

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  
(VEC)

**MEMORANDUM OF LAW IN SUPPORT OF**  
**MOTION TO DISMISS AND IN**  
**OPPOSITION TO PLAINTIFFS ORDER TO SHOW CAUSE**  
**SEEKING A PRELIMINARY INJUNCTION**

Date: November 22, 2024

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Defendant-Intervenors, Make the Road New York (“MRNY”) and West Harlem Environmental Action Inc. (“WE ACT”) respectfully submit this memorandum of law in support of their motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and in opposition to plaintiffs’ Motion for a Preliminary Injunction.

### **PRELIMINARY STATEMENT**

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 (“LL1/04”) was enacted, the New York City Department of Housing Preservation and Development (“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 HPD from enforcing the lead laws that protect children from lead poisoning.

Plaintiffs ask this court to declare unconstitutional HPD’s policy on lead-based paint enforcement, implemented pursuant to duly enacted laws passed by the New York City Council. They complain that HPD’s policy prohibiting property owners from contesting positive lead-based paint findings, at a time, in a manner, and using a method of their choosing, is unlawful. Additionally, plaintiffs allege that HPD’s implementation of Local Law 1 of 2004 violates their due process rights because there is no administrative process to challenge lead-based paint violations placed by HPD. Further, plaintiffs allege that they have been threatened with future enforcement of the violations either through imminent forcible entry of plaintiffs’ properties, or the possibility of liens being placed on plaintiffs’ properties. Amended Complaint (“Am. Compl.”) ¶¶ 61, 63, 65, 79. Plaintiffs’ challenge to New York City’s lead-based paint regulatory

scheme fails as a matter of law as administrative agencies have discretion to decide how to implement the laws they are tasked with enforcing. Similarly, plaintiffs' challenge fails as a matter of fact and law as the process HPD chose was based in science and approved the United States Department of Housing and Urban Development. Plaintiffs' challenge fails as a matter of law because they fail to articulate a protected property interest. However, even if the court finds that there are property interests that implicate due process protections, plaintiffs were provided with state remedies where they could have challenged the violations and could challenge the potential forcible entry or future lien placement. Plaintiffs, thus, have failed to state a cause of action

Plaintiffs seek a preliminary injunction 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 owners' financial bottom line.

Plaintiffs' preliminary injunction motion should therefore be denied, and their complaint should be dismissed.

### **FACTUAL BACKGROUND**

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.<sup>1</sup> 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.”<sup>2</sup> According to the Centers for Disease Control, no safe blood lead level in children has been identified<sup>3</sup>.

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 enacts 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.

### CITY LEGISLATIVE ACTION

New York City recognized the pernicious effects of lead-based paint on children and banned the sale and use of lead-based paint in 1960<sup>4</sup>. It was not until 1982, however, that the City enacted legislation to prevent lead poisoning by requiring landlords to remove or cover any and all lead-based paint in units inhabited by children six or under, pursuant to Local Law 1 of 1982 (“LL1/82”)<sup>5</sup>.

After decades of litigation by advocates seeking to eradicate childhood lead based paint poisoning, New York City enacted Local Law 1 of 2004 (“LL1/04”) with the express aim of eradicating childhood lead poisoning by 2010<sup>6</sup>. LL1/04 requires the safe remediation of lead

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<sup>1</sup> U.S. Department of Health and Human Services/National Institutes of Health, *NTP Monograph on Health Effects of Low-Level*

*Lead* (2012), [https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead\\_newissn\\_508.pdf](https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead_newissn_508.pdf)

<sup>2</sup> NYC Health, *Lead Poisoning*, <https://www1.nyc.gov/site/doh/health/health-topics/lead-poisoning-prevention.page>

<sup>3</sup> Centers for Disease Control, Prevent Lead Paint Poisoning in Children. <https://www.cdc.gov/lead-prevention/communication-resources/prevent-lead-poisoning-in-children.html>.

<sup>4</sup> 24 RCNY § 173.13(a).

<sup>5</sup> Former NYCAC § 27-2013(h).

