussed the matter on March 15, 2018. Ex. P.

In early April 2018, Plaintiffs informed VDOT that no payment had been received, including the

preapproved reimbursement for a commercial mover, and requested confirmation that VDOT would "finalize review of [Plaintiffs'] submission by April 20, 2018." Ex. Q; Am. Compl. ¶ 42. In an April 17, 2018, letter, VDOT informed Plaintiffs that "$35,346.68 for claim of relocation payment had been approved" and that a check in that amount would be ordered. Ex. R at 2-3; Am. Compl. ¶ 43. VDOT stated that although "additional documentation was requested for several items in order to move forward with the review process," VDOT "was still not in receipt of the . . . requested documentation that was outlined in [VDOT's accompanying] email." *Id.* at 5. The accompanying e-mail listed several questions and notes regarding documentation required before VDOT could "continue with the review process and make additional determinations." *Id.* at 2.

In a May 8, 2018 letter, VDOT acknowledged that Plaintiff provided some necessary forms, but said that "before the check can be released[,] requested receipts and documentation will still be needed." Ex. S at 2; Am. Compl. ¶ 45. VDOT's letter listed several requests for documentation and included VDOT's own calculations of Plaintiffs' benefit claims. Ex. S at 2-8.[2] The next day, VDOT approved a $255.00 reimbursement for Dr. Fernandez's time spent planning the move and again requested further information "[i]n continuation of the

2. In part, VDOT requested information regarding Plaintiffs' substitution of property claim, Ex. S at 2-3, but Plaintiffs could not answer the request because VDOT possessed the relevant property after it filed the Certificate of Take and tried to evict Plaintiffs from the Greenwich Office. Am. Compl. ¶ 45.

review for Dr. Fernandez's claim for payment." Ex. T at 2-3; Am. Compl. ¶ 48.

On May 24, 2018, VDOT mailed Plaintiffs a check for $35,346.68. Ex. R at 12-14. Plaintiffs received the check and the April 17, 2018 letter approving the reimbursement from employees in VDOT's Right of Way Division. Am. Compl. ¶ 44; Ex. R at 2, 5-6, 12.

In a June 15, 2018 letter, VDOT informed Plaintiffs that it was "unable to proceed any further in the review of Dr. Fernandez's previously submitted relocation claim until [it] receive[s] information requested in [VDOT's] letter dated May 9, 2018 and follow up e-mail dated June 5, 2018." Ex. U at 2; Am. Compl. ¶ 48. VDOT advised Plaintiffs of their "right to appeal in whole or in part" if they "are not in agreement with any determinations made by [VDOT]" and said they "must submit [their] appeal in writing . . . within 90 days of this notice." Ex. U at 3. VDOT attached a copy of VDOT's appeal process regulations under 24 Va. Admin. Code § 30-41-90. *Id.* at 3, 6.

On June 27, 2018, VDOT reminded Plaintiffs of its May 9, 2018, and June 15, 2018, requests for additional documentation "needed in order to continue with the review process" of Plaintiffs' claim for payment.[3] Ex. V at 2. VDOT stated it "cannot move forward until all requested information is received." *Id.* at 2. VDOT's letter was signed by a subordinate to Ms. Snider. Am. Compl.

3. VDOT also noted it had not received a completed copy of the claim form provided on June 15, 2018 for the approved $255.00 reimbursement. Ex. V at 2.

¶ 52; Ex. V at 2. Plaintiffs allege this letter "confirm[s] no determination had been made" regarding "most all of the claims [Plaintiffs] submitted." Am. Compl. ¶¶ 51-53.

In June 2018, Plaintiffs filed suit against Commissioner Brich in the Circuit Court for the City of Virginia Beach seeking reimbursement of Plaintiffs' relocation costs. *Id.* ¶ 54. The Commissioner filed a demurrer arguing in part that Dr. Fernandez failed to exhaust his administrative remedies before seeking judicial review. *Id.* In November 2018, the court sustained the demurrer and dismissed the suit after finding the Virginia Relocation Assistance Act, Virginia Code § 251.400 *et seq.* ("VRAA"), did not create an independent cause of action. *Id.; see Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, No. CL18-3017, 2018 WL 11033625, at *2–*4 (Va. Cir. Ct. Nov. 28, 2018). The Supreme Court of Virginia affirmed the Circuit Court's decision on June 17, 2020. Am. Compl. ¶ 54; *see* Ex. X at 8-12 (containing copy of *Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, No. 191056, 298 Va. 616, 842 S.E.2d 200); *Michael Fernandez, D.D.S., Ltd v. Comm'r of Highways*, 298 Va. 616, 842 S.E.2d 200 (2020).

In December 2020, Plaintiffs wrote to counsel for Commissioner Brich to ask whether VDOT "intends to make a final determination on the remaining costs submitted by Dr. Fernandez." Ex. W at 2; Am. Compl. ¶ 55. In January 2021, counsel for the Commissioner responded via letter, stating that "VDOT already provided its written determination with regard to [Plaintiffs'] claim" in its June 15, 2018 letter. Ex. X at 2; Am. Compl. § 56. The Commissioner asserted that per the Supreme

Court of Virginia's opinion, "Fernandez failed to exhaust the administrative remedies afforded to him under 24 VAC § 30-41-90." Ex. X at 2 (quoting *Fernandez*, No. 191056, slip op. at 5); Am. Compl. ¶ 56. According to the Commissioner, Plaintiffs "had 90 days from receipt of the June 15, 2018 letter in order to appeal but chose not to do so," and an attempt to appeal "would be untimely." Ex. X at 3. A subordinate to Ms. Snider was copied on the Commissioner's letter. Am. Compl. ¶ 56.

Plaintiffs responded to the Commissioner a few weeks later, asserting that VDOT never "provided a final determination regarding the majority of Dr. Fernandez's claim." Ex. Y at 2. Plaintiffs argued the May 9, 2018 letter indicated VDOT's review was still underway and no determination had been made. *Id.* at 2; Am. Compl. ¶ 57 (citing Exs. T, U, V, Y). Plaintiffs asserted they could not have filed an appeal because VDOT never provided a final determination. Ex. Y at 2.

In an April 2021 letter to Ms. Snider, Plaintiffs reviewed the history of their claims and requested a final determination from VDOT. Am. Compl. ¶ 58; Ex. Z at 2. The letter references a discussion between Plaintiffs' counsel and Ms. Snider. Ex. Z at 2. Ms. Snider responded in May 2021, stating that VDOT requested additional information and documentation on March 15, 2018, and April 27, 2018, but never received the information requested, leaving it "unable to proceed any further in the review of Dr. Fernandez's previously submitted claims." Ex. AA at 2-3. Ms. Snider said VDOT "consider[ed] this relocation concluded." *Id.* at 3.

Nevertheless, in May 2021, Ms. Snider sent Plaintiffs a letter requesting documents and information to determine whether certain moving costs were reimbursable. Ex. BB at 2-4 ("Whatever you can send I will have reviewed to determine it would be a reimbursable cost."). Plaintiff responded in June 2021 with supporting information and documents and said they were collecting additional materials on costs associated with Campo Construction. Ex. CC. In December 2021, Plaintiffs provided those materials and explained the Campo Construction costs. Ex. DD.

