

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

753 EAST 226 LLC, 148 W 142, LLC, and
820 EAST 10TH ST. LLC,

Plaintiffs,

-against-

THE NEW YORK CITY DEPARTMENT
OF HOUSING PRESERVATION AND
DEVELOPMENT and ADOLFO CARRIÓN JR.
in his official capacity as Commissioner of THE
NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Defendants.

Case No. 24-cv-4197

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW
CAUSE FOR A PRELIMINARY INJUNCTION**

Date: October 25, 2024

Ellen Davidson
Pavita Krishnaswamy
The Legal Aid Society
49 Thomas Street, 5th Floor
New York, NY 10013

*Attorney for Proposed Intervenors Make The
Road New York & WE ACT*

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Proposed Intervenors, Make the Road New York (“MRNY”) and West Harlem Environmental Action Inc. (“WE ACT”) respectfully submit this memorandum of law in opposition to Plaintiffs’ motion for a preliminary injunction that would leave children throughout the City vulnerable to lead poisoning, while Plaintiffs themselves would face no ongoing harm in the absence of injunctive relief. For the reasons set forth below, Plaintiffs’ motion to enjoin enforcement of the New York City Housing Preservation and Development’s (“HPD”) lead-based paint regulations should be denied. Proposed Intervenors adopt the Government’s reasoning in their Motion to Dismiss.

PRELIMINARY STATEMENT

Lead is a well-known human neurotoxin that can irreversibly damage the developing brains and nervous systems of infants and young children and have grave medical effects on adults. As noted on the Department of Health and Mental Hygiene’s (“DOHMH”) website, “The most common source of lead poisoning for children in New York City is peeling lead paint and its dust.” According to the Centers for Disease Control, no safe blood lead level in children has been identified. (Proposed Intervenors Memorandum of Law at 1-2)

In 2010, almost 14,000 children in the city had dangerous levels of lead in their blood. In 2021, 2,577 children tested positive for elevated blood levels. This latter number, while still unacceptably high, shows that when the City passes strong laws and enforces them, positive change is possible. But that change has come over incessant complaining, obstruction, and litigation from some property owners who don’t seem to care that children are being poisoned in apartments they own. This lawsuit is just the latest attempt to block enforcement of the law.

Plaintiffs are the owners of three buildings that house children under the age of six. For decades, they have been under a continuing obligation to remediate lead-based paint in their buildings. Yet, in 2023 and 2024, over twenty years after Local Law 1 of 2004 was enacted, HPD issued notices of violations to the subject properties for lead-based paint violations of New York City’s Administrative Code. After receiving these notices of violations, Plaintiffs did not remediate the hazard, nor did they challenge the violations in state courts; instead, they filed this lawsuit seeking to stop the City from enforcing the lead laws that protect children from lead poisoning. They seek a preliminary injunction—not just on their own behalf but on behalf of a vast, inchoate group of property owners—alleging irreparable injury that is solely in the form of monetarily compensable damages should they prevail in the underlying case. Nowhere in their motion for a preliminary injunction is an acknowledgement that, balanced against this purely monetary damage is the potential of serious injury to children who live in the properties they own, should the Court grant their motion.

Plaintiffs’ motion for a mandatory preliminary injunction must be denied as they cannot demonstrate a substantial likelihood of success, they have failed to show irreparable harm, and the public interest favors prioritizing children’s health over property’s owners’ financial bottom line.

ARGUMENT

A preliminary injunction “is an extraordinary remedy never awarded as of right.” *Gazzola v. Hochul*, 88 F.4th 186, 193 (2023) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 55 U.S. 7, 24 (2008)). In the Second Circuit, to obtain a preliminary injunction that “will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate 1) irreparable harm absent injunctive relief, 2) a likelihood of success on the