<sup>6</sup> LL1/04 “Statement of Findings and Purposes”, formerly codified at NYCAC § 27-2056.1.

paint that is peeling or otherwise presents a hazard. The law prevents child lead poisoning through the “lead safe” approach instead of the “lead free” approach of LL1/82. Under LL1/04, landlords have the responsibility to annually investigate apartments for lead hazards where children under the age of six reside for ten or more hours a week. Additionally, the law requires landlords to permanently abate the lead-based paint on the riskiest surfaces, such as friction surfaces on windows and door frames, at vacancy.

In 2018, Defendant-Intervenors fought for amendments to LL1/04 that they hoped would lead to better enforcement of the law. That campaign led to a number of amendments enacted in 2019 which included Local Law 66 of 2019 (“LL66/19”) which, among other things, redefined “lead-based paint” as having a value of 0.5 milligrams of lead per square centimeter (“mg/cm<sup>2</sup>”) or greater (down from 1.0 mg/cm<sup>2</sup>), to take effect no less than 10 months after the federal department of Housing and Urban Development (“HUD”) approved a commercially available X-ray fluorescence (“XRF”) analyzer capable of being reliably calibrated to test at a 0.5 mg/cm<sup>2</sup> level.<sup>7</sup> LL 66/19 provided that this new 0.5 mg/cm<sup>2</sup> standard was to be implemented by amendment of HPD’s rules.

Subsequently HUD did approve a commercially available XRF analyzer capable of being reliably calibrated to test a 0.5 mg/cm<sup>2</sup>.<sup>8</sup> As required by LL66/19, after noticing such proposed rules for comment and public hearing, 148 NYC Record (121) 3898 (June 24, 2021),<sup>9</sup> HPD adopted such amendments on October 13, 2021, effective December 1, 2021. 148 NYC Record

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<sup>7</sup> Codified at NYCAC § 27-2056.2(7)(b). The Board of Health adopted this more stringent standard for DOHMH investigations of the homes of lead-poisoned children earlier, on June 11, 2019. 146 NYC Record (118) 3049, 3052 (June 11, 2019).

<sup>8</sup> Indeed, HUD has approved six XRF analyzers that are capable of being calibrated to test at 0.5 mg/cm<sup>2</sup> or less. See [https://www.hud.gov/program\\_offices/healthy\\_homes/lbp/hudguidelines](https://www.hud.gov/program_offices/healthy_homes/lbp/hudguidelines)

<sup>9</sup> There are no indications that Plaintiffs submitted comments on these proposed regulations, nor sought to timely challenge them under NY CPLR Article 78 upon promulgation.

(197) 6956 (October 13, 2021). These amended rules acknowledged the parameters of HUD's approval by classifying results are either negative, positive or inconclusive. See 24 RCNY § 11-01(t). Specifically, the amended rules state that the results are positive if greater than or equal to 0.6 mg/cm<sup>2</sup>, negative if less than or equal to 0.4 mg/cm<sup>2</sup>, and inconclusive if equal to 0.5 mg/cm<sup>2</sup>. *Id.* HPD further clarified that inconclusive results could be contested by means of a paint chip sample test, and positive results were not subject to challenge by the property owner.

Thereafter, the City enacted additional amendments to LL1/04 in 2020, 2021, and 2023 that created additional notice, testing, remediation, and record-keeping obligations for HPD and property owners.

### **FEDERAL AND CITY REGULATION**

HUD has published guidelines for individuals and groups including residential property owners and state and local housing agencies who seek to reduce lead hazards in housing. See *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing* (2012 Edition) ("Guidelines")<sup>10</sup>. The Guidelines state that that XRF testing is the most common primary analytical method for inspections because of its demonstrated ability to determine if lead-based paint is present and to measure the paint without destructive sampling or paint removal. See *Guidelines* Chapter 7, at 12. According to the Guidelines, readings at or above the positive threshold of 0.6 mg/cm<sup>2</sup> are considered conclusive. *Id.* Paint chip samples are to be collected only when the overall results are inconclusive by XRF or were not measured by XRF. *Id.* at 7. The Guidelines address substrate corrections which may be needed depending on the XRF analyzer used. *Id.* at 26. The Guidelines preference for XRF testing over paint chip samples is

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<sup>10</sup> [https://www.hud.gov/program\\_offices/healthy\\_homes/lbp/hudguidelines](https://www.hud.gov/program_offices/healthy_homes/lbp/hudguidelines)

echoed by other authorities including the World Health Organization’s Brief Guide to Analytical Methods for Measuring Lead in Paint (Second Edition) (“Handheld XRF is an alternative for measuring lead in existing paint as it does not require destructive sampling or paint removal and because of its high speed and low cost per sample. For these reasons, it is the preferred method when inspecting a home for the presence of lead paint”)<sup>11</sup>.