On February 7, 2022, Plaintiffs asked Ms. Snider for an update regarding VDOT's review of the information provided in the June and December 2021, letters. Ex. EE. On April 7, 2022, Plaintiffs provided Ms. Snider with a national relocation expert's analysis of their reimbursable expenses. Ex. FF. Plaintiffs sent follow up letters to Ms. Snider in April and June 2022 to confirm receipt of the expert's analysis, but Plaintiffs received no response. Exs. GG, HH. In the June letter, Plaintiffs asserted they had not received a final determination on their claims and asked when VDOT would issue one. Ex. HH at 2.

In the fall of 2022, Plaintiffs held a phone call with Virginia Deputy Attorney General Leslie Haley. Am. Compl. ¶ 66. On behalf of VDOT, Deputy Attorney General Haley told Plaintiffs that if they had not hired attorneys to represent them, filed suit against VDOT, and tried to enforce their rights, VDOT would have paid Plaintiffs more in relocation assistance and benefits. *Id.*

Appendix C

Plaintiffs commenced this action by filing a Complaint on February 22, 2023, and they later filed the Amended Complaint on April 12, 2023. *See* ECF Nos. 1, 12. Defendants filed the instant Motion to Dismiss and their Supporting Memorandum on April 25, 2023. *See* ECF Nos. 16, 17. Plaintiffs filed a Memorandum in Opposition to the Motion on May 10, 2023. *See* ECF No. 19. Defendants replied on May 15, 2023. *See* ECF No. 20.

Plaintiffs assert three substantive Counts against Defendants under 28 U.S.C. § 2201 *et seq.* and 42 U.S.C. §§ 1983 and 1988.[4] Under Count I, Plaintiffs allege Defendants have denied them of their "right to . . . relocation benefits" under the Uniform Relocation Act, 42 U.S.C. § 4601 *et seq.* ("URA"), and its implementing regulations by (1) failing to award Plaintiffs relocation benefits to which they are entitled and (2) foreclosing their ability to appeal by failing to issue a final determination on their relocation benefit claims.[5] Am. Compl. (¶¶ 75, 84, 91-92, 111-15. Although Plaintiffs make several allegations under Count I that appear related to constitutional due process and equal protection claims, the fact that Plaintiffs make those claims explicitly under Counts II

4. Plaintiffs include a fourth Count alleging that a justiciable controversy exists and that declaratory relief pursuant to 28 U.S.C. § 2201 *et seq.* is necessary and appropriate in this case. Am. Compl. ¶¶ 151-53. Because Count IV contains no factual allegations, but rather legal conclusions, the Court interprets Count IV as part of Plaintiffs' request for relief, not as a substantive claim.

5. The Court considers "relocation assistance" to be part of "relocation benefits." *See, e.g.*, ¶¶ 102, 107, 114.

and III leads the Court to construe Count I as a federal statutory claim. *See id.* ¶¶ 87, 94-98, 105-08, 111, 116.

Under Count II, Plaintiffs claim that Defendants deprived them of their procedural due process rights under the Fifth and Fourteenth Amendments. *Id.* ¶ 125. Plaintiffs allege two alternative theories of harm: First, Defendants made no final determination of Plaintiffs' claims to relocation benefits, in violation of federal and Virginia regulations, and thereby stripped Plaintiffs of their ability to appeal, *id.* ¶ 123 (citing 49 C.F.R. §§ 24:10, 24.207(b); 24 Va. Admin. Code § 30-41-90; Va. Code § 2.2-4029; *Bergano v. City of Va. Beach*, 241 F. Supp. 3d 690, 703-05 (E.D. Va. 2017)); second, if a final determination has been made, "neither VDOT nor Defendants or their subordinates provided [Plaintiffs] with notice of this determination or an explanation of the basis therefor," again denying Plaintiffs the opportunity to appeal "required by law," *id.* ¶ 124 (citing 49 C.F.R. §§ 24.10, 24.207(e); Va. Code § 2.2-4029; 24 Va. Admin. Code § 30-41-90).

In Count III, Plaintiffs allege Defendants deprived them of their equal protection rights under the Fourteenth Amendment. Plaintiffs again allege alternative theories of harm: First, Defendants denied Plaintiffs relocation benefits while providing similarly situated persons with relocation benefits, *id.* ¶¶ 107, 134-35, 142; second, Defendants singled them out for disparate treatment when Defendants told them in May 2020 that a final determination had already been made on Plaintiffs' relocation benefit claims, *id.* ¶¶ 138, 144.

Plaintiffs request an order declaring that (1) "Defendants have failed to properly manage and supervise their employees and representatives and have failed to provide a determination as to the relocation claims submitted by Plaintiffs as a result of being forced to relocate due to VDOT's road project," *id.* ¶ 154; (2) "Defendants have deprived [Plaintiffs] of their rights as displaced persons under State and Federal law," *id.* at 26 ¶ A; and (3) "Defendants have denied Plaintiffs due process and equal protection of the law in violation of their Federally protected statutory and Constitutional rights," *id.* at 26 ¶ B. Plaintiffs also seek compensatory damages, attorneys' fees and costs, and any other relief as justice may require. *Id.* at 26 ¶¶ C–E.

II. LEGAL STANDARD

A. Rule 12(b)(1): Lack of Subject Matter Jurisdiction

The standard of review for a challenge to the Court's Article III jurisdiction may be raised under either Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction or Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 360 (E.D. Va. 2009), *aff'd*, 333 F. App'x 733 (4th Cir. 2009). When a defendant seeks dismissal under Rule 12(b)(1), the plaintiff bears the burden of proving subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 767, 768 (4th Cir. 1991). To determine whether subject-matter jurisdiction exists, a district court "may consider evidence outside the pleadings without converting the

proceedings to one for summary judgment." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (citation omitted). If a court determines that it lacks jurisdiction over a matter, it must dismiss the action.

B. Rule 12(b)(6): Failure to State a Claim upon Which Relief Can be Granted

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of actions that fail to state a claim upon which relief can be granted. For the purposes of a Rule 12(b)(6) motion, courts may only rely upon the complaint's allegations and those documents attached as exhibits or incorporated by reference. *See Sec'y of State for Defence v. Trimble Navigation Ltd*, 484 F.3d 700, 705 (4th Cir. 2007) (A court may "consider documents attached to the complaint . . . as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic."); *see also* Fed. R. Civ. P. 10(c). Courts will favorably construe the allegations of the complainant and assume that the facts alleged in the complaint are true. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). However, a court "need not accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc., v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000).

Federal Rule of Civil Procedure 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which

it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quotations omitted). A complaint need not contain "detailed factual allegations" to survive a motion to dismiss, but the complaint must incorporate "enough facts to state a belief that is plausible on its face." *See id.* at 555, 570. This plausibility standard does not equate to a probability requirement, but it entails more than a mere possibility that a defendant has acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 667-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Accordingly, the plausibility standard requires a plaintiff to articulate facts that, when accepted as true, demonstrate that the plaintiff has stated a claim that makes it plausible he is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557). To achieve factual plausibility, plaintiffs must allege more than "naked assertion[s] . . . without some further factual enhancement." *Twombly*, 550 U.S. at 557. Otherwise, the complaint will "stop[] short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation omitted).

III. DISCUSSION

Defendants move to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). They argue the Court has no subject matter jurisdiction over this case and that the Amended Complaint is procedurally and substantively deficient. *See* Defs.' Mem. Supp. at 1-2.