merits and 3) public interest weighing in favor of granting the injunction.” *We the Patriots, USA, Inc. v. Hochul*, 17 F. 4th 266, 280 (2d Cir. 2021) (quoting *Agudath Israel of Am. v. Cuomo*, 983 F3d 620, 631 (2d Cir. 2020) (internal quotation marks omitted)). Plaintiffs here seek a mandatory preliminary injunction against the City. Where the party seeks a mandatory injunction which would alter the status quo, a heightened standard is required. *JTH Tax LLC v. Agnant*, 62 F.4th 658, 667 (2d Cir. 2023). “Under the heightened standard, [plaintiffs] must show a clear or substantial likelihood of success on the merits and make a strong showing of irreparable harm.” *Id.* at 669. While Plaintiffs do not specify what type of injunction they seek, they concede in their motion that they seek to enjoin HPD from enforcing the existing law, thus making clear that they are seeking a mandatory injunction and therefore their request is subject to the heightened standard of review. Without explanation, Plaintiffs seek to be held to the lesser standard which requires showing only “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant’s favor. (Plaintiffs’ Brief at 10). Plaintiffs request an injunction prohibiting HPD from utilizing a testing methodology approved by HUD that provides safe, accurate, and speedy results and which result in quicker remediation of dangerous conditions that threaten children living in their properties. This is precisely the type of “government action taken in the public interest pursuant to a statutory or regulatory scheme” that triggers the higher standard of review. *We the Patriots, USA, Inc. v. Hochul*, 17 F. 4th at 279 n.13. However, regardless of which standard the Court deems appropriate, Plaintiffs fail to meet either.

I. Plaintiffs Cannot Demonstrate Substantial Likelihood of Success on the Merits

Proposed Intervenor adopt the Government’s arguments in their Motion to Dismiss. Because Plaintiffs cannot demonstrate a substantial likelihood of success on the merits, this court should deny Plaintiffs request for a preliminary injunction.

II. Plaintiffs Cannot Make A Showing of Irreparable Harm

Irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction. *Daileader v Certain Underwriters at Lloyds*, 96 F.4th 351, 358 (2d Cir. 2024) (quoting *JTH Tax LLC v. Agnant*, at 672 (internal quotations marks omitted)).

Plaintiffs claim that they can avoid the question of irreparable harm simply by alleging a constitutional violation. (Pl. Br. at 23). They misunderstand the state of the law in this Circuit. A finding of irreparable harm “[i]n cases alleging constitutional injury” requires “a strong showing of constitutional deprivation that results in noncompensable damages”. *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021). “Irreparable harm is satisfied when “the constitutional deprivation is convincingly shown and that violation carries noncompensable damages.” *Siracusa v. New Hyde Park-Garden City Union Free Sch. Dist.*, 2024 WL 3875793, at *8 (E.D.N.Y. Aug. 19, 2024), citing *Blakeman v. James*, WL 3201671, at *18 (E.D.N.Y. Apr. 4, 2024). And not all alleged constitutional violations merit a finding of irreparable harm—Courts in this Circuit have distinguished between substantive constitutional injuries and procedural due process deprivations, particularly where the latter can be remedied with money damages. *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996), citing, among others, *New Alliance Party v. Dinkins*, 743 F.Supp. 1055, 1063 (S.D.N.Y.1990).

Viewed through this framework, Plaintiffs' request for a preliminary injunction must fail. First, Plaintiffs do not explain why they failed to take advantage of the avenues of appeal that are available to property owners who disagree with HPD's findings of the existence of code violations, which include challenging them in Housing Court or via an Article 78 proceeding in State Supreme Court. Therefore, their assertion that they have been deprived of procedural due process is just that—a mere assertion which comes nowhere close to the strong showing of constitutional deprivation required in this Circuit. Second, with the removal of their conclusory due process claim, all that is left in their request for relief is compensable monetary damages should they prevail in this case, specifically \$3,850 for Plaintiff 753, \$3,100 for Plaintiff 148, and \$26,810 for Plaintiff 820. (Plaintiffs' Complaint Prayer for Relief). Where monetary damages will make the party whole after trial, an injunction should be denied. *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.* 60 F. 3d 27 (2d Cir. 1995). This Court has previously denied injunctive relief where the only alleged harm is economic, and it should do so again here. *Kane v. de Blasio*, 575 F. Supp. 3d 435, 441 (S.D.N.Y. 2021), *aff'd sub nom. Keil v. City of New York*, No. 21-3043-CV, 2022 WL 619694 (2d Cir. Mar. 3, 2022).