HPD has created an administrative process to address results that are labeled inconclusive. As is clear from HUD’s Performance Characteristic Sheet<sup>12</sup> for the Viken Detection Model Pb200i (“Viken model”), results above 0.4 mg/cm<sup>2</sup> and below 0.6 mg/cm<sup>2</sup> are inconclusive. HPD’s rules recognize this limitation and explicitly designate those findings as inconclusive and permit owners to contest findings within this range by providing paint chip analysis to demonstrate that the paint is negative for lead-based paint. See Department of Housing Preservation and Development, Information Regarding the Implementation of Local Law 66 of 2019: Amendment to the Definition of Lead-Based Paint Under Article 14 of the Housing Maintenance Code<sup>13</sup>.

## LEGAL ARGUMENT

### Standard for Review

#### A. MOTION TO DISMISS

The standard of review on a motion to dismiss pursuant to Rule 12(b)(6), is that the party plead sufficient facts to “state of claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiffs pleads

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<sup>11</sup> <https://iris.who.int/bitstream/handle/10665/332932/9789240006058-eng.pdf?sequence=1> at 12.

<sup>12</sup> [https://www.hud.gov/sites/dfiles/HH/documents/Viken\\_Pb200i\\_Pb200e\\_PCS\\_0.5\\_2022-09.pdf](https://www.hud.gov/sites/dfiles/HH/documents/Viken_Pb200i_Pb200e_PCS_0.5_2022-09.pdf)

<sup>13</sup> <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/lead-based-paint-threshold-faqs.pdf>

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) “A pleading that offers “labels and conclusions” or a formulaic recitation of the elements of a cause of action will not do.” *Iqbal* at 678 (Citing *Bell Atl. Corp.* at 557). Hence, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Bell Atl. Corp. v. Twombly*, at 555). While for the purposes of a motion to dismiss, a court must take all factual allegation in the complaint as true, the court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (citing *Bell Atl. Corp.* (internal quotation marks omitted)). The plausibility standard is not a probability requirement but “it asks for more than the sheer possibility that a defendant has acted unlawfully. *Id.* (Citing *Bell Atl. Corp.* at 556).

## **B. PRELIMINARY INJUNCTION**

A preliminary injunction “is an extraordinary remedy never awarded as of right.” *Gazzola v. Hochul*, 88 F.4<sup>th</sup> 186 (2d Cir. 2023), 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. 4<sup>th</sup> 266, 280 (2d Cir. 2021) (quoting *Agudath Israel of Am. v. Cuomo*, 983 F3d 620, 631 (2d Cir. 2020) (internal quotation marks omitted)).

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.4<sup>th</sup> 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.

## POINT I

### **Plaintiffs fail to state of cause of action because their challenge to HPD’s enforcement of the lead laws has no basis in law or fact**

Plaintiffs claim that HPD “totally bans” verification of XRF results using other testing methodologies. (Am. Compl. Paragraph 31). As discussed above, this is demonstrably false since HPD’s guidance provides that inconclusive results may be challenged by submission of a negative paint chip test. Plaintiffs themselves acknowledge this later in their factual allegations, when they clarify that their outrage is actually directed at HPD’s refusal to permit them to dispute conclusive XRF results using a disruptive and potentially dangerous paint chip test. (Am. Compl. ¶ 39). While the Court must view the pleadings in the light most favorable to the plaintiff, it is not obliged to reconcile plaintiffs’ own pleadings that are contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint. *Fisk v. Letterman*, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005). *See also, I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991).