Appendix C

A. Rule 12(b)(1) Motion: Subject Matter Jurisdiction

Plaintiffs sue Defendants in both their individual and official capacities. Am. Compl. at 1. Defendants contest (1) they are not "persons" under 42 U.S.C. § 1983 per *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), and therefore cannot be sued in their individual capacities, and (2) the Eleventh Amendment bars Plaintiffs' claims against them in their official capacities. Defs.' Mem. Supp. at 5-6. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has not clearly decided "whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Andrews v. Daw*, 201 F.3d 521, 525 n.2 (4th Cir. 2000). Yet the distinction makes "little practical difference," and the Court finds it appropriate to address these issues as a matter of the Court's subject matter jurisdiction. *Zemedagegehu v. Arthur*, No. 1:15-cv-57, 2015 U.S. Dist. LEXIS 55603, 2015 WL 1930539, at *3 (E.D. Va. Apr. 28, 2015).

i. Legal Standard: Eleventh Amendment and 42 U.S.C. § 1983

Under the Eleventh Amendment, "an unconsenting State is immune from suit brought in federal court by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). State agencies and instrumentalities also receive Eleventh Amendment protections and may not

be sued for injunctive or monetary relief. *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014); *Regents of Univ. Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997). Additionally, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself." *Will*, 491 U.S. at 71 (citations omitted). Accordingly, state officials are immune from damages suits in their official capacities. *See Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); *Harter v. Vernon*, 101 F.3d 334, 337 (4th Cir. 1996). "[S]overeign immunity is akin to an affirmative defense, which the defendant bears the burden of demonstrating." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014).

Under the *Ex parte Young* exception, a plaintiff may avoid the Eleventh Amendment bar to suit against state officials if she seeks prospective injunctive or declaratory relief from state officials' unlawful acts. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *see Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004). To determine whether the *Ex parte Young* exception applies, "a court need only conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (cleaned up). The exception does not apply when the alleged violations "occurred entirely in the past." *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999).

Appendix C

Section 1983 imposes liability on "[e]very person" who acts under color of law to deprive an individual of her federal constitutional or statutory rights. *See* 42 U.S.C. § 1983.[6] Because actions against state officials acting in their official capacities are typically considered actions against the state, those officials typically do not qualify as "persons" subject to suit under § 1983. *See Will*, 491 U.S. at 71. But "official-capacity actions for prospective relief are not treated as actions against the State," *Kentucky v. Graham*, 473 U.S. 159, 167, n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985), meaning a state official is a "person" under § 1983 wherever the *Ex parte Young* exception applies. *See Will*, 491 U.S. at 71 n.10 (citing *Graham*, **473** U.S. at 167, n.14; *Ex parte Young*, 209 U.S. 159-160). Where applicable, the Court will address Defendants'

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6. Section 1983 provides in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

§ 1983 "person" defense first, and then their Eleventh Amendment defense. *See Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 779-80, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000); *Power v. Summers*, 226 F.3d 815, 818 (7th Cir. 2000); 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 8.01 (4th ed. 2023) ("[W]hen faced with *Will* person and Eleventh Amendment defenses, the court must first resolve the *Will* person issue.").

ii. Claims against Defendants in their Individual Capacities

It is well established that "state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983." *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Thus, whether Plaintiffs may sue Defendants for damages is not a § 1983 "person" question, but rather an Eleventh Amendment question of whether the action is truly brought against Defendants as individuals. "[T]he mere incantation of the term 'individual capacity' is not enough to transform an official capacity action into an individual capacity action." *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001), *overruled in part on other grounds by Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003). Because the Eleventh Amendment "bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury,'" *Hafer*, 502 U.S. at 30 (quoting *Edelman*, 415 U.S. at 663), the Court must look to the Amended Complaint's substance to determine whether Plaintiffs genuinely seek relief from Defendants as individuals or

instead seek relief from the state. *See Adams v. Ferguson*, 884 F.3d 219, 225 (2018). The Court may examine whether anything in the Amended Complaint or in the record undermines Plaintiffs' assertion. *See Adams*, 884 F.3d at 225; *Garrett v. Clarke*, 552 F. Supp. 3d 539, 554-55 (E.D. Va. 2021), *rev'd on other grounds*, 74 F.4th 579 (4th Cir. 2023).

Defendants argue that nothing in the Amended Complaint demonstrates a true intent to sue them for compensatory damages in their individual capacities. Defs.' Mem. Supp. at 7-8. Defendants insist that although Plaintiffs repeatedly name "VDOT and the Defendants" as violators, Plaintiffs still intend to sue VDOT only and fail to specify which facts support individual liability rather than official liability. Defs.' Reply at 4-5 (quoting Am. Compl. ¶¶ 105, 112). Defendants also argue that the Eleventh Amendment bars Plaintiffs' claim for damages because they effectively seek relocation benefits that would have been paid from the state treasury. Defs.' Mem. Supp at 8. Plaintiffs maintain that they seek compensatory damages from Defendants as individuals and disclaim any request that the Court award them relocation benefits. Pls.' Opp'n at 3-4.

Plaintiffs' Amended Complaint contains sufficient allegations to construe the action as one against Defendants in their individual capacities, but only as it relates to Counts II and III. In these Counts, Plaintiffs allege Defendants violated their constitutional rights by failing to properly manage or supervise their subordinates. "[P]ublic administrators . . . may be liable in their

individual capacities only for their personal wrongdoing or supervisory actions that violated constitutional norms." *Timpson v. Anderson Cnty. Disabilities & Special Needs Bd.*, 31 F.4th 238, 257 (4th Cir. 2022) (citing *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)). Plaintiffs allege facts addressing the elements of supervisory liability, including Defendants' knowledge of the alleged violations and their inadequate response to those violations. Am. Compl. ¶¶ 127-133, 150. Plaintiffs also identify Defendants' subordinates when describing certain events and alleged constitutional violations. *See id.* ¶¶ 25, 49, 52, 56, 124. Defendants argue that Plaintiffs seek damages against all named Defendants and make minimal efforts to specify which allegations support individual-versus official-capacity claims. Defs.' Mem. Supp. at 7 (citing *Dillow v. Va. Polytechnic Inst. & State Univ.*, 7:22cv00280, 2023 U.S. Dist. LEXIS 34952, 2023 WL 2320765, at *18, *21 (W.D. Va. Mar. 2, 2023)). Yet this is only a two-defendant matter, not one involving several named individuals and institutions, meaning there is no confusion about who Plaintiffs intend to sue in their individual capacities. *See Dillow*, 2023 U.S. Dist. LEXIS 34952, 2023 WL 2320765, at *1, *3, *8-9 (finding no individual action where plaintiff named eight state officials and one state institution as defendants). Thus, the Court finds the allegations sufficiently specific to determine that Plaintiffs properly sue Defendants in their individual capacities under Counts II and III.

Plaintiffs do not sufficiently establish a suit against Defendants in their individual capacities under Count I, however. Plaintiffs do not allege a theory of supervisory

or individual misconduct regarding Plaintiffs' rights under the URA. Instead, Count I of the Amended Complaint largely mirrors Count I of the original Complaint, in which Plaintiffs sued VDOT and the Commissioner of Highways generally. *See generally* Compl. Although Plaintiffs updated the Amended Complaint to allege supervisory or individual wrongdoing under Counts II and III, Plaintiffs made only nominal changes in Count I to allege that "VDOT, through the actions of Defendants"—rather than simply "VDOT"—deprived them of relocation benefits. *Compare* Am. Compl. ¶¶ 92, 94-99, *with* Compl. ¶¶ 86, 88-93. These minor, superficial changes are insufficient to turn an action against the State into one against Defendants in their individual capacities.