By contrast, the cases Plaintiffs cite to support their position that they will be irreparably harmed absent injunctive relief dealt with injuries far more pernicious and dangerous than the alleged injury here. *Jolly v. Coughlin* 76 F. 3d 468 (2d Cir. 1996) (finding that where the violation of a prisoner's free exercise of religion could not be compensated monetarily and where the plaintiff had suffered physical effects of his confinement, the plaintiff would suffer irreparable harm in the absence of preliminary injunctive relief); *Basank v. Decker* 449 F. Supp. 3d 205 (S.D.N.Y. 2020) (holding that the risk that petitioners will face a severe and possible fatal illness if they remain in detention constitutes irreparable harm); *Sajous v. Decker* 2018 WL

2357266 (S.D.N.Y. 2018) (finding that a detained immigrant who had not been granted a bond hearing in eight months had demonstrated irreparable harm). *Statharos v. New York City Taxi and Limousine Com'n* 198 F. 3d 317 (2d Cir. 1999) (upholding district court's denial of an injunction where plaintiffs failed to demonstrate a likelihood of success on the merits of their privacy claim); *Boyle v. Cnty. of Suffolk*, No. 10-CV-3606 JS ARL, 2010 WL 4340627 (E.D.N.Y. Oct. 19, 2010) (implicating the fairness of a trial that resulted in forfeiture of a vehicle after an arrest for driving while intoxicated). Paradoxically, the types of dangerous injuries implicated in these cases will be of a kind with the injury that will accrue to New York City children should Plaintiffs' request for an injunction be granted in this case.

III. The Public Interest Favors Prioritizing Children's Health over Plaintiffs' Bottom Line

Plaintiffs seek to enjoin the City from enforcing two of the most significant outcomes of the amendments enacted in Local Law 66 of 2019—the enhanced methodology for testing for lead in residences using XRF analyzers, and the contestability of positive tests. The dangers of lead paint poisoning, particularly to children, are well documented. (Proposed Intervenors Memorandum of Law at 1-2). The Centers for Disease Control have determined that no amount of lead in the bloodstream is safe. In recognition of this reality, HPD classifies the presence of lead in a residential building as a Class C violation, the highest classification available, which requires landlords to ordinarily remediate the underlying condition within 24 hours. This classification reflects HPD's science-based judgment that the presence of lead paint constitutes an emergency that must be remedied without delay.

Local Law 69 of 2019 further reflects the City's concern with prompt lead remediation by requiring HPD to amend its guidance to lower the acceptable amount of lead paint in an apartment and to begin to use the more rapidly available data produced by XRF analyzers to

measure for this lowered amount. It is a well-established principle that administrative agencies have discretion to decide how to implement the laws they are charged with enforcing—particularly insofar as those views are expressed in rules and regulations that implement the statute—so long as their decisions are not arbitrary or capricious. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (finding that the Environmental Protection Agency did not violate the Administrative Procedures Act by adopting total maximum daily loads of phosphorus in eight New York reservoirs with which Plaintiffs disagreed).

Besides being mandated by law, HPD's decision to utilize XRF analysis to determine the levels of lead in a residence is rational. XRF testing yields immediate results compared to lead paint chip testing, which requires physical transmission of the sample to a testing facility. Quicker results mean a quicker start of remediation and abatement if the outcome is positive. Furthermore, paint chip testing often requires manually disturbing the potentially contaminated surface which in turn can lead to enhanced danger of exposure not present in an intact surface.

Balanced against the dangers to New York City children should HPD's testing regimen be suspended by this Court are the speculative injuries cursorily laid out in one paragraph in Plaintiffs' brief, including alleged violations of due process in situations where Plaintiffs failed to take advantage of the process in place to contest what is essentially monetary harm to them. Since Plaintiffs fail to justify issuance of an injunction even as to their own properties, they should certainly be denied the broad injunction they seek for landlords who are not parties to this action and whose facts are not before this court.

The balance of the equities tip decidedly against Plaintiffs and this court should deny their request for a preliminary injunction.

CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' request for injunctive relief.

Date: October 25, 2024

/s/
Ellen Davidson
Pavita Krishnaswamy
The Legal Aid Society
49 Thomas Street, 5th Floor
New York, NY 10013

Attorney for Proposed Intervenors Make The Road New York & WE ACT