#### **A. PLAINTIFFS’ CHALLENGE TO HPD’S ENFORCEMENT OF THE NEW YORK CITY LEAD-BASED PAINT LAWS HAS NO BASIS IN LAW.**

HPD has broad latitude to pick among scientifically sound testing methods that serve the public good so long as its choice is not arbitrary and capricious. HPD cannot be required to litigate each discrete finding on a case-by-case basis. *See Weinberger v. Hynson, Westcott & Dunning* 412 U.S. 609 (1973). Courts do not strike down laws or regulations simply because the problem could have been addressed better another way. *See Beatie v. City of New York* 123 F. 3d 707 (2d Cir. 1997) (*Citing Mourning v. Family Publications Services, Inc.* 411 U.S. 356, 378 (1973)). In *Beatie*, cigar makers challenged New York City’s Smoke-Free Air Act claiming that scientific evidence did not support prohibiting cigar smoking in restaurants. The court found that

it is up to those who attack the law to demonstrate that there is no rational connection between the law being challenged and the City's promotion of public health. *Id.* at 712. *See also, All Aire Conditioning, Inc. v. City of New York*, 979 F. Supp. 1010, 1018 (S.D.N.Y. 1997) (“In other words, as long as City officials responsible for the enforcement guidelines reasonably might have conceived that the policies would serve legitimate interests, those guidelines must be sustained”). Unlike in *Beatie*, where there was little scientific evidence supporting the prohibition of cigar smoking, both HUD and the World Health Organization prefer the method of testing that HPD has chosen.

The gravamen of plaintiffs' complaint is they want the HPD to use paint chip analysis to determine whether to place violations of the Housing Maintenance Code (“HMC”) on apartments in New York City. They want HPD to replace its chosen method of testing, which they alleged to be flawed, with the method that plaintiffs prefer. However, plaintiffs do not cite to any authority that supports their claim that they have a due process right to their preferred method of testing. Instead, 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 Clean Water Act by adopting total maximum daily loads of phosphorus in eight New York reservoirs with which Plaintiffs disagreed). Furthermore, HPD's choice, the Viken model and XRF testing, is scientifically sound and supported by HUD guidance. Even plaintiffs admit that HPD's chosen device has a 95 percent confidence interval.<sup>14</sup> HPD's decision to rely on XRF testing is neither

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<sup>14</sup> Guidelines For the Evaluation and Control of Lead-Based Paint Hazards in Housing, (2012 Ed.), Ch. 7 p. 12, <https://www.hud.gov/sites/documents/LBPH09.PDF>.

arbitrary nor capricious, instead it is based on available science and on the HPD's consideration of the pernicious effects of lead-based paint on New York City's children.

**B. PLAINTIFFS' CHALLENGE HAS NO BASIS IN FACT.**

Plaintiffs challenge HPD's enforcement of New York City's duly enacted and implemented lead-based paint laws as scientifically flawed<sup>15</sup>. However, their complaint is replete with false assertions, legal conclusions couched as factual allegations and is internally contradictory. The device that HPD chose to inspect apartments for lead-based paint hazards, the Viken Model, testing has a 95 percent confidence interval. See Plaintiffs' Amended Complaint para 47. Plaintiffs admit this incredibly high confidence interval and then allege that the device is "ill configured for this purpose and regularly produces inaccurate results." Am. Compl. ¶ 30.<sup>16</sup>

**POINT II**

**Plaintiffs fail to state of cause of action because there is no property interest implicated.**

The threshold question for any §1983 action where a party alleges denial of procedural due process is whether the party possessed a protected property interest and if so, was what process was due. *Rosu v. City of New York*, 742 F.3d 523 (2d Cir. 2014) (Citing *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 428) (1982)). Here, plaintiffs have failed to allege that they have been deprived of any property interest in the subject premises.