Further, "immunity applies where the 'governmental entity is so connected to the State that the legal action against the entity would . . . amount to the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Thresher v. Northam*, No. 3:20-cv-307, 2020 U.S. Dist. LEXIS 261459, 2020 WL 12862835, at *5 (E.D. Va. Nov. 23, 2020) (quoting *Hutto*, 773 F.3d at 543). Defendants' duties include overseeing VDOT's award of benefits and issuance of final determinations on benefit claims pursuant to the URA and its implementing regulations. Am. Compl. ¶¶ 12-13, 75-80. Holding Defendants liable for violating Plaintiffs' alleged rights under the URA would essentially hold them liable for failing to carry out their official duties and would "amount to subjecting the Commonwealth to the judicial process." *Thresher*, 2020 U.S. Dist. LEXIS 261459, 2020 WL 12862835, at *5. Therefore, Defendants

are merely the "alter ego of the state" under Count I, and "the state is the real party in interest." *Hutto*, 773 F.3d at 542 (citation omitted).

In sum, Plaintiffs state justiciable claims against Defendants in their individual capacities under Counts II and III of the Amended Complaint. Plaintiffs do not state a justiciable claim against Defendants in their individual capacities under Count I. Count I is therefore DISMISSED as it applies to Defendants in their individual capacities.

iii. Claims against Defendants in their Official Capacities

As stated above, States are not "persons" under § 1983, and actions against state officials are usually considered actions against the State. *Will*, 491 U.S. at 71. But under the *Ex parte Young* exception, state officials are "persons" when sued in their official capacities for prospective relief from ongoing violations of federal law. *See id.* at 71 n.10; *Ex parte Young*, 209 U.S. at 159-60. Although compensatory damages only offer retrospective relief, Plaintiffs also request declaratory relief, which may be prospective. *See Green v. Mansour*, 474 U.S. 64, 67-68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Therefore, whether Defendants are "persons" under § 1983 when sued in their official capacity depends on whether Plaintiffs allege ongoing violations of federal law and request declaratory relief that is prospective. *See Verizon Md.*, 535 U.S. at 645; *Ex parte Young*, 209 U.S. at 159-60.

Defendants argue that Plaintiffs do not request prospective relief, but rather a retrospective "declaration pertaining to the Defendants' denial of Plaintiffs' reimbursement requests in the past." Defs.' Mem. Supp. at 6. Defendants assert that Plaintiffs only seek "declaratory relief to force the Defendants to pay an accrued monetary liability," not "to ensure that relocation expenses incurred in the future are properly reimbursed." Defs.' Reply at 3. Plaintiffs rebut that they sufficiently allege ongoing constitutional violations. Pls.' Opp'n at 3-4 (citing Am. Compl. Counts II–VI, ad damnum clause). They argue the Court can provide prospective relief by declaring "that the Defendants have deprived and continue to deprive the Plaintiffs of Constitutionally protected rights." *Id.* at 3.

"In discerning on which side of the line a particular case falls, [the Court] look[s] to the substance rather than to the form of the relief sought and will be guided by the policies underlying the decision in *Ex parte Young.*" *Papasan v. Allain*, 478 U.S. 265, 279, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (citing *Edelman*, 415 U.S. at 668). The Court will analyze whether Plaintiffs allege ongoing violations of federal law under each Count and request prospective relief for those claims. *Verizon Md.*, 535 U.S. at 645.

a. Count I: Rights under Federal Law

Under Count I, Plaintiffs allege Defendants have denied them of their "right to . . . relocation benefits" under the Uniform Relocation Act ("URA") and its implementing regulations by denying Plaintiffs' benefit claims. *See*

Am. Compl. ¶¶ 91-92, 111-15. Plaintiffs request an order "declaring that the Defendants have deprived [Plaintiffs] of their rights as displaced persons under State and Federal law."[7] *Id.* at 26 ¶ A.

Plaintiffs do not allege an ongoing violation of their alleged rights under the URA, but rather past violations. Plaintiffs allege no "presently experienced harmful consequences of past conduct" stemming from the fact they did not receive certain relocation benefits. *Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998). Further, Plaintiffs do not allege they intend to submit more benefit requests in the future or otherwise need the Court to protect them from a "real and immediate threat of future injury." *Savage v. Maryland*, 896 F.3d 260, 274-75 (4th Cir. 2018).

Additionally, declaratory judgment would not offer Plaintiffs prospective relief under Count I. Declaratory judgment is not available where it would only be useful if "offered in state-court proceedings as res judicata on the issue of liability," because it "would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." *Green*, 474 U.S. at 73; *see also Manning v. S.C. Dep't of Highway & Pub. Transp.*, 914 F.2d 44, 48 (4th Cir. 1990) (rejecting claim for declaratory relief where "[t]he only benefit [plaintiff] could

7. To the extent Plaintiffs claim violations of their state statutory rights, that claim is dismissed because "§ 1983 does not provide redress for violations of state law." *Clear Sky Car Wash, LLC v. City of Chesapeake, Va.*, 910 F. Supp. 2d 861, 889 (E.D. Va. 2012).

derive from a favorable ruling would be a judgment which he could argue as res judicata in his stayed state court proceedings against the [State] Highway Department").[8] Here, declaratory judgment would only be useful to Plaintiffs for its preclusive effect in further proceedings against Defendants or VDOT to collect the same relocation benefits Plaintiffs have already claimed. In other words, a declaratory order holding that Defendants' failure to award relocation benefits was unlawful would essentially render Defendants liable to Plaintiffs for those benefits. The Supreme Court has rejected attempts to characterize claims of retrospective liability in equitable terms where the result would be the same as awarding monetary relief from the state. *See Edelman*, 415 U.S. at 664-67; *Papasan*, 478 U.S. at 281-81. *Wright-Gray v. Ill. Dep't of Healthcare & Family Servs.*, No. 09 C 4414, 2010 U.S. Dist. LEXIS 6740, 2010 WL 381115, at *4 (N.D. Ill. Jan. 26, 2010) ("As [*Edelman*] explained, the award of past benefits wrongfully withheld would 'to a virtual certainty be paid from state funds . . . .'" (quoting *Edelman*, 415 U.S. at 668)). Therefore, declaring that Defendants unlawfully denied relocation benefits would be retrospective in nature and would have more than an "ancillary effect" on the state treasury. *Edelman*, 415 U.S. at 668.

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8. As noted in *Green*, "[i]f, of course, [Plaintiffs] would make no claim that the federal declaratory judgment was res judicata in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason." *Green*, 474 U.S. at 74 n.2 (citing *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247, 73 S. Ct. 236, 97 L. Ed. 291 (1952)).

Without alleging an ongoing violation of federal law and requesting prospective relief, Plaintiffs may not sue Defendants in their official capacities under Count I. *Verizon Md.*, 535 U.S. at 645. Therefore, the Eleventh Amendment deprives the Court of jurisdiction to hear Plaintiffs' official-capacity claims in Count I, and those claims are DISMISSED.

b. Count II: Due Process

In Count II, Plaintiffs allege Defendants deprived them of their constitutional due process rights under the Fifth and Fourteenth Amendments. First, Plaintiffs allege that because Defendants failed to issue a final determination on Plaintiffs' benefit claims, Plaintiffs cannot appeal those claims and have no opportunity to be heard. Am. Compl. ¶ 123. Alternatively, Plaintiffs allege that if Defendants rendered a final determination, they failed to provide notice and an explanation of the final determination on Plaintiffs' benefit claims, which also forecloses their ability to appeal. *Id.* ¶ 124. Additionally, Plaintiffs allege Defendants are liable for due process violations arising from their failure to properly manage and supervise their subordinates within VDOT. *Id.* ¶¶ 126-31, 154.

