New York Supreme Court
Appellate Division – Third Department

PEOPLE OF THE STATE OF NEW YORK,

Petitioner-Appellant,

– against –

COMMONS WEST, LLC, COLLEGETOWN PLAZA, LLC, CITYVIEW, LLC, COLLEGETOWN CENTER, LLC, COLLEGETOWN COURT, LLC, FANE ENTERPRISES, INC. AND JASON H. FANE INDIVIDUALLY AND D/B/A ITHACA RENTING COMPANY, AND AS THE SOLE MEMBER OF COMMONS WEST, LLC, COLLEGETOWN PLAZA, LLC, CITYVIEW, LLC, COLLEGETOWN CENTER, LLC AND COLLEGETOWN COURT, LLC, AND AS PRESIDENT, DIRECTOR AND SHAREHOLDER OF FANE ENTERPRISES, INC.,

Respondents-Respondents.

Docket No. CV-23-1255

Sup Ct Index No. EF2022-0558

BRIEF OF *AMICI CURIAE* SAFE HORIZON, INC. AND CONGREGATIONS LINKED IN URBAN STRATEGY TO EFFECT RENEWAL, INC. IN SUPPORT OF PETITIONER-APPELLANT

Evan Henley
Edward Josephson
THE LEGAL AID SOCIETY
49 Thomas Street, Floor 5
New York, NY 10013
212-298-5233
ewhenley@legal-aid.org

Marcie Kobak
LEGAL SERVICES OF THE HUDSON VALLEY
30 South Broadway
Yonkers, New York 10701
914-376-3757
mkobak@lshv.org

Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Regulations

Other Authorities

Charter Provisions

I. Introduction

Over 245,000 New York families depend on Housing Choice Vouchers (also known as Section 8 Vouchers) to pay their rent and prevent them from becoming homeless. The New York State Human Rights Law (NYSHRL) forbids property owners from refusing to accept rental payments made via a lawful source of income, including Section 8 benefits. However, numerous landlords still refuse Section 8, either explicitly or for pretextual reasons, seeking to avoid the Section 8 program's habitability requirements or rejecting voucher holders based on stereotyped views of low-income renters.

In the proceeding below, Respondents-Respondents (the Landlords) sought to justify their refusal of Section 8 vouchers by alleging a fear of unconstitutional searches of their rental units and their rental records. However, they failed to identify even one specific instance, in Ithaca or elsewhere, where a landlord was compelled to permit a warrantless inspection or faced a penalty for failing to consent to a warrantless inspection under the Section 8 program. In other words, the Landlords failed to allege that the NYSHRL "directly or in practical effect authorizes or requires a warrantless inspection"[1] and thus poses a threat to any interests protected

[1] *Stender v Albany*, 188 AD2d 986 [3d Dept 1992].

by the Fourth Amendment and Article I, Section 12 of the New York Constitution.[2] Their claims boil down to a speculative assertion that the government will act unconstitutionally in the future. Yet, the trial court ruled that the NYSHRL's source-of-income protections as to Section 8 vouchers are facially unconstitutional. The trial court's decision was grounded in a flawed understanding of the Section 8 program, facial constitutional challenges, and the Fourth Amendment, and this Court should reverse it.

Over half of the New Yorkers with Section 8 vouchers live in New York City. Amicus curiae Safe Horizon, Inc. (SafeHorizon) serves a particularly vulnerable subset of this population: homeless and unstably housed youth. Its clients rely on the NYSHRL and the New York City Human Rights Law (NYCHRL)'s analogous source-of-income protections to use their vouchers. Amicus curiae Congregations Linked in Urban Strategy to Effect Renewal, Inc. (CLUSTER) is one of many organizations working with Section 8 participants outside of New York City who are protected by the NYSHRL. In Westchester County, where CLUSTER operates, the Westchester County Human Rights Law also protects Section 8 participants. Even with these protections in place, landlords continue to refuse to rent to Section 8 participants outright or for pretextual reasons. But the protections provide voucher

[2] The Landlords do not allege that the New York Constitution imposes a different standard in this regard than the Fourth Amendment. This brief uses the shorthand "Fourth Amendment" to refer to both constitutional provisions.

holders recourse, and they can assert their rights to obtain fair consideration of their rental applications. If this Court allows the Landlords' speculative claims about Section 8 inspections to invalidate the NYSHRL's protections, SafeHorizon and CLUSTER's clients—and hundreds of thousands of other New Yorkers—will have far more difficulty using their vouchers. Many will lose their vouchers after they pass their expiration date and remain homeless or unstably housed indefinitely.

This amicus brief focuses on two reasons why this Court should reject the Landlords' facial challenge to the NYSHRL and reverse the trial court. First, the portion of the Section 8 Housing Assistance Payments contract concerning the inspection of property and records must be construed in light of constitutional limits. It does not waive a landlord's Fourth Amendment rights. Second, the Fourth Amendment only requires that a party have the opportunity to request that a neutral decision maker review the propriety of a search demand before it faces penalties for failing to comply with the demand, otherwise known as "precompliance review." Landlords participating in the Section 8 program have multiple avenues for precompliance review.

II. Statement of Interest

Founded in 1978, SafeHorizon is a non-profit organization that serves under resourced and vulnerable New Yorkers, including those who are unsheltered, unstably housed, or homeless due to domestic violence, abuse, and other forms of

violence. Through its Streetwork Project, SafeHorizon serves homeless, unsheltered, and unstably housed youth. Among other services, the Streetwork Project employs housing navigators who assist clients with locating housing opportunities and the housing application and move-in process.

The Streetwork Project alone serves over 200 clients with Section 8 vouchers. It frequently uses the NYCHRL to overcome source-of-income discrimination. SafeHorizon intervened as a defendant in a federal lawsuit challenging the NYCHRL on the same theory advanced by the Landlords in this case (*see 216 E. 29th St. Trust v City of New York*, 2025 US Dist LEXIS 15267 [SD NY, Jan. 28, 2025, No. 24-cv-00595]).[3] SafeHorizon has also been a plaintiff in a lawsuit alleging source-of-income discrimination claims under the NYCHRL and NYSHRL (*Safe Horizon, Inc. et al. v 3823 Carpenter Ave LLC*, 450373/2023 [Sup Ct, NY County]).

CLUSTER's Housing Resource Center provides services to tenants to prevent evictions and improve housing conditions. For over twenty years, it has worked with low-to-moderate-income Yonkers residents. Many of its clients are Section 8 participants who struggle to find safe and livable apartments. Tenants facing eviction merely based upon lease expiration have difficulties securing alternative housing

[3] The judge granted Safe Horizon and New York City's motions to dismiss, and the plaintiff has appealed the decision to the Second Circuit. The legal issues in this case bear directly on that appeal.

before their court-imposed eviction date; this difficulty is magnified for a household seeking to move with a voucher and facing discrimination. Discrimination may result in the family permanently losing its voucher. Before Westchester County and the State amended their Human Rights Laws to protect Section 8 recipients, CLUSTER's clients had no recourse against such discrimination.

This Court is the first Department of the Appellate Division to consider this issue, and its decision will be binding authority throughout the state (*see, e.g.*, *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]). Because the NYCHRL and the Westchester County Human Rights Laws' prohibitions of discrimination against Section 8 voucher holders are very similar to the NYSHRL's, the outcome of this appeal will also provide authoritative, if not binding, guidance to trial courts, the New York City Commission on Human Rights, the Office of Administrative Trials and Hearings, and the Westchester County Human Rights Commission regarding the resolution of similar Fourth Amendment claims or defenses regarding the NYCHRL and the Westchester County Human Rights Law.

If protections for Section 8 voucher holders were invalidated, SafeHorizon and CLUSTER would encounter heightened challenges when seeking to connect clients to housing and would need to devote additional resources to helping their clients find and apply for housing and supporting them while they remained

homeless.

III. Background on the Section 8 voucher program

Congress created the Housing Choice Voucher Program—formerly, and still commonly, known as the Section 8 Voucher Program—to remedy the acute shortage of decent, safe, and sanitary dwellings for low-income families and to promote economic integration (42 USC § 1437f [a]; *Austin Apt. Assn. v City of Austin*, 89 F Supp 3d 886, 889 [WD Tex 2015]). There are approximately 2.3 million active Housing Choice Voucher Program participants in the United States,[4] and over 245,000 in New York.[5] The New York City Housing Authority administers the largest Section 8 program in the country, with approximately 100,000 participants.[6] The New York City Department of Housing Preservation and Development[7] and New York State Homes and Community Renewal[8] also administer Section 8

[4] US Dept. of Hous. & Urban Dev., *Housing Choice Voucher Data Dashboard*, available at https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard (summary page) [last accessed Mar. 3, 2025].

[5] *Id.* [filter by State, NY].

[6] *Id.* (filter by Public Housing Authority, New York City Housing Authority); *see also* New York City Hous. Auth., *About Section 8*, available at https://www.nyc.gov/site/nycha/section-8/about-section-8.page [last accessed Mar. 3, 2025].

[7] New York City Dept. of Hous. Preservation & Dev., *About Section 8*, available at https://www.nyc.gov/site/hpd/services-and-information/about-section-8.page [last accessed Mar. 3, 2025] [stating that program has over 39,000 participants].

[8] New York State Homes & Cmty. Renewal, *Subsidy Services Bureau*, available at https://hcr.ny.gov/subsidy-service-bureau [last accessed Mar. 3, 2025].

voucher programs in New York City. There are seventeen separate Section 8 programs in Westchester County;[9] the Municipal Housing Authority for the City of Yonkers alone has over 4,500 participants.[10] Section 8 is governed by the authorizing statute (42 USC § 1437f [o]), regulations promulgated by the United States Department of Housing and Urban Development (HUD) (24 CFR §§ 982.1-.643), and the specific rules of the Public Housing Agency (PHA) that administers the voucher.[11]

The HUD regulations lay out how the Section 8 program works. First, the PHA selects a person from its waitlist, assesses their eligibility, and issues a voucher (*id.* §§ 982.201-.202, .302 [a]). The voucher has a limited term; if it is not used within that term or before the expiration of any subsequent extension, the voucher holder will lose it (*see id.* §§ 982.302 [c], .303). Second, the voucher holder is responsible for locating a unit on the private rental market that meets program requirements (*id.* § 982.302 [b]). Third, after locating a unit, the voucher holder and owner must submit a "Request for Tenancy Approval" and associated information and documents to the PHA (*id.* § 982.302 [c]). Fourth, the PHA inspects the unit to

[9] Westchester County, *Tenants and Landlords*, available at https://homes.westchestergov.com/tenants/207-tenants-and-landlords [last accessed Apr. 17, 2025].

[10] *Housing Choice Voucher Data Dashboard* [filter by Public Housing Authority, NY003].

[11] *E.g.*, New York City Hous. Auth., *Housing Choice Voucher Administrative Plan* [Oct. 1, 2023], available at https://www.nyc.gov/assets/nycha/downloads/pdf/hcpvadministrative.pdf.

ensure that it complies with Housing Quality Standards (HQS) (*id.* §§ 982.305, .405). Fifth, after reviewing the lease and ensuring compliance with other program requirements, the PHA will approve the assisted tenancy (*id.* § 982.305). These requirements include "rent reasonableness," meaning that the rent for the unit is reasonable based on the location and unit features (*id.* § 982.507). After this approval, the voucher holder can move into the unit, and the PHA will sign a Housing Assistance Payments (HAP) contract with the owner (*id.* § 982.305 [c]). The term of the HAP contract begins on the first day of the lease term (*id.* § 982.309 [c]).

After the initial HQS inspection, the PHA must inspect the unit biennially (*id.* § 982.405). HQS only apply to the subsidized unit, means of egress for the subsidized unit, common areas for residential use, and systems that directly service the subsidized unit (*id.* § 5.703 [a]). After the HAP contract is signed, if the owner breaches it, the PHA may exercise rights and remedies including "recovery of overpayments, abatement or other reduction of housing assistance payments, termination of housing assistance payments, and termination of the HAP contract" (*id.* § 982.453 [d]).

Nothing in the regulations authorizes or requires a PHA to perform a warrantless search or imposes a penalty on the owner for failing to consent to a warrantless search. Nothing in the regulations requires an owner to provide the PHA

with access to its files or records; essentially the only information that the regulations require it to share is "information requested by the PHA on rents charged by the owner for other units in the premises or elsewhere" (*id.* § 982.507 [d]).

The HAP contract provides that "the owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require" (*Housing Assistance Payments (HAP) Contract* part B, ¶ 11 [a]).[12] It further states that the "PHA, HUD, and the Comptroller General of the United States shall have full and free access to the contract unit and the premises, and to all accounts and other records" that are relevant to the HAP contract, including electronic records (*id.* ¶¶ 11 [b], [c]).

IV. Protections against source-of-income discrimination are essential for Section 8 voucher holders such as SafeHorizon's clients.

SafeHorizon's experience highlights the need for source-of-income protections, especially for rental applicants with vouchers like Section 8. Between 2021 and 2022, SafeHorizon's Streetwork Project helped clients apply for the Section 8 Emergency Housing Voucher (EHV) program through the New York City Department of Youth and Community Development's EHV allocation. Over 200 of the Streetwork Project's clients received a Section 8 voucher through the EHV program.

[12] Available at https://www.hud.gov/sites/dfiles/OCHCO/documents/52641ENG.pdf [last accessed Mar. 3, 2025].

Section 8 vouchers, including EHVs, must be used by deadlines set by NYCHA or another PHA, or they expire (*e.g.*, 24 CFR § 982.303). When a client's Section 8 voucher expires, there is a great risk that they will lose it permanently and will have no chance of obtaining a replacement voucher.

The Streetwork Project employs housing navigators who help clients locate, apply for, and view apartments. Once clients are accepted by a landlord, housing navigators help their clients do the paperwork necessary to complete the rental and, for most clients, the subsidy approval process. When clients are rejected due to source-of-income discrimination, they stay homeless longer, and their vouchers may expire and be permanently lost.

SafeHorizon's housing navigators and other staff frequently encounter source-of-income discrimination against clients with vouchers, including EHVs. Some brokers and landlords overtly refuse to rent to people with vouchers; others try to hide their refusal to accept vouchers with a pretextual reason. SafeHorizon has also found that source-of-income discrimination is a cover or proxy for other types of discrimination, as the population of voucher holders overlaps considerably with the populations of other marginalized groups.

While source-of-income discrimination remains a major issue, the prohibitions on source-of-income discrimination have had significant and concrete benefits for SafeHorizon's clients. For example, when SafeHorizon encounters

source-of-income discrimination, it starts by attempting to educate the landlord, broker, or management company that is discriminating. It frequently shares pamphlets and factsheets prepared by the New York City Commission on Human Rights and other agencies. Often, this is enough to get the landlord, broker, or management company to reconsider. If its initial attempts to educate and advocate do not work, SafeHorizon seeks legal advice, provides relevant court decisions to the landlord's attorney, and enlists a lawyer's assistance in reaching out to the landlord, broker, or property manager to explain their legal obligations. This more assertive invocation of source-of-income protections frequently works. And when SafeHorizon filed a lawsuit containing source-of-income discrimination claims under the NYCHRL and NYSHRL, the lawsuit[13] resulted in the clients being approved for apartments and an agreement to connect other SafeHorizon clients with future available apartments.

The prevalence of source-of-income discrimination in the face of protections in New York City (in place for almost seventeen years) and New York State (in place for almost six years) suggests that, were source-of-income protections to be invalidated, many landlords would refuse to rent to Section 8 voucher holders. This would result in Section 8 voucher holders having significantly fewer housing options

[13] *Safe Horizon, Inc. et al. v 3823 Carpenter Ave LLC et al.*, Index No. 450373/2023 [Sup Ct, NY County].

(*see, e.g.*, Council of the City of New York, *Committee Report of the Governmental Affairs Division on Proposed Int. No. 61-A* at 6-7 [Mar. 26, 2008][14] [describing results of two tests asking landlords if they accepted Section 8 vouchers; in one, only 16 of 121 available apartments were available to Section 8 voucher holders]). Permitting discrimination against Section 8 voucher holders would not only mean that New Yorkers like SafeHorizon and CLUSTER's clients would remain homeless or unstably housed for longer (or permanently); it would also undermine the Section 8 program's goals of aiding "low-income families in obtaining a decent place to live" and promoting "economically mixed housing" (42 USC § 1437f [a]). Against these important purposes, the Landlords' baseless constitutional claim falls flat.

V. **Argument**

To prevail on a facial challenge, a party must establish that "in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (*Cuomo v N.Y. State Commn. on Ethics & Lobbying in Govt.*, 2025 NY LEXIS 103, *11-12 [Feb. 18, 2025, no. 1], quoting *White v Cuomo*, 38 NY3d 209, 216 [2022]). Put differently, the challenger must demonstrate beyond a reasonable doubt that "'no set of circumstances exists under which the Act would be valid'" (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003], quoting *United States*

[14] Available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448132&GUID=9D5752D9-9480-4D50-BD19-B971257E8AF2&Options=&Search= [last accessed Mar. 5, 2025].

v Salerno, 481 US 739, 745 [1987]). A facial challenge "requires the court to examine the words of the statute on a cold page and without reference to the defendant's conduct" (*People v Stuart*, 100 NY2d 412, 421 [2003]; *see Field Day, LLC v County of Suffolk*, 463 F3d 167, 174 [2d Cir 2006], citing *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 770 n 11 [1988]).[15] Fourth Amendment facial challenges are unlikely to succeed "when there is substantial ambiguity as to what conduct a statute authorizes" (*City of Los Angeles v Patel*, 576 US 409, 416 [2015], citing *Sibron v New York*, 392 US 40, 59, 61, n 20 [1968]).

The Fourth Amendment does not protect against all searches and seizures, only unreasonable ones (US Const amend IV; *see also* NY Const art I, § 12). When an individual seeks to preserve an area or sphere as private, and the expectation of privacy is reasonable, "official intrusion into that private sphere generally qualifies as a search and requires a warrant" (*Carpenter v United States*, 585 US 296, 304 [2018]). If the individual does not have a reasonable expectation of privacy in a location or sphere, then there is no "search," and no warrant is required (*see, e.g.*, *Minnesota v Carter*, 525 US 83, 91 [1998]; *United States v Holland*, 755 F2d 253,

[15] Under this standard, Respondents-Respondents' challenge to the NYSHRL is clearly not a facial challenge. The text of the NYSHRL not only does not require a warrantless inspection—it does not even mention a search (Executive Law § 296 [5] [a] [1]; *see 216 E. 29th St. Trust*, 2025 US Dist LEXIS 15267, *18-19). Plus, the NYSHRL protects those who use housing vouchers other than Section 8, with different program rules (Executive Law § 292 [36]). Still, *amici* use the facial challenge framing for this brief because it reinforces that the NYSHRL is not constitutionally infirm.

255 [2d Cir 1985]). In other circumstances, searches are deemed reasonable despite being conducted without a warrant. These include "searches pursuant to a regulatory scheme" that "need not adhere to the usual requirements where special governmental needs are present" (*Palmieri v Lynch*, 392 F3d 73, 79 [2d Cir 2004] [citation and internal quotation marks omitted]).

To prevail on a facial Fourth Amendment challenge in the property or record inspection context, plaintiffs must show that they face penalties for failing to consent to a search without first having had the opportunity to have a neutral decisionmaker review the search demand (*see Patel*, 576 US at 419, 421; *Sokolov v Vill. of Freeport*, 52 NY2d 341, 343 [1981]; *Stender*, 188 AD2d at 987). This opportunity is known as "precompliance review" (*Patel*, 576 US at 421).[16] A law that affords a party a choice—either consent to a search demand or obtain precompliance review—is constitutional (*Pashcow v Town of Babylon*, 53 NY2d 687, 688 [1981]). Among other reasons, the NYSHRL's source-of-income protections for Section 8 voucher holders are constitutional because New York landlords participating in Section 8 have the choice to either consent to search demands or obtain precompliance review. This Court should reject the Landlords' attempt to undermine this critical law.

[16] The type of precompliance review that is required depends on the type of search (*see, e.g.*, *Patel*, 576 US at 421).

The Landlords claim that, by requiring them to accept Section 8, the NYSHRL penalizes them for failing to consent to a search. But this claim is founded on a false premise and speculation. The Section 8 program does not require or compel landlord participants to submit to searches without precompliance review. Strikingly, the Landlords do not present any factual allegations that they will face a warrantless inspection under the Section 8 program—indeed, they do not allege or present evidence of even one instance where a warrantless inspection has occurred (*cf. 216 E. 29th St. Trust*, 2025 US Dist LEXIS 15267, *27).[17] The Landlords' speculation is particularly baseless because they would not consent to warrantless searches in the HAP contract, and, in any event, there are multiple avenues for precompliance review of the search demands that could conceivably occur within the context of the Section 8 program.

A. *None of Section 8's regulations or contract provisions mandates warrantless searches on its face.*

Of course, the NYSHRL itself does not require or authorize a warrantless search (Executive Law § 296 [5] [a] [1]). The HUD regulations discussed above do not mandate or authorize inspections or audits without a warrant or subpoena, nor

[17] "Here, there is no actual imminent injury without an actual or imminent inspection, and there is no concrete and particularized injury without a warrantless inspection. Although the Trust claims that after signing the HAP contract, 'inspections will take place without warrants,' the Trust does not allege or provide evidence of even one instance where this has happened . . . . The Trust's conjectural fear that a warrantless inspection will take place in the future does not confer standing" (*216 E. 29th St. Trust*, 2025 US Dist LEXIS 15267, *27).

do they establish penalties for the failure to consent to inspections (*see, e.g.*, 24 CFR § 982.405). The only "facts" regarding inspections pleaded or cited by the Landlords regard the occurrence of HQS inspections and the contents of the HAP contract (*e.g.*, R. at 277-278, 875-887, 1210-1213, 1242, 1297-1301). The HAP contract states that the PHA and the owner "shall have free and full access to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract . . . ." *Housing Assistance Payments (HAP) Contract* ¶ 11. Based solely on this paragraph, the Landlords conclude that signing the HAP contract would serve as consent for Fourth Amendment purposes[18] and result in the compelled waiver of their Fourth Amendment right to be free from unreasonable searches (*e.g.*, R. at 1300-1301). What is missing from the Landlords' affirmations, answer, and briefing is any factual allegation regarding how this contractual term drives HUD or PHAs' policies or practices—namely, any allegation that HUD, PHAs, or any other governmental actor deem this paragraph to be consent for Fourth Amendment purposes and use it as justification to conduct a warrantless search of

[18] This is a curious contention given that "consent" for Fourth Amendment purposes is not viewed in the abstract: determining consent is a fact-specific inquiry that analyzes all of the surrounding circumstances (*see Anobile v Pelegrino*, 303 F3d 107, 124 [2d Cir 2001] ["To ascertain whether consent is valid, courts examine the totality of all the circumstances to determine whether the consent was a product of that individual's free and unconstrained choice, rather than a mere acquiescence in a show of authority," quoting *United States v Garcia*, 56 F3d 418, 422 (2d Cir 1995)]).

an owner's private property.[19] This omission is glaring because PHAs, HUD, and the Comptroller General have numerous constitutional means at their disposal to obtain access to an owner's property or records, including administrative warrants (*e.g.*, New York City Charter § 398; Code of City of Ithaca § 210-76 [b]; Code of City of Yonkers § 58-6 [A]),[20] administrative subpoenas (*e.g.*, New York City Charter § 803 [f]; CPLR 2308 [b]), and contract enforcement actions (*Housing Assistance Payments (HAP) Contract* part B, ¶10 [d]). At minimum, there is substantial ambiguity about what conduct the HAP contract authorizes, meaning that the Landlords cannot succeed on this facial challenge (*see Patel*, 576 US at 416).

B. *The terms of the Housing Assistance Payments contract must be construed as preserving owners' Fourth Amendment rights.*

Assuming that this Court deems the terms of the HAP contract definite enough to analyze the Landlords' Fourth Amendment challenge, the claim fails. Participation in the Section 8 program does not subject an owner to searches and penalties that would be unconstitutional had it not signed the HAP contract. The scope of the "consent" given in the HAP contract is congruent with constitutional limits.

[19] Similarly, the Landlords fail to allege that an owner has ever been penalized under the NYSHRL for failing to consent to a warrantless inspection.

[20] Each municipality has its own administrative warrant process. The existence of these administrative warrant statutes highlights that the NYSHRL does not suffer wholesale constitutional impairment (*White*, 38 NY3d at 216).

The foundation for the Landlords' claim is *Sokolov v Village of Freeport* (52 NY2d 341). In *Sokolov*, the Court of Appeals held that a rental licensing ordinance was unconstitutional because it conditioned the grant of a rental permit on the owner consenting to a warrantless inspection and imposed a fine of $250 a day if the owner rented a unit without first having obtained the permit. *Sokolov* falls in the long line of cases involving "unconstitutional conditions": the government cannot deny a benefit to someone because they exercise a constitutional right (or, put differently, the government cannot condition the grant of a benefit on the recipient's waiver of a constitutional right)[21] (*Sokolov*, 52 NY2d at 346-347, citing *United States v Chicago, M., S. P. & P. R. Co*., 282 US 311, 328-29 [1930]; *Koontz v St. Johns River Water Mgt. Dist.*, 570 US 595, 604 [2013]). When the unconstitutional condition automatically imposes a penalty or blocks someone from obtaining a benefit, courts will declare the law containing the condition unconstitutional and invalidate it[22] (*e.g.*, *Sokolov*, 52 NY2d at 346-347). The unconstitutional conditions doctrine also guides courts' interpretation of certain contractual terms, like inspection provisions in public housing leases. Such provisions cannot amount to blanket "advance

[21] The same day, the Court of Appeals affirmed the constitutionality of a rental licensing ordinance where the municipality also required an inspection as a condition of obtaining a rental permit but required either consent or a warrant (*Pashcow*, 53 NY2d at 688). In *Pashcow*, there was no unconstitutional condition because the warrant option meant that a rental permit applicant's Fourth Amendment rights were respected.

[22] Assuming, of course, that the party has standing to bring the claim.

consent" to searches because this would be an unconstitutional condition of obtaining the public housing benefit (*Cox v Dawson*, 2020 US Dist LEXIS 4826, *17 [D Conn, Jan. 10, 2020, No. 3:18-cv-578]; *Gutierrez v City of East Chicago*, 2016 US Dist LEXIS 138374, *23-24 [ND Ind, Sept. 6, 2016, No. 2:16-CV-111-JV]).

The same principles that animate the unconstitutional conditions doctrine influence courts' interpretations of government contracts. Notably, courts have held that open-ended contractual terms similar to the HAP contract's paragraph 11, where consent to provide access is given in advance, permit only "reasonable searches as that term is defined under the Fourth Amendment" (*First Alabama Bank, N.A. v Donovan*, 692 F2d 714, 719-720 [11th Cir 1983]; *United States v Harris Methodist Ft. Worth*, 970 F2d 94, 100-101 [5th Cir 1992]; *cf. Anobile*, 303 F3d at 124-25 [holding that agreement to consent to searches of "persons and property" in racing license applications did not provide effective consent to search of dormitory rooms]).[23]

This approach to evaluating the scope of advance contractual consent is not only constitutionally sound—it is a basic application of contract doctrine. The HAP

[23] *Zap v United States* is not in conflict with these cases. *Zap* involved a fact-dependent, *ex post* analysis of a search, which related to a Navy contract during World War II (the heavily regulated defense industry) and was done with the permission of the petitioner's employees (328 US 624, 628 [1946] [also stating that defense contractor agreed to permit inspection "in order to obtain the Government's business"]).

contract includes a reasonableness limitation: "[t]he owner must provide any information pertinent to the HAP contract that the PHA [Public Housing Agency] or HUD [Department of Housing and Urban Development] may reasonably require." And as paragraph 11 of the HAP contract relates to government searches, it incorporates the Fourth Amendment's reasonableness requirements (*see*, *e.g.*, *Primax Recoveries v Carey*, 242 F Supp 337, 343 n 7 [SD NY 2022] [stating that contract terms are interpreted against the "'background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they do not govern,'" quoting *Wal-Mart Stores v Wells*, 213 F3d 398, 402 (7th Cir 2002)]). In other words, the notion underlying *First Alabama Bank* and other cases is that parties to a contract that references government searches reasonably expect the Fourth Amendment to govern (*see Brown Bros. Electrical Contractors, Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]).

Determining the validity and scope of consent to a search is a fact-intensive inquiry that requires an evaluation of the surrounding circumstances and the expressed object of the search (*see, e.g.*, *Florida v Jimeno*, 500 US 248, 250-251 [1991]; *Anobile*, 303 F3d at 124, quoting *Garcia*, 56 F3d at 422). At the time of the HAP contract's signing, it is unknown what form a future search demand may take.

Because it is not reasonable or lawful to obtain blanket consent to any and all searches in advance,[24] logically, the contract must have a limiting principle, and the Constitution supplies one. The HAP contract does not obviate or alter the Fourth Amendment's requirements.

In New York, where eligible owners cannot refuse Section 8 vouchers, it cannot be said that these owners enter into the HAP contract based on an "unconstrained choice" (*see Anobile*, 303 F3d at 124). The consent given in the HAP contract only extends to reasonable searches.[25] If a landlord challenges a search pursuant to the Section 8 program, the court's analysis would depend on the particular facts of a given situation. So, there is no legal basis for the Landlords to claim that the NYSHRL and HAP contract result in a compelled waiver of their constitutional rights. Moreover, as explained below, the Landlords' consent is not needed for PHAs and HUD to conduct the inspections contemplated by the HAP contract.

[24] An extreme case would be an "early morning mass raid" (*see Wyman v James*, 400 US 309, 326 [1971]).

[25] The reason that access terms are needed in the HAP contract, despite HUD, the Comptroller General, and the PHAs' independent ability to obtain access to the premises or records using constitutional means, is that there is a difference between seeking to obtain access and enforcing contractual rights if an owner hinders their lawful attempts to obtain access.

C. *Inspections under the Section 8 program pose no constitutional concerns.*

As the cases cited above indicate, each attempt by the government to perform an inspection under the Section 8 program must be analyzed on its own merits. There is no constitutional issue with any conceivable inspection. The Landlords may not simply posit that the government will perform inspections and searches by unconstitutional means in the future (*cf. Clapper v Amnesty Intl.*, 568 US 398, 409-410 [2013]). There are readily available, constitutional means to accomplish all the inspections and other searches that the HAP contract and HUD regulations contemplate.

Because the HAP contract begins when the lease does, an owner does not have a privacy interest in the rented premises or the common areas. A PHA may seek a warrant if an owner fails to consent to an inspection. And most importantly, nothing in the HAP contract imposes penalties on an owner for failing to consent to a search without first having had the opportunity to have a neutral decisionmaker review the demand for the search (*see Patel*, 576 US at 419).

1. Because the HAP contract is signed in conjunction with the lease, the owner does not have an expectation of privacy with respect to the unit and common areas.

The HAP contract starts on the same day as the lease, meaning that a tenant is in possession of the subsidized unit during the entire term of the HAP contract (24 CFR § 982.309 [c]). Therefore, it is the Section 8 tenant, not the owner, who has the

right to provide access for inspections of the premises. Consent from the owner is not needed or even valid because the owner has no expectation of privacy with respect to the leased premises (*Mangino v Inc. Vill. of Patchogue*, 739 F Supp 2d 205, 234 [ED NY 2010]). Rather, the PHA must obtain consent for the inspection from the tenant (*see, e.g.*, 24 CFR § 982.405 [stating that the PHA must inspect the *unit* "at least biennially during assisted occupancy"] [emphasis added]). To the extent that the PHA also enters the common areas of the premises during the inspection, the owner does not have an expectation of privacy with respect to those areas, either, given that they form part of the leased premises and tenants can access them (*see, e.g.*, *Holland*, 755 F2d at 255). So, the PHA can perform nearly all inspections required by the HAP contract without implicating the owner's privacy rights whatsoever.

In limited circumstances, the PHA may need to inspect the systems that "directly service the subsidized unit" (24 CFR § 5.703 [a]). These systems may not be in parts of the building that are accessible to tenants; they may be behind locked doors. However, heating, plumbing, electrical, and other systems in buildings without Section 8 tenants are already subject to inspection by multiple government agencies (*e.g.*, Administrative Code of City of NY § 27-2003 [a]; *id.* § 28-116.2). If the PHA has cause to inspect a building system for which an access warrant is

needed,[26] it will proceed in the same way as these city agencies do and obtain a warrant for the inspection (*see, e.g.*, New York City Charter § 398; Administrative Code § 27-2123 [a]; *see also See v Seattle*, 387 US 541, 545 [1967] ["[An] administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."]).[27] For these reasons, inspections of the premises under the HAP contract pose no constitutional concerns.

2. Neither the NYCHRL nor the Section 8 program penalizes an owner for failing to consent to a search without affording an opportunity for precompliance review.

Patel and its antecedents stand for the proposition that, if a government agency seeks to search private property or records, the individual with the privacy interest must have the opportunity to have a neutral decisionmaker review the demand before facing penalties for failing to comply[28] (*Patel*, 576 US at 421; *Camara v Municipal Court*, 387 US 523, 538-39 [1967]). In certain situations, like

[26]While the special needs exception arguably applies to all Section 8 inspections, in exigent circumstances involving a building system like the boiler, it would certainly make a warrantless search reasonable (*see Palmieri*, 392 F3d at 81). Given the importance of such systems to the health and safety of tenants, owners are required to make them available for inspection, and they have diminished privacy interests in the areas where they are kept.

[27] For the same reason, there is no constitutional issue with the initial HQS inspection before the tenant moves in. If the owner declines to consent, the PHA may obtain a warrant where required.

[28] Of course, this assumes that no exception to the precompliance review requirement applies (*see, e.g.*, *Patel*, 576 US at 418-19).

searches of nonpublic areas of a commercial enterprise, the government may need an administrative warrant (*see Marshall v Barlow's Inc.*, 436 US 307, 320-321 [1978]). In others, like records access requests, an administrative subpoena or similar mechanism suffices (*Patel*, 576 US at 421-422; *Donovan v Lone Steer, Inc.*, 464 US 408, 415 [1984]). The Supreme Court has not mandated a certain form of precompliance review: what matters is that the individual can obtain review of the reasonableness of the demand before suffering penalties (*see Patel*, 576 US at 423 ["Of course administrative subpoenas are only one way in which an opportunity for precompliance review can be made available. But whatever the precise form, the availability of precompliance review alters the dynamic between the officer and the hotel to be searched . . . ."]). In New York City (and in municipalities around New York), Section 8's regulatory scheme meets these requirements, which is fatal to the Landlords' facial challenge.

First, as discussed above, should a PHA wish to perform an administrative inspection of nonpublic area (including of the owner's computers), it could seek an administrative warrant (*e.g.*, New York City Charter § 398).[29] Second, should a PHA, HUD, or the Comptroller General of the United States seek to audit the owner's accounts and records to determine compliance with program requirements,

[29] If the search is part of a criminal investigation, then the Criminal Procedure Law applies. *See* Criminal Procedure Law §§ 690.05-.55.

it could serve the owner with an administrative subpoena. For example, the New York City Department of Investigations is empowered to conduct investigations and issue administrative subpoenas related to any person or entity who is paid money through any city agency (*see id.* § 803 [f]; CPLR 2308 [b]; *New York City Dept. of Investigation v Passannante*, 148 AD2d 101, 102 [1st Dept 1989]). Similarly, HUD's Office of the Inspector General and the Comptroller General may conduct audits and investigations and issue administrative subpoenas (5 USC §§ 401, 402, 406 [4]; 31 USC § 716 [c] [1] ["[T]he Comptroller General may subpena [sic] a record of a person not in the United States Government when the record is not made available . . . to which the Comptroller General has access by law or by agreement . . . ."]). An owner may move to quash a warrant or a subpoena, thus obtaining precompliance review (*e.g.*, *Patel*, 576 US at 422).

Third, even if the PHA chose not to use any procedure outside those provided by the HAP contract itself, the owner nonetheless has an opportunity to have a neutral decisionmaker review the reasonableness of a search demand before facing any penalties for failing to comply. Paragraph 11 of the HAP contract does provide that the agencies will have full and free access to the contract unit, the premises, and the owner's accounts and records, but this term must be viewed in light of the preceding paragraph, which states that "the owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require"

(*Housing Assistance Payments (HAP) Contract*, part B, ¶ 11 [a]). An owner faces no statutory or regulatory penalties for failing to comply with this term. At most, an owner's failure to comply with the obligations imposed by paragraph 11 is a breach of the HAP contract (*see id.* ¶ 10 [a] [1]). In the event of a breach, the PHA must notify the owner of its determination that the breach has occurred, including a brief statement of its reasoning (*id.* ¶ 10 [b]). The PHA's "rights and remedies" in the event of the owner's breach of the HAP contract include the suspension, abatement, or termination of housing assistance payments or the termination of the HAP contract (*id.* ¶ 10 [c]). Additionally, the PHA may seek additional relief by judicial action, such as specific performance or other injunctive relief (*id.* para. 10 [d]).

The worst-case scenario if the owner refuses to permit a search or respond to a request for information is that the PHA gives the owner notice that it has determined that a breach of the HAP contract has occurred and informs the owner that it will stop making payments and/or terminate the HAP contract.[30] This means that the HAP contract provides for precompliance review before the owner experiences any consequence for its breach. The PHA may file a lawsuit seeking

[30] This consequence is a far cry from the automatic "penalties" of arrest, criminal prosecution, and fines identified in *Patel*, *See v Seattle*, and other cases (*see, e.g.*, *Patel*, 576 US at 421). Any negative consequence due to alleged noncompliance with the HAP contract occurs within a contractual framework, where the owner may equally claim that the PHA's failure to make payments based on an unlawful or unreasonable demand breaches the contract. The suspension or termination of payments under these circumstances would not infringe upon the owner's Fourth Amendment rights.

specific performance or other injunctive relief (*id*). Or, after obtaining the PHA's written determination, the owner may file a lawsuit seeking a declaratory judgment that no breach occurred because the demand for information or request to perform a search was not reasonable or an Article 78 proceeding seeking similar relief. The posture of the former would be analogous to a motion to enforce an administrative subpoena, while the posture of the latter would be analogous to a motion to quash an administrative subpoena. In either case, the owner would obtain judicial review of the reasonableness of the PHA's demand, which would be guided by the legal standards discussed above.

VI. **Conclusion**

For the foregoing reasons, the NYSHRL's prohibition on discrimination against Section 8 voucher holders is not facially unconstitutional. The Landlords' speculative claims and flimsy constitutional arguments provide no basis to invalidate this critical protection and allow harmful discrimination against low-income voucher holders. This Court should reverse the trial court's order and judgment.

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Respectfully submitted,

Evan Henley
Edward Josephson
THE LEGAL AID SOCIETY
49 Thomas Street
Floor 5
New York, NY 10013
212-298-5233
ewhenley@legal-aid.org

Marcie Kobak
LEGAL SERVICES OF THE HUDSON VALLEY
30 South Broadway
Yonkers, New York 10701
914-376-3757
mkobak@lshv.org
Counsel for Amici Curiae

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Evan Henley