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<sup>15</sup> Plaintiffs' description of New York City's prohibition of lead content in paint as "allegedly enacted to protect New York inhabitants from over-exposure to lead-based materials" (Am. Compl. ¶ 26) is itself scientifically flawed. There is no blood lead level that is safe for children. Exposure is over exposure. See Centers for Disease Control, Prevent Lead Paint Poisoning in Children. <https://www.cdc.gov/lead-prevention/communication-resources/prevent-lead-poisoning-in-children.html#:~:text=No%20safe%20level%20of%20lead,child's%20risk%20of%20lead%20exposure.>

<sup>16</sup> While plaintiffs claim that XRF testing regularly produces inaccurate results, they fail to acknowledge to the court that plaintiff 753 received not one but four violations for conclusive lead-based paint. This proceeding challenges only one of those violations. See Declaration of Ramon Guzman (ECF 72). See Amended Complaint para 11. Presumably plaintiffs agree that the other three violations were accurate. Plaintiff 753 is the only plaintiff where HPD was provided access to the apartment by the tenant to remediate the lead-based paint hazards.

Plaintiffs seek to strike down the HPD's lead-based paint enforcement regime because they believe the HPD must modify their administrative process to allow challenges to scientifically conclusive XRF results prior to reporting violations of the Housing Maintenance Code ("HMC"). According to plaintiffs the absence of such procedures could result in forcible entry to owners' property, tax liens on affected property, and ultimately foreclosure actions. Am. Compl. ¶ 55. The complaint does not allege that any of these possible circumstances have occurred in these buildings. The only consequence that resulted from the HPD's lead-based paint inspection, is that the HPD issued notice of violation of the Housing Maintenance Code.

Housing Maintenance Code violations are not self-executing. See Admin. Code §27-1116(a). Under the HMC, in order to recover civil penalties, HPD must bring a case in the housing part of New York City Civil Court and in that proceeding, a landlord may defend such case by showing that the violation did not exist at the time the notice of violation was served. See Admin Code §27-1116(b)(2). No action for civil penalties has been brought against Plaintiffs.

As there have been no enforcement proceedings, the gravamen of plaintiffs' complaint is that HPD erroneously issued notices of violations for lead-based paint in their buildings. Plaintiffs do not have a property interest in a violation free building. Indeed, in *Kraebel v. Michetti*, the Court found that the property owner had not been deprived of any property right when she alleged that the City had improperly placed violations on her property. See *Kraebel v. Michetti* 1994 WL 455468, \*3 (S.D.N.Y), *aff'd*, 57 F.3d 1063 (2nd Cir.). ("The Court cannot conceive of how defendants' mere identification and reporting of violations, without taking action to impose a penalty, could amount to a deprivation of plaintiffs' property).

Plaintiffs have failed to establish that they have been deprived of a protected interest. Thus, this case should be dismissed.

### POINT III

**Even if the plaintiffs were deprived of a protected property interest, they were provided with all the process that is due.**

Where courts have found that a plaintiff was deprived of a protected property interest, the inquiry shifts to whether established state procedure affords procedural due process.<sup>17</sup> The Supreme Court has set forth a three-part balancing test for determining whether an individual has received due process: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value (if any) of alternative procedures; and (3) the government's interest, including the possible burdens of alternative procedures. *Mathews v. Eldridge*, 424 U.S. 319 (1965) (holding that where Social Security disability benefits were terminated, pre deprivation hearings were not constitutionally required even though the time period between deprivation and hearing was over a year). The *Mathews* Court explained that due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Mathews*, 424 U.S. at 334, (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). It is "flexible and calls for such procedural protections as the particular situation demands." *Id.* (internal quotations omitted). "Mathews is a test for both when a hearing is required (i.e., pre or post deprivation) and what kind of procedure is due a person deprived of liberty or property." *Brody v. Village of Port Chester*, 434 F. 3d 121, 135 (2d Cir. 2005). Assuming arguendo that plaintiffs have alleged deprivation of a property interest, considering the private interests at stake, the procedures in place and the government's interest leads to the conclusion that plaintiffs have received all process that is due.

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<sup>17</sup> As a threshold matter, it should be noted that, contrary to Plaintiffs' assertions, there are actually three types of challenges available to them to contest a violation, including either defensively or affirmatively in Housing Court, via an administrative challenge to an emergency repair charge placed on their Statement of Account by the Department of Finance, and finally, through a Civil Procedure Law and Rules Article 78 proceeding.