Plaintiffs request two relevant declaratory orders: First, an order "declaring that Defendants have denied Plaintiffs due process . . . in violation of their [f]ederally protected . . . [c]onstitutional rights," *id.* at 26 ¶ B; and second, an order "declaring that Defendants have failed to properly manage and supervise their employees and

representatives and have failed to provide a determination as to the relocation claims submitted by Plaintiffs," *id.* ¶ 154. Because the second order, if issued, would describe one way in which Defendants violated Plaintiffs' constitutional rights, the Court will construe these as a single request for declaratory relief on Plaintiffs' constitutional claims, with the description only applying if Plaintiffs prove their third theory of harm.

Plaintiffs sufficiently allege ongoing constitutional due process violations. Plaintiffs explicitly allege "ongoing harm to Plaintiffs' due process rights" under Count II because they "are unable to . . . appeal the determination reached." *Id.* ¶ 132. Plaintiffs also allege Defendants know that they and VDOT "have not rendered—and refuse to render—a determination as to the relocation benefits claimed by [Plaintiffs]." *Id.* at ¶¶ 127, 129. The Court need not "consider the merits of [these] claims; it is enough that the complaint *alleges* an ongoing violation of federal law." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 497 (4th Cir. 2005) (citing *Verizon Md.*, 535 U.S. at 646).

Plaintiffs' request for declaratory relief is also "properly characterized as prospective" under Count II because it would not affect the substance of any final determination on Plaintiffs' benefit claims. *Verizon Md*, 535 U.S. at 645. If the Court declares that Defendants deprived Plaintiffs of due process by failing to issue a final determination sufficient to allow them to appeal, the order would not oblige Defendants or the state to award Plaintiffs any benefits. Rather, it would only require that

Defendants make a final determination with sufficient notice and explanation, and Defendants could choose to grant or deny Plaintiffs' benefit claims. Thus, declaratory judgment here would have at most an "ancillary effect" on the state treasury, *Edelman*, 415 U.S. at 668, and would "directly end[] the violation of federal law." *Papasan*, 478 U.S. at 278.

For these reasons, the Court has jurisdiction to consider Plaintiffs' claims under Count II against Defendants in their official capacities.

c. Count III: Equal Protection

In Count III, Plaintiffs allege Defendants deprived them of their equal protection rights under the Fourteenth Amendment. First, Plaintiffs allege Defendants denied Plaintiffs relocation benefits while providing similarly situated persons with relocation benefits. Am. Compl. ¶¶ 107, 134-35, 142. Second, Plaintiffs allege that Defendants singled them out for disparate treatment when Defendants told them in May 2020 that the June 15, 2018 letter constituted a final determination on their relocation benefit claims. Am. Compl. ¶¶ 138, 144.

Plaintiffs do not allege an ongoing violation of their equal protection rights, but rather that their equal protection rights were "violated at one time or over a period of time in the past." *Papasan*, 478 U.S. at 277-78; *see generally* Am. Compl. ¶¶ 133-49. Although Plaintiffs' second theory under Count III is similar to Count II regarding their ability to appeal, Plaintiffs allege no

"real and immediate threat of future injury" arising from Defendants' disparate treatment or discriminatory animus. *Savage*, 896 F.3d at 274-75. Plaintiffs' key allegation regarding discriminatory animus—that Deputy Attorney General Haley said VDOT would have paid Plaintiffs more relocation benefits if they had not hired attorneys and sued VDOT—addresses past disparate treatment regarding Plaintiffs' prior benefit claims. Am. Compl. ¶ 66. Further, the allegation does not address Defendants' characterization of the June 15, 2018, letter as a final determination. Rather than allege a "present disparity in the distribution of . . . benefits," Plaintiffs allege "past actions of the state." *Papasan*, 478 U.S. at 282.

Because the harm alleged is in the past, a declaratory order would only serve to deter disparate treatment in later proceeding to collect on Plaintiffs' previously submitted benefit claims. While that may be desirable, the Court may not issue a declaration "intended indirectly to encourage compliance with federal law through deterrence." *Id.* at 278; *see also Green*, 474 U.S. at 68 ("[C]ompensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."). Rather, it may only issue "relief against [a] state official [that] directly ends the violation of federal law." *Papasan*, 478 U.S. at 278.

For these reasons, the Court lacks jurisdiction to hear Plaintiffs' claims in Count III against Defendants in their official capacities, and those claims are DISMISSED.

iv. Disposition on Rule 12(b)(1) Motion to Dismiss

For the foregoing reasons, Defendants' 12(b)(1) Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The 12(b)(1) Motion is GRANTED with respect to Count I in full and with respect to Count III to the extent Plaintiffs assert claims against Defendants in their official capacities. The 12(b)(1) Motion is DENIED with respect to Count II in full and with respect to Count III to the extent Plaintiffs assert claims against Defendants in their individual capacities.

B. Rule 12(b)(6) Motion: Failure to State a Claim upon which Relief Can be Granted

Proceeding to Defendants' 12(b)(6) Motion to Dismiss, Defendants raise several defenses: Defendants are qualifiedly immune from Plaintiffs' claims; Plaintiffs' claims are untimely under the applicable statute of limitations; Plaintiffs' claims are barred by res judicata; Plaintiffs fail to allege facts showing that Defendants' actions were wrongful; and Plaintiffs fail to allege sufficient facts to show a due process violation or equal protection violation under Counts II and III. Defs.' Mem. Supp. at 10-28. The Court will address these arguments where necessary and relevant to Plaintiffs' justiciable claims asserted in Counts II and III.

Appendix C

i. Qualified Immunity

Qualified immunity is an affirmative defense, and "the burden of pleading it rests with the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 587, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)). Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Indeed, the "driving force" behind the creation of the qualified immunity doctrine was to ensure that "'insubstantial claims' against government officials be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Accordingly, the Supreme Court has repeatedly stressed "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 US. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). It is therefore appropriate to consider and, if possible, to resolve qualified immunity questions at this stage.

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). A clearly established right is one that is "sufficiently clear that every

reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)). Generally, if the law is clearly established, "a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 819. However, "the public interest may be better served" by independent action taken without fear of consequences "where an official's duties legitimately require action in which clearly established rights are not implicated." *Id.* Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149(2011) (citation omitted). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix*, 577 U.S. at 12 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

The first step of the qualified-immunity analysis asks "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232. Second, "the court must decide whether the right at issue was clearly established at the time of [the] defendant's alleged misconduct." *Id.* (internal quotation marks omitted). "If the answer to either question is no, then the official is entitled to qualified immunity." *Halcomb v. Ravenell*, 992 F.3d 316, 319 (4th Cir. 2021). Courts have discretion to address either of the two steps

first, based on "the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

Defendants argue they enjoy qualified immunity from Plaintiffs' individual-capacity claims because Plaintiffs do not allege constitutional rights that were "clearly established at the time of the alleged violation." Defs.' Mem. Supp. at 17. Plaintiffs counter that the court in *Bergano v. City of Va. Beach*, 241 F. Supp. 3d 690, 706-07 (ED. Va. 2017), clearly establishes that Plaintiffs' right to equal protection under the law is violated when a state actor treats a plaintiff differently and with discriminatory animus because the plaintiff obtained legal counsel. Pls.' Opp'n at 13. Plaintiffs also assert that Ms. Snider knew Plaintiffs were entitled to relocation benefits as displaced persons. *Id.* at 13-14. Defendants respond that although Plaintiffs enjoy due process and equal protection rights in general, they do not allege specific rights that are "clearly established" in the context of this case. Defs.' Mem. Supp. at 16-17. Defendants also argue no controlling precedent puts the constitutional rights at issue here "beyond debate." Defs.' Reply at 11 (quoting *Adams*, 884 F.3d at 227).

a. Count II: Due Process

Under Count II, Plaintiffs fail to allege that defendants violated a constitutional right that is "clearly established" by controlling precedent.[9] First, as explained in detail

9. Even though Plaintiffs claim Defendants "do not and cannot argue the right to due process is not clearly established," Pls.' Opp'n at 13, Defendants challenge all of Plaintiffs' constitutional claims on

below when analyzing Count II for failure to state a claim, Plaintiffs do not plead sufficient facts to show that Defendants violated a constitutional right. In particular, the Supreme Court of Virginia's opinion in *Michael Fernandez, D.D.S., Ltd v. Comm'r Highways*, 298 Va. 616, 842 S.E. 2d (2020), identifies other state processes available to Plaintiffs to enforce their rights to relocation benefits, including action under the Administrative Process Act or filing a petition for a writ of mandamus in Virginia state court. *Fernandez*, 298 Va. at 204. In the Fourth Circuit, "to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state." *Tri Cnty. Paving, Inc. v. Ashe Cnty.*, 281 F.3d 430, 436 (4th Cir. 2002) (quoting *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)). The weight of authority indicates that Plaintiffs experienced no due process violation where they failed to pursue state remedies available to them. *See, e.g., Tri Cnty. Paving*, 281 F.3d at 438. Therefore, Plaintiffs do not satisfy the first step of the qualified immunity analysis under Count II. *See Pearson*, 555 U.S. at 232.

Second, even if Plaintiffs did adequately plead a constitutional violation, Defendants are persuasive in arguing that Plaintiffs fail to assert a particularized right, and that no controlling precedent clearly establishes a right to a final determination or ability to appeal. Plaintiffs argue that because Ms. Snider was copied on a

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qualified immunity grounds and therefore satisfy their burden to raise the qualified immunity defense to Count II. *See* Defs.' Mem. Supp. at 16-17; *Crawford-El*, 523 U.S. at 587.

VDOT letter informing Plaintiffs that they were entitled to relocation benefits as displaced persons, Ms. Snider "knew or should have known Plaintiffs were entitled to receive relocation benefits and the rights related thereto." Pls.' Opp'n at 13-14 (citing Am. Compl. ¶ 17; Ex. A). This argument does not address the substance of Count II, however, which focuses on Defendants' failure to render a final determination or to provide notice and an explanation therefor, not their failure to award benefits. *See* Am. Compl. ¶¶ 123-24. Plaintiffs also cite no precedent to suggest that "every reasonable official would have understood" they would commit a due process violation by failing to award benefits, failing to issue a final determination, or deciding that a final determination was already issued, especially after requesting further information on Plaintiffs' benefit claims. *Mullenix*, 577 U.S. at 11. Indeed, *Fernandez* indicates Defendants would have no reason to expect these acts would violate due process because Plaintiffs could have pursued several state avenues for relief. *See Fernandez*, 298 Va. at 204.

For these reasons, Defendants are protected by qualified immunity from Plaintiffs' individual-capacity claims in Count II, and those claims are DISMISSED.

b. Count III

In Count III, Plaintiffs fail to identify a clearly established right that Defendants violated. Plaintiffs assert that equal protection rights are well established and that disparate treatment for obtaining counsel is inappropriate, Pls.' Opp'n at 13, but this argument does not satisfy the particularized standard necessary to

demonstrate a "clearly established" constitutional right. *See Anderson*, 483 U.S. at 639-40. "The Supreme Court has 'repeatedly told courts not to define clearly established law at a high level of generality.'" *Adams*, 884 F.3d at 227 (quoting *al-Kidd*, 563 U.S. at 742). Instead, courts must "consider whether a right is clearly established 'in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Mullenix*, 577 U.S. at 12). The right to equal protection under the law is too general to overcome the qualified immunity defense.

At most, Plaintiffs assert that *Bergano* clearly establishes the right to be free from discrimination on the basis of representation by counsel. But no matter how similar *Bergano* may be to the present case, a single district court's holding—even one from the same federal district as this Court—is not binding and "falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'" *al-Kidd*, 563 U.S. at 741-42 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). Therefore, Plaintiffs do not show that Defendants violated a clearly established constitutional right.

For these reasons, Defendants are qualifiedly immune from Plaintiffs' individual-capacity claims in Count III, and those claims are DISMISSED.

c. Disposition on Qualified Immunity

For the foregoing reasons, Defendants are qualifiedly immune from Plaintiffs' individual-capacity claims under Counts II and III. Those Counts are therefore

DISMISSED to the extent they state claims against Defendants as individuals.

ii. Failure to State a Claim under Count II

The only remaining claims are Plaintiffs' due process claims under Count II against Defendants in their official capacities. These must be dismissed because Plaintiffs fail to state a claim on which relief can be granted.[10]

To plausibly allege deprivation of procedural due process, Plaintiffs must allege facts sufficient to show "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate." *Accident, Inj. and Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019) (quoting *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009)); *see Sansotta v. Town of Nags Head*, 724 F.3d 533, 540 (4th Cir. 2013).

Defendants contend that Plaintiffs fail the first and third elements above. First, Defendants argue that relocation benefits and a final determination on benefit claims are not cognizable property interests because the URA does not create an entitlement to those purported interests. Defs.' Mem. Supp. at 19-20 (citing *Clear Sky Car Wash v. City of Chesapeake, Va.*, 910 F. Supp.2d 861,

10. The Court declines to address Defendants' statute of limitations and res judicata defenses, which are intertwined with issues of Virginia law, in favor of resolving the Motion on federal law grounds.

866 (E.D. Va. 2012); *Bergano v. City of Va. Beach*, **No. 2:15-cv-520, 2016** WL 4435330, at *22 (E.D. Va. Aug. 17, 2016)). Second, Defendants argue that Plaintiffs' frequent exchange of correspondence with Defendants constituted sufficient process, in part because VDOT advised Plaintiffs of their right to appeal in the June 15, 2018, letter. *Id.* at 22-23.

Plaintiffs counter that the district court opinions in *Bergano* and *Clear Sky Car Wash* confirm that the URA affords them "a property interest in relocation benefits and procedures." Pls.' Opp'n at 17 (citing *Bergano*, 241 F. Supp. 3d at 703; *Clear Sky Car Wash*, 901 F. Supp. 2d at 875). Plaintiffs also challenge that their correspondence with Defendants is not sufficient process because Defendants never provided a final determination that would have allowed Plaintiffs to appeal. *Id.* at 18-19. Plaintiffs posit that if they had "sought to appeal any purported decision (or lack thereof) by VDOT in state court via an Administrative Process Act claim, the Defendants (or VDOT) would have claimed that no such decision had been made and that the appeal was improper." *Id.* at 19.