First, the private interest at stake here is minimal. Plaintiffs allege that HPD erroneously placed housing maintenance code violations on their buildings. They claim that these violations may lead to forcible entry and tax liens at some indeterminate future time<sup>18</sup>. As set forth in Point I *supra*, no civil penalties will be imposed without HPD filing a case in housing court. No such enforcement proceedings have been filed. See *Kraebel v. Michetti* 1994 WL 455468, \*3 (S.D.N.Y), *aff'd*, 57 F.3d 1063 (2nd Cir.) (“Plaintiff does not have an entitlement to an unblemished housing code record, and an unblemished record is all that defendants have arguably deprived her at this point in time”)

The second *Mathews* factor requires analysis of what processes the state has provided and whether they protect plaintiffs from erroneous deprivation of the protected property interest. Here, HPD offers a procedure for landlords to challenge *inconclusive* XRF results but forecloses futile and time-wasting challenges to *conclusive* results using testing methodologies that could pose a risk to occupants of the apartment. To the extent that HPD refuses to allow pre-deprivation challenges of a particular form in some circumstances, this “will not offend the constitutional guarantee of due process, provided there is sufficient post [-] deprivation process.” *Spinelli v. City of New York*, 579 F3d 160, 170 (2d Cir. 2009) (quoting *Catanzaro v. Weiden* 188 F.3d 56,61 (2d Cir. 1999). Courts have recognized that that an Article 78 proceedings constitutes “a wholly adequate post-deprivation hearing for due process purposes.” *Locurto v. Safir* 264 F. 3d 154,175 (2d Cir. 2001).

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<sup>18</sup> The original complaint was filed May 31, 2024 (ECF 1). The Amended Complaint filed five months later still describes the permanent deprivation as imminent. (ECF 64). Paragraphs 61, 63, 65 (“facing imminent permanent deprivation of property”); ¶¶ 62, 64, 66 (“HPD’s forced implementation of unnecessary remedial work at . . . attempts to inflict damages”); ¶ 78 (“threatening Plaintiffs with imminent forcible entry”); and ¶ 79 (“threatening Plaintiffs with imminent action including lien enforcement”). According to HPD, to date the only building where work was done is in the building owned by plaintiff 753. In that apartment, there were four violations issued for lead-based paint, plaintiff only challenges one of the four conclusive results. See Declaration of Ramon Guzman (ECF 72).

Here where plaintiffs complain about the future consequences of alleged erroneous HMC violations placed by HPD, New York State's Article 78 proceeding provides a more than adequate pre-deprivation hearing. See *Chase Group Alliance LLC v. City of New York Dep't of Finance*, 620 F. 3d 146, 152 (2d Cir 2010) ("Due process requires only that the state afford a party threatened with a deprivation of property a process involving a pre-deprivation notice and access to a tribunal in which the merits of the deprivation may be fairly challenged.") Due process requires a state process but that does not mean that Section 1983 provides a remedy for every error alleged to have occurred in the state process. *Id.* (citing *New York State Nat'l Org. for Women v. Pataki*, 261 F.3d 156, 168 (2d Cir 2001)).

New York State's Article 78 proceedings adequately protect property owners such as plaintiffs from erroneous deprivation of their property interests. Plaintiffs can challenge the method used by HPD to test lead-based paint, whether the violations placed were erroneously and the constitutionality of HPD's regulatory and enforcement scheme. Plaintiffs can submit affidavits and other written proof of their allegations and may obtain a trial before a judge. *Hellenic American Neighborhood Action Committee v. City of New York* 101 F.3d 877 (2d Cir. 1996). Constitutional issues can be decided in an Article 78 proceeding. *Walton v. N.Y.S. Dep't of Corrections*, 8 N.Y.3d 186 (2007). The State may provide procedural due process in either an administrative proceeding or in a courtroom. *Campo v. N.Y. City Empls.' Ret. Sys* 843 F.2d 96, 103 (2d Cir. 1988).

Finally, the third *Mathews* factor requires the court to consider the government's interest. The government's interest in protecting children from lead-based paint poisoning is strong. So too is the government's interest in quickly remediating lead-based paint from apartments where children live. Courts have weighed heavily on a city's interest in public health and safety. *See*

*Brancato v. City of New York*, 244 F.Supp 2d 239 246 (S.D.N.Y 2003) (“As a remedy to a hazardous public health condition, the merely temporary property deprivation in the form of a lien, weighed against the potential risks that prolongation of the nuisance may entail, should be given appropriate weight in the Court’s consideration of the extent of process due.”) *Ferrari v. County of Suffolk*, 845 F.3d 46, 67-68 (2d Cir. 2016) (weighing heavily city’s interest in preventing accidents from drunk driving in finding that the city’s hearing proceedings for vehicle forfeiture *pendente lite* were consistent with due process) *Spinelli v. City of New York*, at 170 , (noting that the city had a sufficient interest “in ensuring the security of gun shops” such that a pre-deprivation hearing regarding gun shop licenses was not constitutionally required).

Requiring HPD to allow property owners to contest conclusive XRF results prior to placing violations would be extremely burdensome and would greatly slow the remediation of conditions that constitute a health emergency. Children could be left living in hazardous conditions while the administrative process played out. The third *Mathews* factor strongly favors the HPD.

Because the private interests are minimal, the government interests are significant, and plaintiffs had the option of challenging the violations in state court, plaintiffs fail to state a claim for a violation of due process. Thus, this case should be dismissed.

#### POINT IV

##### **Plaintiffs are not entitled to the extraordinary remedy of a mandatory injunction.**

A preliminary injunction “is an extraordinary remedy never awarded as of right.” *Gazzola v. Hochul*, at 193. 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. 4<sup>th</sup> 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 HPD. 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.4<sup>th</sup> 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<sup>19</sup>. 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. 4<sup>th</sup> at 279 n.13. However, regardless of which standard the Court deems appropriate, Plaintiffs fail to meet either.

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<sup>19</sup> Considering that plaintiffs Amended Complaint still describes the permanent property deprivation as imminent, it is striking that the injunction sought is not to stay HPD from doing unnecessary remedial work or forcible entry or lien enforcement but is to stop the HPD from future enforcement of lead-based paint laws. (ECF 64). See amended complaint Paragraphs 61, 63, 65 (“facing imminent permanent deprivation of property”); paragraph 62, 64, 66 (“HPD’s forced implementation of unnecessary remedial work at . . . attempts to inflict damages”); paragraph 78 (“threatening Plaintiffs with imminent forcible entry”); and paragraph 79 (“threatening Plaintiffs with imminent action including lien enforcement”).

**A. PLAINTIFFS CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS**

As stated above in Points II and III, plaintiffs' claims fail as a matter of law. As plaintiffs seek an injunction that will both alter the status quo and provide them with substantially all the relief sought, they must meet a clear or substantial likelihood of success on the merits. See *Tom Doherty Associates Inc. v. Saban Entertainment*, 60 F.3d 27 (2d Cir. 1995). As plaintiffs cannot show any likelihood of success on the merits, this court should deny their motion for a preliminary injunction.

**B. 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*, 62 F. 4<sup>th</sup> 658, 672(2d Cir. 2023) (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).

Indeed, Plaintiffs argue that where a party alleges constitutional harm, they need not show a substantial likelihood of success on the merits. See MOL page 22. The cases cited do not support Plaintiff's contention that merely alleging constitutional harm is enough to upend a carefully thought-out regulatory framework. *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).

### **C. 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. Intervenors-Defendants Motion to Intervene 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. Local Law 69 of 2019 required HPD to amend its guidance to lower the acceptable amount of lead paint in an apartment and to begin to use 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 Clean Water Act by adopting total maximum daily loads of phosphorus in eight New York reservoirs with which Plaintiffs disagreed).

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. For these reasons, HUD guidelines recommend XRF testing over paint chip testing.<sup>20</sup>

As a preliminary injunction is not in the public interest, the Court should deny Plaintiffs' preliminary injunction.

### **CONCLUSION**

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

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<sup>20</sup> *Guidelines For the Evaluation and Control of Lead-Based Paint Hazards in Housing, (2012 Ed.)*, Ch. 7 p. 12, <https://www.hud.gov/sites/documents/LBPH09.PDF>.