For the reasons explained below, Plaintiffs fail to allege a cognizable property interest and fail to allege they were afforded constitutionally inadequate process.

a. Cognizable Property Interest

"Property interests are not defined by the Constitution. Rather, they 'are created and their dimensions are defined by existing rules or understandings that stem from an

independent source such as state law.'" *Rockville Cars, LLC v. City of Rockville, Md.*, 891 F.3d 141, 146 (4th Cir. 2018) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (quoting *Roth*, 408 U.S. at 577).

1. No cognizable property interest under federal law

First, Plaintiffs fail to allege a cognizable property interest arising under federal law. Plaintiffs assert they have a "right to and property interest in relocation benefits" under the URA, but they do not identify a particular statutory provision conferring that right or interest. Am. Compl. ¶ 91; *see also id.* ¶ 87. Instead, Plaintiffs broadly allege that the URA and the VRAA—the state analogue to the URA—and their implementing regulations require VDOT to provide relocation assistance benefits, thereby entitling Plaintiffs to those benefits. *See id.* ¶¶ 76-79, 84-85 (citing 42 U.S.C. § 4601 *et seq.*; Va. Code § 25.1-400 *et seq.*; 49 C.F.R. § 24.207(b)). Not only do these allegations fail to address the substance of Count II—Defendants' failure to issue a final determination with sufficient notice and explanation—but they identify no statutory language conferring a right to relocation benefits, demonstrating that Plaintiffs have no more than an "abstract need or desire" for such benefits. *Castle Rock*, 545 U.S. at 756.

Appendix C

Plaintiffs' argue *Clear Sky Car Wash* noted that "Section 4622 [of the URA] entitles businesses to recover" certain relocation benefits and observed a "right to prompt payment of [relocation] expenses" that exists after submitting a proper payment application. 910 F. Supp. 2d at 875; Pls.' Opp'n at 17. Yet Plaintiffs do not allege that 42 U.S.C. § 4622 is the source of their asserted "rights" or "entitlements," and they take these statements from *Clear Sky Car Wash* out of context. In *Clear Sky Car Wash*, the plaintiffs alleged that the defendants unconstitutionally violated "certain pre-deprivation rights" under the URA by "failing to comply with the URA's policies." 910 F. Supp. 2d at 885. The district court first analyzed the plaintiffs' claim that they had a federal right of action to enforce those pre-deprivation rights under Subchapters II and III of the URA. *See id.* at 872 (discussing 42 U.S.C. §§ 4622, 4625 (Subchapter II); 42 U.S.C. §§ 4651, 4655 (Subchapter III)). The court found that even though "Section 4622 entitles businesses to recover" relocation expenses and a "right to prompt payment of such expenses exists only after a proper application for authorized payments has been made," the statutory language "does not address whether the URA gives Plaintiffs a federal right of action to pursue the statutorily authorized benefits." *Id.* at 875. Applying the Supreme Court's methodology in *Gonzaga University v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), the court held that Congress "did not evidence an intent to create a federal right of action" under either Subchapter. *Id.* at 877.

In their procedural due process claim, the *Clear Sky Car Wash* plaintiffs also cited the URA as the source of their asserted property interest. *Id.* at 886. The court

held that because "the URA does not give rise to an independently enforceable right," the plaintiffs had "no entitlement to pre-deprivation benefits under the URA giving rise to a constitutionally protected property interest."

The district court's holding in *Clear Sky Car Wash* is highly persuasive here. The weight of authority indicates the URA provides no individually enforceable right to relocation benefits. *See Clear Sky Car Wash v. City of Chesapeake, Va.*, 743 F.3d 438, 440, 444 (4th Cir. 2014) (affirming district court's holding that no individually enforceable rights exist under Subchapter III of the URA governing "mandatory real property acquisition policies . . . made appliable to state agencies" under 42 U.S.C. §§ 4651 and 4655); *Osher v. City of St. Louis, Mo.*, 903 F.3d 698, 703 (8th Cir. 2018) (holding no private right of action exists under 42 U.S.C. § 4622); *Delancey v. City of Austin*, 570 F.3d 590, 592 (5th Cir. 2009) (holding no private right of action exists under 42 U.S.C. § 4625); *Clear Sky Car Wash*, 910 F. Supp. 2d at 877-79. Without an individually enforceable right of action under the URA, Plaintiffs have only an abstract need or desire for relocation benefits or a final determination. *See Clear Sky Car Wash*, 910 F. Supp. 2d at 886. Plaintiffs' allegation that they are "among the class of persons Congress chose to protect under the relocation statutes and regulations" because they are "displaced persons" under the URA, Am. Compl. ¶¶ 88-89, 93, does not satisfy the requirement that Congress "speak with a clear voice" to create an individually enforceable right of action in a statute. *See Clear Sky Car Wash*, 743 F.3d at 443-44 (quoting *Gonzaga*, 536 U.S. at 280).

Plaintiffs' passing allegation that they have an "expectation and interest" in receiving relocation benefits "expeditiously" under 49 C.F.R. § 24.207(b) is also insufficient to state a cognizable property interest. That regulation states, in part: "The Agency shall review claims in an expeditious manner . . . Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim." Am. Compl. ¶ 85. This language doees not create any rights or liabilities, but rather directs VDOT to act in a particular manner. *Cf. Clear Sky Car Wash*, 743 F.3d at 443 (finding the "statutory directive [under Subchapter II of the URA] is aimed at the *agency head*, and it omits any language conferring rights or benefits on landowners"). Further, a regulation cannot create an individually enforceable right to relocation benefits where the URA does not. *See Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text has created, but it may not create a right that Congress has not." (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577, n.18, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979))); *Peters v. Jenney*, 327 F.3d 307, 316 n.9 (4th Cir. 2003) ("An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." (quoting *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987))). Therefore, Plaintiffs merely have a unilateral expectation that their relocation benefit claims will be resolved "expeditiously."

For these reasons, "[j]ust as the *Clear Sky* plaintiffs failed to state a property interest required for a procedural

due process claim, Plaintiff[s] ha[ve] failed to allege a property interest for URA benefits." *Bergano*, 2016 WL 4435330, at *8 (evaluating motion to dismiss).

2. No cognizable property interest under state law

Second, Plaintiffs do not show that Virginia law creates a cognizable property interest in relocation benefits. Although *Bergano* held that the plaintiffs there had a "constitutionally cognizable property interest[]" in "relocation benefits protected by [Virginia] law," 241 F. Supp. 3d at 702-03, the Supreme Court of Virginia's more recent holding in *Fernandez* significantly weakens *Bergano*'s persuasive authority here. The Supreme Court of Virginia held that the VRAA does not "create or imply the existence of a private right of action." *Fernandez*, 298 Va. at 619. As with the URA, the fact that Plaintiffs lack a right of action to relocation benefits under the VRAA means they have "[a]t most ... a unilateral expectation of receiving certain benefits under the [VRAA] and such an expectation is not enough to create a property interest enforceable under the Due Process Clause." *Clear Sky Car Wash*, 910 F. Supp. 2d at 886.

3. No cognizable property interest in procedures

Finally, Plaintiffs cannot claim a constitutionally cognizable interest in certain procedures, whether they arise under federal or state law. *See Dist. Att'y's Off for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67, 129

S. Ct. 2308, 174 L. Ed. 2d 38 (2009) ("Process is not an end in itself . . . ."); *In re Premier Auto Servs., Inc.*, 492 F.3d 274, 282 (4th Cir. 2007) ("[P]rocess is not property. Indeed, procedural rights have not been held 'property rights in the constitutional sense.'" (quoting *Lim v. Cent. DuPage Hosp.*, 871 F.2d 644, 648 (7th Cir. 1989))). Therefore, Plaintiffs have no protectible interest in a final determination on their benefit claims or notice and explanation thereof.

b. Constitutionally Inadequate Process

Even if Plaintiffs have a constitutionally cognizable interest in relocation benefits or a final determination on those benefits, Plaintiffs fail to allege they experienced "constitutionally inadequate" process. *Accident, Inj. and Rehab.*, 943 F.3d at 203. "Due process of law generally requires that a deprivation of property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Tri Cnty. Paving*, 281 F.3d at 436 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). "[T]o determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state." *Id.* (quoting *Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)).

Defendants afforded Plaintiffs significant pre-deprivation notice and opportunity to be heard regarding their relocation benefit claims. Plaintiffs allege and demonstrate through exhibits extensive

correspondence with Defendants and their subordinates within VDOT, which included direct letter, e-mail, and oral communications with Ms. Snider. *See, e.g.*, Exs. D, P, V, Z—DD. Plaintiffs submitted several documents to support their relocation benefit claims, and Defendants considered the materials and awarded benefits on some claims while requesting further information on others. *See, e.g.*, Exs. I, L, M, R—T, V. After losing their state action in the Supreme Court of Virginia, Plaintiffs requested a final determination on their previously submitted benefit claims. *See* Am. Compl. ¶ 55; Ex. W at 2. After Commissioner Brich informed Plaintiffs in writing that the June 15, 2018 letter constituted a final determination, "Defendant Snider corresponded and spoke with Plaintiffs' counsel over a series of months regarding the [alleged] failure to issue a final determination and the provision of additional information so that a determination could be made." Am. Compl. ¶ 128; *see id.* ¶ 56; Ex. X at 2. Ms. Snider provided Plaintiffs another opportunity to submit supporting documentation, and Plaintiffs availed themselves of that opportunity. *See* Exs. BB, CC, DD. This record of detailed and frequent communications between Defendants, their subordinates, and Plaintiffs does not demonstrate "constitutionally inadequate" pre-deprivation process. *Accident, Inj. and Rehab.*, 943 F.3d at 203; *see Tri Cnty. Paving*, 281 F.3d at 437 (finding no deprivation of due process where permit applicants were afforded the "opportunity to submit the documentation necessary to qualify for a building permit" and "often spoke directly with . . . the Director of Building Inspections[] regarding [their] permit application").

Even after Defendants maintained they already issued a final determination and later failed to respond to Plaintiffs' additional submissions, Plaintiffs never availed themselves of the "panoply of . . . postdeprivation process provided by the state." *Tri Cnty. Paving*, 281 F.3d at 436. As the Supreme Court of Virginia explained in *Fernandez*, Dr. Fernandez failed to exhaust his administrative remedies afforded to him under 24 Va. Admin. Code § 30-41-90 before filing suit in state court. *Fernandez*, 842 S.E.2d at 203. Although the court found no evidence that VDOT "ignored or refused to decide Fernandez's claim for relocation expenses," it held that even "if such evidence did exist, Fernandez would not be without recourse" because he "would be entitled to file suit under the Virginia Administrative Procedures Act, which authorizes courts to 'compel agency action unlawfully and arbitrarily withheld or unreasonably delayed.'" *Id.* at 204 (quoting Va. Code § 2.2-4029). The court also noted that "a writ of mandamus may be sought when a public official or body refuses to perform a duty required under the law." *Id.* (citation omitted).

Plaintiffs never pursued administrative review or the avenues for relief outlined in *Fernandez*. The fact that Plaintiffs "failed to . . . pursue the post-deprivation state remedies afforded to [them] . . . proves fatal to [their] claim when 'the existence of state remedies *is* relevant for a § 1983 action based on procedural due process.'" *Rockville Cars*, 891 F.3d at 149 (quoting *Mora v. City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008)). Plaintiffs' speculation that Defendants would have contested a

Virginia Administrative Process Act action does not explain why that process is constitutionally deficient. *See* Pls.' Opp'n at 19; *see also Osborne*, 557 U.S. at 72 ("It is difficult to criticize the State's procedures when [the plaintiff] has not invoked them."). Because Plaintiffs failed to seek available state remedies, "the Court has no reason to believe that the state process for redeeming [Plaintiffs'] alleged property right . . . was constitutionally inadequate." *Rockville Cars*, 891 F.3d at 149; *see also Tri Cnty. Paving*, 281 F.3d at 438 (finding that after plaintiff chose not to pursue state court remedies, including petition for writ of mandamus, plaintiff could not "complain now that the state did not provide adequate procedures").

For the foregoing reasons, Plaintiffs fail to plead sufficient facts showing Defendants violated their procedural due process rights under the Fifth and Fourteenth Amendments. Plaintiffs' due process claims against Defendants in their official capacities under Count II are therefore DISMISSED.

iii. Disposition on Rule 12(b)(6) Motion to Dismiss

For the foregoing reasons, Defendants' 12(b)(6) Motion to Dismiss is GRANTED IN PART and DISMISSED IN PART as moot. The 12(b)(6) Motion to Dismiss is GRANTED with respect to Plaintiffs' claims against Defendants in their individual capacities under Counts II and III. The 12(b)(6) Motion is also GRANTED with respect to Plaintiffs' claims against Defendants in their official capacities under Count II. The 12(b)(6) Motion is otherwise DISMISSED as moot to the extent it relates to the claims resolved under Defendants' 12(b)(1) Motion.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss, ECF No. 16, is **GRANTED IN PART, DENIED IN PART, and DISMISSED IN PART** as moot. Defendants' 12(b)(1) Motion to Dismiss is GRANTED with respect to Count I in full and with respect to Count III to the extent Plaintiffs assert claims against Defendants in their official capacities. The 12(b)(1) Motion is DENIED with respect to Count II in full and with respect to Count III to the extent Plaintiffs assert claims against Defendants in their individual capacities. Defendants' 12(b)(6) Motion to Dismiss is GRANTED with respect to Count II in full and with respect to Count III to the extent Plaintiffs assert claims against Defendants in their individual capacities. The 12(b)(6) Motion is DISMISSED as moot with respect to all claims resolved under the 12(b)(1) Motion. Accordingly, Plaintiffs' Amended Complaint, ECF No. 12, is **DISMISSED** in full.

The Court **DIRECTS** the Clerk to provide a copy of this Memorandum Opinion and Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
December 18, 2023

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 4, 2025

FILED: August 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1658
(2:23-cv-00069-RAJ-RJK)

DR. MICHAEL FERNANDEZ, D.D.S., LTD., A DIVISION OF ATLANTIC DENTAL CARE, PLC; DR. MIGUEL FERNANDEZ, D.D.S.,

Plaintiffs-Appellants,

v.

STEPHEN C. BRICH, P.E., COMMISSIONER OF HIGHWAYS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; LORI A. SNIDER, STATE RIGHT OF WAY & UTILITIES DIRECTOR, VIRGINIA DEPARTMENT OF TRANSPORTATION, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk