

# 25-465-cv

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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216 EAST 29TH STREET TRUST,

*Plaintiff-Appellant,*

v.

CITY OF NEW YORK,

*Defendant-Appellee,*

SAFE HORIZON, INC.,

*Intervenor-Defendant-Appellee,*

NEW YORK CITY COMMISSION ON HUMAN RIGHTS,

*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE SAFE HORIZON, INC.

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## **CORPORATE DISCLOSURE STATEMENT**

Safe Horizon, Inc. is not owned by a parent corporation, and no publicly held corporation owns more than ten percent of Safe Horizon, Inc.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iv
PRELIMINARY STATEMENT .....	1
COUNTERSTATEMENT OF THE ISSUES.....	3
COUNTERSTATEMENT OF THE CASE.....	3
A. The Section 8 Voucher Program .....	4
B. The New York City Human Rights Law .....	7
C. The Commission Proceeding.....	10
D. Proceedings Before the District Court.....	10
SUMMARY OF ARGUMENT .....	11
STANDARD OF REVIEW .....	12
ARGUMENT .....	13
I. Protections against source-of-income discrimination are essential for Section 8 voucher holders like SafeHorizon’s clients.....	13
II. The District Court correctly dismissed the Trust’s complaint on justiciability grounds. ....	18
A. The Trust’s Fourth Amendment challenge is as-applied. ....	18
B. <i>Younger</i> abstention applies. ....	20
C. The Trust’s Fourth Amendment claim is not ripe.....	21
D. The Trust lacks standing to maintain its Fourth Amendment claim.....	25

1. The Trust lacks standing for its as-applied challenge. ....	26
2. The Trust also lacks standing to bring a facial Fourth Amendment challenge. ....	27
III. In any event, the Trust’s complaint fails to state a claim upon which relief can be granted. ....	28
A. The Trust does not plead any facts supporting an as-applied Fourth Amendment challenge. ....	29
B. The Trust does not plausibly allege that the NYCHRL’s prohibition on discrimination against Section 8 voucher holders necessitates unreasonable searches in all its applications. ....	30
1. The HAP contract does not authorize warrantless searches or otherwise waive Fourth Amendment rights. ....	35
2. The HAP contract is signed in conjunction with a lease, so the landlord lacks privacy rights in the rented unit and common areas. ....	38
3. The Section 8 program provides various avenues for precompliance review. ....	40
4. Precompliance review is available under the HAP contract itself. ....	42
C. Federal law does not preempt the NYCHRL’s prohibition on discrimination against Section 8 voucher holders. ....	45
IV. The District Court correctly denied the Trust’s motion for summary judgment. ....	49
CONCLUSION. ....	49
CERTIFICATE OF COMPLIANCE. ....	51

## TABLE OF AUTHORITIES

### Cases

<i>Abateco Servs., Inc. v. Bell</i> , 477 S.E.2d 795 (Va. Ct. App. 1996) .....	37
<i>Abiele Contracting, Inc. v. New York City Sch. Constr. Auth.</i> , 689 N.E.2d 864 (N.Y. 1997).....	43
<i>ACLU v. Clapper</i> , 785 F.3d 787 (2d Cir. 2015) .....	22
<i>Anobile v. Pelegrino</i> , 303 F.3d 107 (2d Cir. 2001) .....	23, 35
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	26, 28
<i>Austin Apt. Ass’n v. City of Austin</i> , 89 F. Supp. 3d 886 (W.D. Tex. 2015). 4, 45, 47, 48	
<i>Barrientos v. 1801-1825 Morton LLC</i> , 583 F.3d 1197 (9th Cir. 2009).....	37
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979) .....	23
<i>Bigio v. Coca Cola Co.</i> , 675 F.3d 163 (2d Cir. 2012).....	49
<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019) .....	30
<i>Cadet-Legros v. N.Y. Univ. Hosp. Ctr.</i> , 21 N.Y.S.3d 221 (N.Y. App. Div. 2015)..	46
<i>Calcano v. Swarovski N. Am. Ltd.</i> , 36 F.4th 68 (2d. Cir. 2022).....	26
<i>Camara v. Mun. Ct.</i> , 387 U.S. 523 (1967).....	24, 33, 40
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018).....	31
<i>Chambers v. Time Warner, Inc.</i> , 282 F.3d 147 (2d Cir. 2002).....	28
<i>Christ the King Reg’l High Sch. v. Culvert</i> , 815 F.2d 219 (2d Cir. 1987) .....	21
<i>City of Lakewood v. Plain Dealer Publ’g Co.</i> , 486 U.S. 750 (1988) .....	19
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409 (2015) .....	passim

<i>Clapper v. Amnesty Int’l</i> , 568 U.S. 398 (2013) .....	25, 26, 27
<i>Cnty. Hous. Improvement Program v. City of New York</i> , 59 F.4th 540 (2d Cir. 2023) .....	30, 39
<i>Comm’n on Hum. Rts. &amp; Opportunities v. Sullivan Assocs.</i> , 739 A.2d 238 (Conn. 1999) .....	46, 48
<i>Comm’n on Hum. Rts. ex rel. Shmushkina v. New Brooklyn Realty</i> , OATH Index Nos. 2541/08, 2542/08, 2543/08, Memorandum Decision (Jan. 2, 2009) ....	10, 21
<i>Comm’n on Hum. Rts. ex rel. Watson v. PPC Residential</i> , OATH Index Nos. 2245/19, 2246/19, 2023 N.Y. OATH LEXIS 342 (Sept. 11, 2023).....	9
<i>Connecticut v. Duncan</i> , 612 F.3d 107 (2d Cir. 2010).....	13
<i>Cortlandt St. Recovery Corp. v. Hellas Telecomms.</i> , 790 F.3d 411 (2d Cir. 2015)	25
<i>Crook v. City of Madison</i> , 168 So. 3d 930 (Miss. 2015) .....	38
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	22
<i>Delta Airlines v. N.Y. State Div. of Hum. Rts.</i> , 689 N.E.2d 898 (N.Y. 1997) ..	10, 21
<i>Disability Rts. N.Y. v. New York</i> , 916 F.3d 129 (2d Cir. 2019) .....	13
<i>Donovan v. Lone Steer, Inc.</i> , 464 U.S. 408 (1984).....	40
<i>FDA v. All. for Hippocratic Med.</i> , 602 U.S. 367 (2024) .....	25
<i>Fid. Fed. Sav. &amp; Loan Ass’n v. De la Cuesta</i> , 458 U.S. 141 (1982).....	46
<i>Field Day, LLC v. Cnty. of Suffolk</i> , 463 F.3d 167 (2d Cir. 2006) .....	19, 20
<i>Figueroa v. Forster</i> , 864 F.3d 222 (2d Cir. 2017).....	46, 47
<i>First Ala. Bank, N.A. v. Donovan</i> , 692 F.2d 714 (11th Cir. 1983).....	35, 36
<i>Florida v. Jimeno</i> , 500 U.S. 248 (1991) .....	36
<i>Flynn v. City of Lincoln Park</i> , No. 2:18-cv-12187 (TGB), 2020 WL 344854 (E.D. Mich. Jan. 21, 2020) .....	26, 38

<i>Franklin Tower One, L.L.C. v. N.M.</i> , 725 A.2d 1104 (N.J. 1999) .....	47
<i>Hudson Shore Assocs. Ltd. P’ship v. New York</i> , No. 24-1678, 2025 U.S. App. LEXIS 13349 (2d Cir. June 2, 2025).....	passim
<i>IQ Dental Supply, Inc. v. Henry Schein, Inc.</i> , 924 F.3d 57 (2d Cir. 2018) .....	12, 13
<i>Jones v. Park Front Apts., LLC</i> , 901 N.Y.S.2d 46 (N.Y. App. Div. 2010).....	14
<i>JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.</i> , 412 F.3d 418 (2d Cir. 2005).....	41
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992) .....	22
<i>Mamakos v. Town of Huntington</i> , No. 16-CV-5775(SJF)(GRB), 2017 U.S. Dist. LEXIS 103706 (E.D.N.Y. July 6, 2017) .....	29
<i>Mangino v. Inc. Vill. of Patchogue</i> , 739 F. Supp. 2d 205 (E.D.N.Y. 2010).....	38
<i>Marine Holdings, LLC v. New York City Comm’n on Hum. Rts.</i> , 100 N.E.3d 849 (N.Y. 2018).....	9
<i>Marshall v. Barlow’s Inc.</i> , 436 U.S. 307 (1978) .....	40
<i>Melendez v. Sirius XM Radio, Inc.</i> , 50 F.4th 294 (2d Cir. 2022) .....	28
<i>Minnesota v. Carter</i> , 525 U.S. 83 (1998) .....	31
<i>N.Y. Civ. Liberties Union v. Grandeau</i> , 528 F.3d 122 (2d Cir. 2008).....	22
<i>Nat’l Org. for Marriage, Inc. v. Walsh</i> , 714 F.3d 682 (2d Cir. 2013).....	21, 27
<i>New York City Dep’t of Investigation v. Passannante</i> , 544 N.Y.S.2d 1 (N.Y. App. Div. 1989).....	41
<i>Norton v. Sam’s Club</i> , 145 F.3d 114 (2d Cir. 1998).....	41
<i>Olson v. Major League Baseball</i> , 29 F.4th 59 (2d Cir. 2022) .....	13
<i>Palmieri v. Lynch</i> , 392 F.3d 73 (2d Cir. 2004).....	31
<i>Paschcow v. Town of Babylon</i> , 53 N.Y.2d 687 (N.Y. 1981).....	33, 41

<i>Patchogue-Medford Cong. of Tchrs. v. Bd. of Educ.</i> , 510 N.E.2d 325 (N.Y. 1987) .....	44
<i>Rakhman v. Alco Realty I, L.P.</i> , 916 N.Y.S.2d 581 (N.Y. App. Div. 2011)	8, 15, 46
<i>Rent Stabilization Ass’n v. Dinkins</i> , 5 F.3d 591 (2d Cir. 1993).....	30
<i>Rosario v. Diagonal Realty, LLC</i> , 872 N.E.2d 860 (N.Y. 2007).....	48
<i>Short v. Manhattan Apts., Inc.</i> , 916 F. Supp. 2d 375 (S.D.N.Y. 2012).....	8
<i>Sibron v. New York</i> , 392 U.S. 40 (1968).....	31
<i>Simmonds v. INS</i> , 326 F.3d 351 (2d Cir. 2003) .....	22
<i>Sokolov v. Vill. of Freeport</i> , 420 N.E.2d 55 (N.Y. 1981).....	24, 32
<i>Soules v. U.S. Dep’t of Hous. &amp; Urban Dev.</i> , 967 F.2d 817 (2d Cir. 1992) .....	47
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016) .....	25
<i>Tapia v. Successful Mgmt. Corp.</i> , 915 N.Y.S.2d 19 (N.Y. App. Div. 2010) .....	8, 15
<i>Texas v. United States</i> , 523 U.S. 296 (1998) .....	22
<i>Tineo v. Att’y Gen.</i> , 937 F.3d 200 (3d Cir. 2019) .....	20
<i>Toilet Goods Ass’n v. Gardner</i> , 387 U.S. 158 (1967) .....	23
<i>United States v. Garcia</i> , 56 F.3d 418 (2d Cir. 1995).....	23
<i>United States v. Harris Methodist Ft. Worth</i> , 970 F.2d 94 (5th Cir. 1992).....	35, 37
<i>United States v. Holland</i> , 755 F.2d 253 (2d Cir. 1985).....	31, 39
<i>United States v. Leon</i> , 468 U.S. 897 (1984) .....	22
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024).....	34
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	18, 30
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990) .....	22

<i>United Transp. Union v. Foster</i> , 205 F.3d 851 (5th Cir. 2000).....	22
<i>Univ. Club v. City of New York</i> , 842 F.2d 37 (2d Cir. 1988) .....	9, 21
<i>Vonderhaar v. Vill. of Evendale</i> , 906 F.3d 397 (6th Cir. 2018) .....	26, 28
<i>Vuksan Realty, LLC v. Olatoye</i> , 118 N.Y.S.3d 1 (N.Y. App. Div. 2020). .....	43
<i>Wal-Mart Stores v. Wells</i> , 213 F.3d 398 (7th Cir. 2002).....	37
<i>Warshak v. United States</i> , 532 F.3d 521 (6th Cir. 2008).....	23, 24
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008).....	18
<i>Williams v. Lew</i> , 819 F.3d 466 (D.C. Cir. 2016) .....	28
<i>Wirth v. City of Rochester</i> , No. 17-CV-6347-FPG, 2020 U.S. Dist. LEXIS 180289 (W.D.N.Y. Sept. 30, 2020).....	26
<i>Wyman v. James</i> , 400 U.S. 309 (1971).....	36
<i>Zap v. United States</i> , 328 U.S. 624 (1946) .....	36
<b>Statutes</b>	
31 U.S.C. § 716.....	41
42 U.S.C. § 1437f.....	3, 4, 48
5 U.S.C. § 401 .....	41
5 U.S.C. § 402.....	41
5 U.S.C. § 406.....	41
American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).....	4
N.Y. C.P.L.R. § 7805.....	44
N.Y.C. Admin. Code § 27-2003 .....	39
N.Y.C. Admin. Code § 27-2123 .....	39, 40

N.Y.C. Admin. Code § 28-116.2 .....	39
N.Y.C. Admin. Code § 8-101 .....	8, 13
N.Y.C. Admin. Code § 8-102 .....	7, 13, 19
N.Y.C. Admin. Code § 8-107 .....	7, 13, 19
N.Y.C. Admin. Code § 8-109 .....	8
N.Y.C. Admin. Code § 8-111 .....	8
N.Y.C. Admin. Code § 8-114 .....	8
N.Y.C. Admin. Code § 8-116 .....	8
N.Y.C. Admin. Code § 8-117 .....	8
N.Y.C. Admin. Code § 8-119 .....	8
N.Y.C. Admin. Code § 8-120 .....	9
N.Y.C. Admin. Code § 8-123 .....	9
N.Y.C. Admin. Code § 8-126 .....	9

**Constitutional Provisions**

N.Y. Const. art. I, § 12 .....	3
U.S. Const. amend. IV .....	3, 18, 30

**Rules**

Fed. R. Civ. P. 12 .....	28
Fed. R. Civ. P. 56 .....	49

**Regulations**

24 C.F.R. § 5.703 .....	6, 39
-------------------------	-------

24 C.F.R. § 982.1 <i>et seq.</i> .....	5
24 C.F.R. § 982.201 .....	5
24 C.F.R. § 982.202 .....	5
24 C.F.R. § 982.302 .....	5
24 C.F.R. § 982.303 .....	5, 15
24 C.F.R. § 982.305 .....	6
24 C.F.R. § 982.306 .....	6
24 C.F.R. § 982.309 .....	6, 38
24 C.F.R. § 982.405 .....	6
24 C.F.R. § 982.451 .....	7
24 C.F.R. § 982.453 .....	6
24 C.F.R. § 982.507 .....	6, 7
24 C.F.R. § 982.53 .....	46, 48
47 R.C.N.Y. § 1-61 .....	8
47 R.C.N.Y. § 1-62 .....	9
47 R.C.N.Y. § 1-66 .....	9
 <b>Charter Provisions</b>	
N.Y.C. Charter § 398 .....	38, 39
N.Y.C. Charter § 803 .....	40

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- Furman Ctr., N.Y. Univ., *The Use of Housing Choice Vouchers in New York City*, <https://furmancenter.org/stateofthecity/view/the-use-of-housing-choice-vouchers-in-new-york-city#soc-content.....> 4
- Lawyers’ Comm. for Better Housing, *Locked Out: Barriers to Choice for Housing Voucher Holders* (2002) ..... 14
- N.Y. State Homes & Cmty. Renewal, *Subsidy Services Bureau*, <https://hcr.ny.gov/subsidy-service-bureau.....> 5
- New York City Comm’n on Hum. Rts., *Source of Income Discrimination*, <https://www.nyc.gov/site/cchr/media/source-of-income.page.....> 15
- New York City Council, *Hearing Transcript—Stated Meeting* (Mar. 26, 2008), available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448132&GUID=9D5752D9-9480-4D50-BD19-B971257E8AF2&Options=&Search=.....> 14
- New York City Dep’t of Hous. Preservation & Dev., *About Section 8*, <https://www.nyc.gov/site/hpd/services-and-information/about-section-8.page....> 5
- New York City Dep’t of Investigations, *Inspectors General*, <https://www.nyc.gov/site/doi/contact/contact-inspectors-general.page.....> 41
- New York City Hous. Auth., *About Section 8*, <https://www.nyc.gov/site/nycha/section-8/about-section-8.page.....> 4
- New York City Hous. Auth., *Housing Choice Voucher Administrative Plan* (June 1, 2025), available at <https://www.nyc.gov/assets/nycha/downloads/pdf/hcpvadministrative.pdf....> 5, 16
- Nicholas Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010)..... 19

S. Rep. 105-21 (1997), 1997 WL 282462.....48

U.S. Dep’t of Hous. & Urban Dev., *Housing Choice Voucher Data Dashboard*,  
[https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/das  
hboard](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard) .....4

## **PRELIMINARY STATEMENT**

Plaintiff-Appellant 216 East 29th Street Trust (“the Trust”) refuses to accept the Section 8 housing vouchers that help over 120,000 low-income New York City households have a safe, affordable, and stable place to call home. This refusal is unlawful. The New York City Council (“the Council”) amended the New York City Human Rights Law (“NYCHRL”) in 2008 to prohibit landlords such as the Trust from discriminating against Section 8 voucher holders. These protections are essential for low-income voucher holders like Intervenor-Defendant-Appellee Safe Horizon, Inc.’s clients.

In July 2023, the Trust rejected a Section 8 voucher holder, who reported it to the New York City Commission on Human Rights (“the Commission”). During the Commission’s investigation and enforcement process, the Trust filed this lawsuit. It claims that New York City cannot prohibit discrimination against Section 8 voucher holders because the Section 8 program requires warrantless searches and because federal law preempts such state and local laws.

The Trust’s Fourth Amendment claim boils down to its speculative fear that the government agencies administering the Section 8 housing voucher program will act unconstitutionally in the future. It presents no allegations or evidence that a warrantless Section 8 inspection has ever occurred over a landlord’s objection. Such speculation does not confer standing. Nor does it state a plausible claim for relief.

The Trust's conjecture is particularly baseless because the Section 8 program provides numerous means for the Trust to obtain the "precompliance review" required by the Fourth Amendment before suffering any penalty for refusing to permit a search.

Earlier this month, the Second Circuit rejected a very similar Fourth Amendment challenge in *Hudson Shore Associates Limited Partnership v. New York*, No. 24-1678, 2025 U.S. App. LEXIS 13349 (2d Cir. June 2, 2025). The Trust fails to state a legally viable claim for many of the same reasons as the *Hudson Shore Associates* plaintiffs.

The District Court correctly dismissed the Trust's complaint on three separate grounds related to justiciability: (1) *Younger* abstention requires the Trust to litigate its claims in the pending Commission and any subsequent state court proceedings; (2) the Trust's Fourth Amendment claim is not ripe; and (3) the Trust lacks standing to bring its as-applied challenge.

Even if the Trust's allegations were justiciable, they fail to state a claim for relief. The Trust fails to allege any cognizable threat to its Fourth Amendment interests, and, as every court to consider the issue has held, there is no conflict between federal law and the prohibition of discrimination against Section 8 voucher holders.

### **COUNTERSTATEMENT OF THE ISSUES**

1. Whether the District Court correctly dismissed the Trust’s complaint as nonjusticiable on the grounds of *Younger* abstention, ripeness, and standing.
2. Alternatively,
  - a. Whether the Trust’s Fourth Amendment claim fails to state a claim for relief.
  - b. Whether the Trust’s preemption claim fails to state a claim for relief.
3. Whether the District Court correctly denied the Trust’s motion for summary judgment.

### **COUNTERSTATEMENT OF THE CASE**

The Trust’s primary challenge to the NYCHRL’s prohibition on discrimination against Section 8 voucher holders rests on the interaction between the NYCHRL, the Section 8 program regulations, and the language of the Section 8 program’s Housing Assistance Payments (“HAP”) contract. Neither the NYCHRL, the Section 8 regulations, nor the HAP contract requires a landlord to submit to unreasonable searches within the meaning of the Fourth Amendment and Article I, Section 12 of the New York Constitution.<sup>1</sup>

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<sup>1</sup> The Trust does 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.

### A. 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 U.S.C. § 1437f(a); *Austin Apt. Ass’n v. City of Austin*, 89 F. Supp. 3d 886, 889 (W.D. Tex. 2015). In 2021, in response to the housing crisis, which the COVID-19 pandemic exacerbated, Congress created the Emergency Housing Voucher Program. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 59-60 (2021). Emergency Housing Vouchers have the same general rules as Housing Choice Vouchers. *Id.* at 59. There are approximately 2.3 million active Housing Choice Voucher Program participant households in the United States,<sup>2</sup> over 240,000 in New York,<sup>3</sup> and over 120,000 in New York City.<sup>4</sup> The New York City Housing Authority (“NYCHA”) administers the largest Section 8 program in the country, with approximately 85,000 participants.<sup>5</sup> The New York City Department

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<sup>2</sup> U.S. Dep’t of Hous. & Urban Dev., *Housing Choice Voucher Data Dashboard*, [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/dashboard](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard) (summary page) (last accessed June 5, 2025).

<sup>3</sup> *Id.* (filter by state, NY).

<sup>4</sup> Furman Ctr., N.Y. Univ., *The Use of Housing Choice Vouchers in New York City*, <https://furmancenter.org/stateofthecity/view/the-use-of-housing-choice-vouchers-in-new-york-city#soc-content> (last accessed June 5, 2025).

<sup>5</sup> New York City Hous. Auth., *About Section 8*, <https://www.nyc.gov/site/nycha/section-8/about-section-8.page> (last accessed June 5, 2025).

of Housing Preservation and Development (“HPD”)<sup>6</sup> and New York State Homes and Community Renewal (“HCR”)<sup>7</sup> also administer Section 8 voucher programs in New York City. The Section 8 program is governed by the authorizing statute, 42 U.S.C. § 1437f(o), regulations promulgated by the United States Department of Housing and Urban Development (“HUD”), 24 C.F.R. §§ 982.1-.643, and the specific rules of the Public Housing Agency (“PHA”) that administers the voucher.<sup>8</sup>

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 landlord 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 ensure

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<sup>6</sup> New York City Dep’t of Hous. Preservation & Dev., *About Section 8*, <https://www.nyc.gov/site/hpd/services-and-information/about-section-8.page> (last accessed June 5, 2025) (stating that program has over 39,000 participants).

<sup>7</sup> N.Y. State Homes & Cmty. Renewal, *Subsidy Services Bureau*, <https://hcr.ny.gov/subsidy-service-bureau> (last accessed June 5, 2025).

<sup>8</sup> *E.g.*, New York City Hous. Auth., *Housing Choice Voucher Administrative Plan* (June 1, 2025), available at <https://www.nyc.gov/assets/nycha/downloads/pdf/hcpvadministrative.pdf>.

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. A PHA may deny the approval of a Section 8 tenancy because of the landlord’s past actions or relationship with the voucher holder. 24 C.F.R. § 982.306. Conflict-of-interest rules generally prevent a limited number of individuals, such as PHA officers or employees, from entering into HAP contracts. *Id.* § 982.161.

Once the PHA approves the tenancy, the voucher holder can move into the unit, and the PHA will sign a HAP contract with the landlord. *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 at least 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). If the landlord breaches the HAP contract after its execution, 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 Section 8 regulations directly authorizes or requires a PHA to perform a warrantless search or imposes a penalty on a landlord for failing to consent to a warrantless search. Nothing in the regulations requires a landlord 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 regulations require the use of the HAP contract. *Id.* § 982.451(a)(1). This contract provides that “the owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require.” (A.207, para. 11(a)). 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. (A.207 paras. 11(b)-(c)).

## **B. The New York City Human Rights Law**

The NYCHRL prohibits various forms of discrimination in the rental housing market. N.Y.C. Admin. Code § 8-107(5)(a). Among the proscribed types of discrimination is discrimination because of “any lawful source of income.” *Id.* § 8-107(5)(a)(1). “Lawful source of income” includes “any form of federal, state, or local public assistance or housing assistance including, but not limited to, section 8 vouchers . . . .” *Id.* § 8-102. The outright rejection of Section 8 vouchers is unlawful

under the NYCHRL. *See, e.g., Tapia v. Successful Mgmt. Corp.*, 915 N.Y.S.2d 19, 20 (N.Y. App. Div. 2010). So is the failure to complete forms required by the Section 8 program. *See, e.g., Rakhman v. Alco Realty I, L.P.*, 916 N.Y.S.2d 581, 582 (N.Y. App. Div. 2011). Landlords must bear the administrative burdens associated with accepting Section 8 vouchers. Allowing landlords to “opt-out” of voucher programs based on these burdens would “effectively nullify the NYCHRL’s source-of-income provisions.” *Short v. Manhattan Apts., Inc.*, 916 F. Supp. 2d 375, 398 (S.D.N.Y. 2012).

The Commission enforces the NYCHRL. N.Y.C. Admin. Code § 8-101. Any person aggrieved by an alleged violation of the NYCHRL may file a complaint with the Commission. *Id.* § 8-109(a). The Commission may also initiate and file a complaint in its own name. *Id.* § 8-109(c). After a complaint has been filed, the respondent files an answer, and the Commission investigates the allegations in the complaint. *Id.* §§ 8-111, 8-114. The Commission may also seek to mediate the complaint and/or reach a conciliation agreement. *Id.* § 8-115. At the conclusion of an investigation related to a non-Commission-initiated complaint, the Commission will determine whether there is probable cause for an NYCHRL violation. *Id.* § 8-116(a). The Commission transfers proceedings to an administrative law judge at the Office of Administrative Trials and Hearings (“OATH”) for adjudication. *Id.* § 8-116(c); 47 R.C.N.Y. § 1-61(a). There, the parties can seek discovery and engage in

motion practice. N.Y.C. Admin. Code § 8-117; 47 R.C.N.Y. § 1-62; *see also Comm'n on Hum. Rts. ex rel. Watson v. PPC Residential*, OATH Index Nos. 2245/19, 2246/19, 2023 N.Y. OATH LEXIS 342 (Sept. 11, 2023) (adjudicating summary judgment motion). The administrative law judge holds a hearing on the complaint and makes a report and recommendation, including findings of fact and conclusions of law. N.Y.C. Admin. Code §§ 8-119, 8-120. Then, the Commission reviews the report and recommendation and the parties' responses and issues an order. *Id.* § 8-120; 47 R.C.N.Y. § 1-66. If the Commission finds that unlawful discrimination has occurred, it may award relief and impose civil penalties. N.Y.C. Admin. Code §§ 8-120, 8-126.

A party can seek judicial review of the Commission's order in a proceeding akin to an Article 78 proceeding. *Id.* § 8-123; *see Marine Holdings, LLC v. New York City Comm'n on Hum. Rts.*, 100 N.E.3d 849, 850 (N.Y. 2018). Both before OATH and when seeking subsequent judicial review, a respondent can argue that a portion of the NYCHRL is unconstitutional as applied or preempted by federal law. *See, e.g., PPC Residential*, 2023 N.Y. OATH LEXIS 342, at \*10-13; *Univ. Club v. City of New York*, 842 F.2d 37, 40 (2d Cir. 1988); *Comm'n on Hum. Rts. ex rel. Shmushkina v. New Brooklyn Realty*, OATH Index Nos. 2541/08, 2542/08, 2543/08,

Memorandum Decision (Jan. 2, 2009)<sup>9</sup>; *Delta Airlines v. N.Y. State Div. of Hum. Rts.*, 689 N.E.2d 898, 900-901 (N.Y. 1997).

### **C. The Commission Proceeding**

In July 2023, a Section 8 Emergency Housing Voucher holder named Dmitri Derodel contacted the Trust’s property manager, Homefront Management, and inquired about an available apartment. (A.108). In response to Derodel’s request to use the voucher to pay part of the rent of the apartment, the Homefront Management representative stated that the Trust did not accept Emergency Housing Vouchers. (A.108). Derodel contacted the Commission, and its staff attempted conciliation efforts. (A.108-109). When the Trust did not timely accept Derodel’s voucher, the Commission informed the Trust that it would imminently commence enforcement action. (A.108, A.128-129). Derodel filed a complaint with the Commission on or about February 5, 2024. (A.137, A.146-152). The proceeding is still pending.

### **D. Proceedings Before the District Court**

The Trust filed a complaint naming the City of New York (“the City”) and the Commission as defendants and requested a preliminary injunction. (A.10, A.48-50). The Trust’s complaint alleged that the NYCHRL’s prohibition on discrimination against Section 8 voucher holders violates the Fourth, Fifth, and Fourteenth

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<sup>9</sup> Available at [https://archive.citylaw.org/wp-content/uploads/sites/17/oath/08\\_Cases/08-2541md.pdf](https://archive.citylaw.org/wp-content/uploads/sites/17/oath/08_Cases/08-2541md.pdf).

Amendments and is preempted by federal law. (A.21-22). The District Court denied the Trust's motion for a preliminary injunction after oral argument. (A.94-95).

Subsequently, the Trust amended its complaint to remove the Commission as a defendant; it also withdrew its takings claim. (A.98-131). The District Court granted SafeHorizon's motion to intervene. (A.236). Both the City and SafeHorizon filed motions to dismiss the amended complaint for lack of subject matter jurisdiction and failure to state a claim, and the Trust cross-moved for summary judgment. (A.243). The District Court granted the motions to dismiss on subject matter jurisdiction grounds, finding that *Younger* abstention applied, the Trust's claims were not ripe, and the Trust lacked standing. (A.247-255). This appeal followed.

## **SUMMARY OF ARGUMENT**

I. Source-of-income protections are critically important to shield Section 8 voucher holders from the effects of prejudice. Without the protections afforded by the NYCHRL, Section 8 voucher holders would face increased barriers to housing. Many would lose their vouchers and remain homeless or unstably housed indefinitely.

II. The District Court correctly dismissed the Trust's complaint on justiciability grounds. Its Fourth Amendment claim is an as-applied challenge and, under *Younger*, should be raised in the pending Commission proceeding along with

its preemption claim. More fundamentally, the Trust bases its Fourth Amendment claim on multiple layers of speculation about an extremely unlikely future scenario. As a result, the Trust's claim is unripe, and it lacks standing to bring either an as-applied or facial Fourth Amendment challenge.

III. Even if the Trust's allegations were justiciable, they should be dismissed for failing to state a claim for relief. There are multiple avenues for a landlord to obtain precompliance review of any search that could take place pursuant to the Section 8 program, so compelled participation in Section 8 poses no Fourth Amendment issue. And there is no conflict between the NYCHRL and federal law. A landlord can comply with both, and the NYCHRL and the Section 8 program share the same overarching purpose of increasing access to housing for low-income people.

IV. The District Court properly denied the Trust's motion for summary judgment as moot. In any case, the Trust's unfounded speculation about searches does not entitle it to a judgment as a matter of law.

### **STANDARD OF REVIEW**

This Court reviews a district court's grant of a motion to dismiss *de novo*. *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 62 (2d Cir. 2018).<sup>10</sup> Questions

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<sup>10</sup> Unless otherwise indicated, when citing or quoting cases, all internal quotation marks and citations are omitted, and all alterations are adopted.

of justiciability, including standing, ripeness, and abstention, are also reviewed *de novo*. *Id.*; *Disability Rts. N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019); *Connecticut v. Duncan*, 612 F.3d 107, 112 (2d Cir. 2010). This Court is not limited to the district court’s rationale and “may affirm on any ground supported by the record.” *Olson v. Major League Baseball*, 29 F.4th 59, 84 (2d Cir. 2022).

### ARGUMENT

The NYCHRL’s prohibition on discrimination against Section 8 voucher holders is constitutional. The Trust’s 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 affirm the District Court’s dismissal of the Trust’s complaint for the reasons given by the District Court or on the alternative basis that the complaint fails to state a claim for relief.

#### **I. Protections against source-of-income discrimination are essential for Section 8 voucher holders like SafeHorizon’s clients.**

In 2008, confronted with extensive evidence of the effects of prejudice against Section 8 voucher holders, the Council enacted Local Law 10. It amended the NYCHRL to prohibit landlords and others from discriminating based on source of income, including the use of Section 8 vouchers. *See* N.Y.C. Admin. Code §§ 8-101, 8-102, 8-107(5)(a). The Council considered the significant obstacles Section 8 voucher holders encountered. For example, in one study surveying advertised

apartments, only 16 of 121 apartments accepted vouchers. 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).<sup>11</sup> Moreover, the Council considered that Section 8 voucher holders faced “multi-level barriers of discrimination based on source of income, race, and ethnicity.” Lawyers’ Comm. for Better Housing, *Locked Out: Barriers to Choice for Housing Voucher Holders* 10 (2002),<sup>12</sup> quoted in *Committee Report of the Governmental Affairs Division on Proposed Int. No. 61-A* at 6. Local Law 10 aimed to increase housing opportunities for voucher holders and the efficacy of subsidies as a partial solution to the affordable housing crisis. See New York City Council, *Hearing Transcript—Stated Meeting* 40-42 (Mar. 26, 2008).<sup>13</sup>

The first Section 8 voucher holders to enforce Local Law 10’s protections had to overcome extreme resistance from landlords, who made nakedly pretextual excuses. See, e.g., *Jones v. Park Front Apts., LLC*, 901 N.Y.S.2d 46, 47 (N.Y. App. Div. 2010) (finding that tenant had shown a likelihood of success on the merits when the landlord provided a pretextual and baseless reason for refusing to accept a

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<sup>11</sup> Available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448132&GUID=9D5752D9-9480-4D50-BD19-B971257E8AF2&Options=&Search=> (last accessed June 5, 2025).

<sup>12</sup> Available at <https://lcbh.org/sites/default/files/resources/2002-lcbh-housing-voucher-barriers-report.pdf> (last accessed June 5, 2025).

<sup>13</sup> Available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448132&GUID=9D5752D9-9480-4D50-BD19-B971257E8AF2&Options=&Search=> (last accessed June 5, 2025).

voucher: the apartment had more bedrooms than listed on the voucher); *Tapia*, 915 N.Y.S.2d at 21 (rejecting landlord’s argument that Local Law 10 did not apply to current tenants); *Rakhman*, 916 N.Y.S.2d at 582 (rejecting landlord’s argument regarding lead paint disclosure form). The Commission has built on the strong foundation laid by these decisions and others by issuing clear guidance documents that explain what the NYCHRL prohibits and requires. New York City Comm’n on Hum. Rts., *Source of Income Discrimination*, <https://www.nyc.gov/site/cchr/media/source-of-income.page> (last accessed June 5, 2025).

SafeHorizon’s experience highlights the need for source-of-income protections for rental applicants with Section 8 vouchers. 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. (A.133 para. 5). Over two hundred clients received a Section 8 EHV. (A.133 para. 5).

Section 8 vouchers, including EHV’s, must be used by deadlines set by NYCHA or another PHA, or they expire. *E.g.*, 24 C.F.R. § 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. *See, e.g.*, New York City

Hous. Auth., *Housing Choice Voucher Administrative Plan* 6, 20. This appears to have happened to Dmitri Derodel. (A.150).

The Streetwork Project employs housing navigators who help clients locate, apply for, and view apartments. (A.133 para. 8). Once clients are accepted by a landlord, housing navigators help their clients do the paperwork necessary to complete the rental and also help most clients with the subsidy approval process. (A.133 para. 8). When clients are rejected due to source-of-income discrimination, they stay homeless longer, and their vouchers may expire and be permanently lost. (A.134 para. 13).

SafeHorizon's housing navigators and other staff frequently encounter source-of-income discrimination against clients with vouchers, including EHV's. 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 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. (A.134 para. 11).

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. (A.134-135, paras. 14-15). It frequently shares pamphlets and factsheets prepared by the Commission 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. (A.135 paras. 15-16). 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, the lawsuit<sup>14</sup> resulted in the clients being approved for apartments and an agreement to connect other SafeHorizon clients with future available apartments. (A.135 para. 17).

The continued prevalence of source-of-income discrimination in the face of protections in New York City suggests that, were source-of-income protections to be invalidated, many more landlords would refuse to rent to Section 8 voucher holders. Permitting discrimination against Section 8 voucher holders would not only mean that New Yorkers like SafeHorizon's clients would remain homeless or unstably housed for longer (or permanently); it would also undermine the Section 8

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<sup>14</sup> *Safe Horizon, Inc. et al. v. 3823 Carpenter Ave LLC et al.*, Index No. 450373/2023 (Sup. Ct. N.Y. Cnty.).

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 Trust’s baseless constitutional claims fall flat.

**II. The District Court correctly dismissed the Trust’s complaint on justiciability grounds.**

The District Court correctly found (a) that the *Younger* abstention doctrine mandated dismissal of the Trust’s complaint because the Trust’s Fourth Amendment and preemption claims can be raised in the pending state proceeding and (b) that the Trust had not satisfied ripeness and standing requirements with respect to its Fourth Amendment claim.

*A. The Trust’s Fourth Amendment challenge is as-applied.*

As a threshold matter, the Trust’s Fourth Amendment challenge to the NYCHRL’s prohibition on discrimination against Section 8 voucher holders is an as-applied challenge, not a facial one. A facial challenge must be solely based on the text of the challenged law itself (i.e., the question for the court is whether the law may ever be applied constitutionally), while an as-applied challenge alleges that the application of the law is unconstitutional under specific circumstances (i.e., the question for the court is whether some particular application of the law—a subset of its possible applications—is unconstitutional). *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-450 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir.

2006) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11 (1988)).<sup>15</sup>

Simply put, this is not a facial challenge because the Fourth Amendment prohibits unreasonable searches or seizures, U.S. Const. amend. IV, and the NYCHRL does not even mention a search or seizure, let alone require one. (A.249). “When addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant.” *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). There can be no facial Fourth Amendment challenge to the NYCHRL because it does not “actually authorize” any searches whatsoever.

The Trust does not challenge the prohibition on discrimination against source-of-income discrimination generally; it identifies no general infirmity with NYC Administrative Code Section 8-107. Rather, it contests the inclusion of “section 8 vouchers” in the definition of “lawful source of income,” N.Y.C. Admin. Code § 8-102, and the specific prohibitions that flow from that inclusion. The reason that the Trust disputes the inclusion of Section 8, but not other housing voucher programs, is the “combination of the Section 8 regulations and the statute compelling

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<sup>15</sup> Another way to conceptualize this distinction is to ask “who” is alleged to have violated the Constitution. In essence, a facial challenge alleges that the legislature violated the Constitution by enacting a statute that can never be applied constitutionally (and is thus unconstitutional itself), while an as-applied challenge alleges that the executive violated the Constitution by applying a statute in a particular manner that violates the Constitution. See Nicholas Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1238-1240 (2010).

participation”—primarily the contents of the HAP contract. (Pl.-App.’s Br. 35-36). In other words, its challenge does not solely rest on the text of the NYCHRL. It is not a facial challenge. *See Field Day, LLC*, 463 F.3d at 174.

Finally, the Trust argues that its challenge to the NYCHRL is facial because the NYCHRL “incorporates Section 8 statutes and regulations by reference . . . .” (Pl-App.’s Br. 25). However, it cites no authority for its argument that a facial challenge can rely on the interaction between one law and a separate law enacted or promulgated by an unrelated legislature or agency, or between a law and a separate contract. There is none. Instead, its challenge turns on the “particular circumstances” created by this interaction and is by definition as-applied. *See Tineo v. Att’y Gen.*, 937 F.3d 200, 210 (3d Cir. 2019). The most obvious “particular circumstance” here is the HAP contract: if HUD decided to modify paragraph 11 of the HAP contract tomorrow to include an explicit term requiring an administrative warrant for any Section 8 inspection, the entire premise for the Trust’s argument would vanish. Because a change that is external to the NYCHRL could obviate the Trust’s entire claim, the claim is not a facial challenge.

B. *Younger abstention applies.*

Under *Younger*, federal courts should abstain when a litigant brings an injunctive or declaratory judgment claim related to a pending state proceeding if three elements are satisfied: (1) there is an ongoing state proceeding; (2) an important

state interest is involved; and (3) “the federal plaintiff has an adequate opportunity for judicial review of his constitutional claims during or after the proceeding.” *Univ. Club*, 842 F.2d at 40. The Trust does not dispute that the first two elements are met, nor does it specifically contest the District Court’s reasoning for dismissing its preemption claim on *Younger* abstention grounds. (Pl.-App.’s Br. 3, 30, 24-28). It only argues that the pending Commission proceeding provides no opportunity to raise a facial Fourth Amendment challenge. (*Id.* at 24-28). Because the Trust’s Fourth Amendment challenge is as-applied, the Trust has an adequate opportunity for judicial review of its claims. *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*22 (“Article 78 has been used for decades to challenge the reasonableness of regulatory searches under the Fourth Amendment . . . .”); *Univ. Club*, 842 F.2d at 40; *Delta Airlines*, 689 N.E.2d at 900-901 (adjudicating preemption claim in Article 78 proceeding); *Shmushkina*, OATH Index Nos. 2541/08, 2542/08, 2543/08 (adjudicating preemption claim in Commission proceeding). *Younger* abstention applies.

C. *The Trust’s Fourth Amendment claim is not ripe.*

Ripeness comprises two related but distinct concepts: constitutional and prudential ripeness. *See Nat’l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). The constitutional ripeness requirement is a specific application of Article III standing’s first element. *See id.* at 688. A plaintiff must have suffered an

injury in fact: an “invasion of a legally protected interest” that is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998); see *United Transp. Union v. Foster*, 205 F.3d 851, 857-858 (5th Cir. 2000). Prudential ripeness allows courts to avoid engaging in the premature or unnecessary adjudication of disagreements, especially of constitutional issues. *N.Y. Civ. Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003)). A claim is ripe if the challenged policy or law is “sufficiently definite and clear to permit sound review.” *Id.* at 131.

The ripeness analysis starts with identifying the relevant legally protected interest. See *Lujan*, 504 U.S. at 560; cf. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (stating that a plaintiff must have standing for each claim and each form of relief sought). The “wrong condemned” by the Fourth Amendment is the unlawful search or seizure itself. See *United States v. Leon*, 468 U.S. 897, 906 (1984); *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). Here, the Trust does not allege that it will face an actual or imminent unreasonable search as part of the Section 8 program. Its allegations regarding searches rely on conjecture regarding future

events that may not occur, (A.104-105), as do its allegations that it could be penalized for refusing a warrantless inspection, (A.252). Moreover, it is conjectural that the Commission would seek to penalize a landlord such as the Trust for denying consent to a search rather than wait for the PHA to obtain a warrant. (A.252).

The Trust argues that its claims are ripe because it faces a Commission proceeding after refusing to sign a HAP contract (Pl.-App.'s Br. 28-30). This argument relies on the faulty premise that the signing of the HAP contract itself works a Fourth Amendment injury. (*Id.*).<sup>16</sup> The Trust cites no authority for this argument, which runs counter to Fourth Amendment jurisprudence. Determining whether consent exists for a particular search is a fact-intensive inquiry that analyzes all the surrounding circumstances. *See, e.g., Anobile v. Pelegrino*, 303 F.3d 107, 124 (2d Cir. 2001) (quoting *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995)). A similarly intensive factual inquiry is needed to determine whether a particular search is reasonable. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In other words, Fourth Amendment analyses depend on an understanding of “complex factual issues.” *Warshak v. United States*, 532 F.3d 521, 528-529 (6th Cir. 2008) (quoting *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163 (1967)). Until the particular circumstances of a search come into focus, the associated legal questions

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<sup>16</sup> As will be discussed *infra*, constitutional searches can and will take place within the framework of the HAP contract and Section 8 regulations. This includes the initial HQS inspection. A PHA may seek a warrant if the landlord declines to consent.

remain “purely speculative.” *Id.* For this reason, a court’s Fourth Amendment analysis should occur after the particular circumstances unfold (or become clear), not before. *Id.* That point has not been reached here. The Trust does not face an actual or imminent Fourth Amendment injury, and the factual record is insufficient for a court’s sound review of its claim.

*Camara, Patel, and Sokolov* are not to the contrary. In *Camara*, the municipality prosecuted the tenant after he refused entry to an inspector who appeared at his door and demanded entry pursuant to statutory authority. *Camara v. Mun. Ct.*, 387 U.S. 523, 526-527 (1967). In *Patel*, the police could immediately arrest hotel owners if they refused to open their registries to police officers on demand; the plaintiffs had been subjected to such mandatory inspections without consent or a warrant before. 576 U.S. at 413, 414, 421. And in *Sokolov*, the municipality prosecuted property owners for renting their properties without first obtaining a rental permit conditioned on consenting to a warrantless inspection. *Sokolov v. Vill. of Freeport*, 420 N.E.2d 55, 56 (N.Y. 1981). Thus, in each of these cases, the challenged search had either occurred or been attempted pursuant to a definite statutory regime. There was nothing conjectural or hypothetical about them. In contrast, the Trust does not make any factual allegations about how the Section 8 regulations and HAP contract drive the relevant entities’ policies or practices—namely, any allegation that NYCHA, other PHAs, HUD, or the Comptroller General

have conducted or will conduct a nonconsensual warrantless search pursuant to the Section 8 program. By extension, the Trust has not alleged that these entities or the Commission will penalize it for refusing a warrantless search.

*D. The Trust lacks standing to maintain its Fourth Amendment claim.*

For related reasons, the Trust lacks standing to bring a Fourth Amendment claim, whether it is as-applied or facial. Standing requires that a plaintiff “have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). “Threatened injury must be *certainly impending* to constitute injury in fact,” and “[a]llegations of *possible* future injury are not sufficient.” *Clapper v. Amnesty Int’l*, 568 U.S. 398, 409 (2013). An injury in fact must also be concrete—“real, and not abstract,” *Spokeo, Inc.*, 578 U.S. at 340—and particularized—the injury must “affect the plaintiff in a personal and individual way,” *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024).

On a motion to dismiss, a plaintiff must allege “facts that affirmatively and plausibly suggest that it has standing to sue.” *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 417 (2d Cir. 2015). When evaluating a plaintiff’s standing, a court need not credit a “legal conclusion couched as a factual allegation” or a “naked assertion devoid of further factual enhancement.” *Calcano v. Swarovski*

*N. Am. Ltd.*, 36 F.4th 68, 75 (2d Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

1. The Trust lacks standing for its as-applied challenge.

To have standing to challenge an inspection ordinance on Fourth Amendment grounds, the “plaintiff needs to present allegations or evidence that the government has actually conducted a warrantless search of plaintiff’s property pursuant to the inspection ordinance or has imminent plans to do so.” *Wirth v. City of Rochester*, No. 17-CV-6347-FPG, 2020 U.S. Dist. LEXIS 180289, at \*10-11 (W.D.N.Y. Sept. 30, 2020); see *Vonderhaar v. Vill. of Evendale*, 906 F.3d 397, 400-402 (6th Cir. 2018); *Flynn v. City of Lincoln Park*, No. 2:18-cv-12187 (TGB), 2020 WL 344854, at \*7 (E.D. Mich. Jan. 21, 2020). This test is a straightforward application of the *Lujan* injury-in-fact standard. See 504 U.S. at 560. Without an actual or imminent inspection, there can be no actual or imminent injury. Without a warrantless inspection, there can be no concrete and particularized injury to a Fourth Amendment interest.

The Trust’s allegations boil down to its speculative fear that a government agency will act unconstitutionally in the future. This is not sufficient to confer standing. See *Clapper*, 568 U.S. at 409-10 (stating that a threatened injury must be “certainly impending” to be an injury in fact). The Trust does not allege that a landlord in a New York City Section 8 program has ever “acquiesced to a warrantless

search due to the threat of a penalty” or that a PHA “has ever conducted an inspection without obtaining a warrant where consent was not given.” *Wirth*, 2020 U.S. Dist. LEXIS 180289, at \*13 (citing *Vonderhaar*, 906 F.3d at 402).

The Trust again points to the Commission proceeding against it as proof of its injury in fact. (Pl.-App.’s Br. 33). This argument has the same error as its argument about ripeness: the Trust’s refusal to sign a HAP contract is not the same thing as the *Camara*, *Patel*, and *Sokolov* plaintiffs’ refusal to permit a warrantless inspection. The Trust’s claim that they are the same rests on its belief that government entities will deem the HAP contract to be consent for Fourth Amendment purposes and use it as authority to perform otherwise unlawful inspections in the future. (Pl.-App.’s Br. at 31). This belief is founded on nothing but speculation about a potential future injury. The Trust has not made factual allegations regarding even one instance when a warrantless inspection has taken place after a landlord signed a HAP contract. (A.255). “The Trust’s conjectural fear that a warrantless inspection will take place in the future does not confer standing.” (A.255 (citing *Clapper*, 568 U.S. at 409; *Nat’l Org. for Marriage*, 714 F.3d at 688)).

2. The Trust also lacks standing to bring a facial Fourth Amendment challenge.

Even if the Trust has alleged a facial Fourth Amendment claim, it lacks standing to assert it because it has not alleged an actual, non-conjectural injury to its Fourth Amendment interests. *See Clapper*, 568 U.S. at 409-10; *Vonderhaar*, 906

F.3d at 401-402 (distinguishing *Patel* due to the past warrantless inspections faced by the *Patel* plaintiffs). Without alleging a certainly impending injury, the Trust lacks standing, no matter what form its claim takes. *See Williams v. Lew*, 819 F.3d 466, 475 (D.C. Cir. 2016).

**III. In any event, the Trust’s complaint fails to state a claim upon which relief can be granted.**

Even if the Trust has a justiciable Fourth Amendment claim, the District Court’s dismissal of its complaint would nonetheless have been proper because the complaint fails to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12(b)(6)*.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678. “A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 299 (2d Cir. 2022). While courts must accept all factual statements as true and draw all reasonable inferences in a plaintiff’s favor, conclusory statements do not suffice. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Additionally, a court must not accept legal conclusions as true—legal conclusions must be supported by factual allegations. *Iqbal*, 556 U.S. at 678.

Whether as-applied or facial, the Trust's Fourth Amendment claim fails. The Trust equally fails to plausibly allege that federal law preempts the NYCHRL's prohibition on discrimination against Section 8 voucher holders.

*A. The Trust does not plead any facts supporting an as-applied Fourth Amendment challenge.*

The Trust's as-applied Fourth Amendment challenge can be quickly dispatched. First, the Trust has not alleged that a PHA attempted to inspect its property without a warrant. Second, it has not signed a HAP contract, (A.109, para. 72), and therefore will not face any search as part of the Section 8 program. Third, the complaint's Fourth Amendment allegations consist entirely of citations to the HAP contract and Section 8 regulations and conclusory statements about their import (i.e., "the government can be expected to search the entirety of computers and facilities to confirm that it has reviewed all pertinent records," (A.104-105)). The Trust has not pleaded any facts to support its allegation that signing the HAP contract would subject it to otherwise unreasonable searches. Without any specific factual allegations, the Trust cannot plausibly allege a Fourth Amendment injury. *See, e.g., Mamakos v. Town of Huntington*, No. 16-CV-5775(SJF)(GRB), 2017 U.S. Dist. LEXIS 103706, at \*37 (E.D.N.Y. July 6, 2017).

B. *The Trust does not plausibly allege that the NYCHRL’s prohibition on discrimination against Section 8 voucher holders necessitates unreasonable searches in all its applications.*

If this Court does construe the Trust’s allegations as a facial challenge, they fail to state a claim for relief. Because facial claims pose numerous risks, they are “the most difficult challenge to mount successfully.” *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*15. A facial challenge is a claim that “the law or policy at issue is unconstitutional in all its applications.” *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). Put differently, a plaintiff must plausibly allege and then establish that “no set of circumstances exists under which the challenged act would be valid.” *Cnty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 548 (2d Cir. 2023). Even if legislation may operate unconstitutionally in some conceivable situation, that is not enough to render it wholly unconstitutional. *Rent Stabilization Ass’n v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993) (citing *Salerno*, 481 U.S. at 745).

On a facial challenge, courts “only look to the bare facial requirements of the statute at issue and decline invitations to speculate about improbable imaginary cases” and “take pains” to interpret a statute in a constitutionally sound manner. *Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*15. Further, Fourth Amendment facial challenges are unlikely to succeed “when there is substantial

ambiguity as to what conduct a statute authorizes.” *Patel*, 576 U.S. at 416 (citing *Sibron v. New York*, 392 U.S. 40, 59, 61 n.20 (1968)).

The Fourth Amendment does not protect against all searches and seizures, only unreasonable ones. U.S. Const. amend. IV. 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 U.S. 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 U.S. 83, 91 (1998); *United States v. Holland*, 755 F.2d 253, 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 F.3d 73, 79 (2d Cir. 2004) (citation and internal quotation marks omitted). An administrative search—one that implicates special needs and is not intended to further a general interest in crime control—does not require a warrant, provided that other safeguards exist. *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*16-17 (describing administrative search requirements). Inspections and other searches under the Section 8 program are administrative searches: their primary purpose is to ensure compliance with HQS and other program

requirements, and it would be impractical for a PHA like NYCHA to obtain a warrant every time it wished, for example, to verify that a landlord charged Section 8 tenants the same rents as other similarly situated tenants.

To prevail on a facial Fourth Amendment challenge in the administrative search context, plaintiffs must show that a law imposes penalties for failing to comply with a search demand without first providing the opportunity to have a neutral decisionmaker review the demand. See *Patel*, 576 U.S. at 419, 421; *Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*20. If this precompliance review is available, there is no Fourth Amendment issue. See *Patel*, 576 U.S. at 421.

The reason courts have invalidated some rental permit inspection ordinances is that the ordinances gave landlords no opportunity to exercise their Fourth Amendment rights: to obtain the permit needed to rent their units, the landlords had to allow an inspector (without a warrant) onto their private property. See, e.g., *Sokolov*, 420 N.E.2d at 56. The landlords' consent to the warrantless inspection was the only way that the inspection could occur and that penalties could be avoided. See, e.g., *id.* They had no adequate opportunity to challenge the search demand. See *Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*20. Similarly, the ordinance in *Patel* required hotel owners to show police officers their registry on the spot or face criminal penalties, 576 U.S. at 421, while the ordinance in *Camara* required the tenant to immediately admit the inspector to his home or face a similar

criminal consequence, 387 U.S. at 530. In all of these cases, there was a direct, definite, and actual or imminent request for a search, and a direct, definite, and immediate punitive consequence if the search was not permitted. On the other hand, when there is a means for the municipality to obtain a warrant, the municipality can take this path to accomplish the inspection required for the permit, and there is no constitutional issue because the landlord can challenge the reasonableness of the inspection. *See, e.g., Paschcow v. Town of Babylon*, 53 N.Y.2d 687, 688 (N.Y. 1981). In other words, when a municipality can obtain a warrant or otherwise provide precompliance review, there is an “escape valve” that avoids the rigid “consent or be penalized” paradigm that courts have found to be unconstitutional.

In New York City, Section 8’s regulatory scheme provides many avenues for precompliance review and for reasonable searches to occur. Participation in the Section 8 program does not subject a landlord 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. Because the HAP contract begins when the lease does, a landlord does not have a privacy interest in the rented premises or the common areas. A PHA in New York City may seek a warrant or subpoena if a landlord fails to consent to an inspection. And most importantly, nothing in the HAP contract imposes penalties on a landlord 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 U.S. at 419.

The fundamental flaw in the Trust’s analysis is that, rather than considering the circumstances where searches under the Section 8 program could occur in a constitutional manner, it focuses on an imagined and unsupported scenario: after a landlord signs a HAP contract, everyone involved says “gotcha” and proceeds to use paragraph 11 of the contract as *carte blanche* to invade the landlord’s privacy interests. (Pl.-App.’s Br. 31). This error leaves the Trust “slaying a straw man.” See *United States v. Rahimi*, 602 U.S. 680, 701 (2024).

As discussed *infra*, the HAP contract is not a “waiver” of the Trust’s Fourth Amendment rights. But since the Trust seeks to bring a facial challenge to the NYCHRL that turns on the obligations imposed by the HAP contract, its challenge to these obligations must meet facial challenge standards. It must show that the “work” done by the HAP contract is always invalid (i.e., that the only application it has is to compel an otherwise unreasonable inspection). See *Patel*, 576 U.S. 418-419. In *Patel*, the statute authorizing warrantless searches did no work where exigency or a warrant permitted the search, or when the hotel owner consented. *Id.* Conversely, the HAP contract does work when a PHA, HUD, or the Comptroller General has a warrant or subpoena, the tenant consents, or the search is otherwise

reasonable: if the landlord obstructs a reasonable search, it breaches the HAP contract. (A.207 paras. 10(a)(1), 11(a)).

1. The HAP contract does not authorize warrantless searches or otherwise waive Fourth Amendment rights.

Open-ended contract 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 Ala. Bank, N.A. v. Donovan*, 692 F.2d 714, 719-20 (11th Cir. 1983); *see United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 100-101 (5th Cir. 1992) ("We reject the government's assertion that Fourth Amendment reasonableness standards do not apply when an administrative search is conducted pursuant to consent."); *cf. Anobile*, 303 F.3d at 112, 124 (rejecting effectiveness of a signed waiver of the "right to object to any search" with respect to a search of employees' dormitory rooms on racetrack premises).

In *Anobile*, while authorities did not need a warrant to search the racetrack premises because horse racing is a heavily regulated industry, 303 F.3d at 117-118, this rationale did not extend to employees' dormitory rooms, where the employees' privacy interests rendered a warrantless search unreasonable, *id.* at 119-121. The waiver provision in the employees' license application did not alter this conclusion, as it did not serve as consent to a warrantless search. *Id.* at 124-125. In other words,

the license application provision (and the underlying regulation) did not permit unreasonable searches.

As *Anobile* demonstrates, 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 also Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). At the time of a contract’s signing, it is unknown what form a future search demand may take. This distinguishes advance contractual consent from the inspection cases discussed above, where an officer or inspector made a direct and immediate search demand. Because it is not reasonable or lawful to obtain blanket consent to any and all searches in advance,<sup>17</sup> logically, an open-ended contract must have a limiting principle, and the Constitution supplies one. The HAP contract does not obviate or alter the Fourth Amendment’s requirements, and it is not a “waiver” at all.

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 contract includes a reasonableness limitation: “[t]he owner must provide any information pertinent to the HAP contract that the PHA [Public Housing Agency] or

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<sup>17</sup> An extreme case would be an “early morning mass raid.” *See Wyman v. James*, 400 U.S. 309, 326 (1971). *Zap v. United States* is not in conflict with these cases. *See First Ala. Bank*, 692 F.2d at 718-720. *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. *See* 328 U.S. 624, 628 (1946) (stating that defense contractor agreed to permit inspection “in order to obtain the Government’s business”).

HUD [Department of Housing and Urban Development] may reasonably require.” (A.207 para. 11(a)). As paragraph 11 of the HAP contract relates to government searches, it incorporates the Fourth Amendment’s reasonableness requirements. *See, e.g., Wal-Mart Stores v. Wells*, 213 F.3d 398, 402 (7th Cir. 2002) (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”). And, like with many other matters, the HAP contract and Section 8 regulations intentionally leave space for the operation of state and local law, *e.g., Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1213-1214 (9th Cir. 2009)—here, to meet the flexible standard for precompliance review, *see Patel*, 576 U.S. at 421.

The Trust does not cite any authority to the contrary. The contract in *Abateco Services, Inc. v. Bell*, involving the heavily regulated asbestos removal industry, explicitly stated that inspectors would be granted access without first obtaining a search warrant. 477 S.E.2d 795, 799-800 (Va. Ct. App. 1996). There is no need for the Trust to withdraw its consent in the HAP contract before exercising its Fourth Amendment rights because, by signing the HAP contract, it will only have consented to reasonable searches. *See Harris Methodist Ft. Worth*, 970 F.2d at 100-01 (permitting hospital to challenge reasonableness of search despite advance written

consent). Similarly inapposite is *Crook v. City of Madison*, where the court invalidated a rental inspection ordinance because its warrant provision incorporated a standard less than probable cause. 168 So. 3d 930, 938-39 (Miss. 2015). The HAP contract does not purport to set any standards for the issuance of a warrant or subpoena.

For these reasons, the HAP contract is not a “waiver.” The Trust retains its right to contest the reasonableness of any inspection pursuant to the Section 8 program.

2. The HAP contract is signed in conjunction with a lease, so the landlord lacks privacy rights in the rented 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 C.F.R. § 982.309(b)(1). Therefore, it is the Section 8 tenant, not the landlord, who has the right to provide access for inspections of the premises. Consent from the landlord is not needed or even valid because the landlord has no expectation of privacy with respect to the leased premises. *Mangino v. Inc. Vill. of Patchogue*, 739 F. Supp. 2d 205, 234 (E.D.N.Y. 2010) (collecting cases); *Flynn*, 2020 U.S. Dist. LEXIS 9433, at \*22-24 (collecting cases). Rather, the PHA must obtain consent for the inspection from the tenant. *See, e.g.*, 24 C.F.R. § 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 landlord 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 F.2d at 255. So, the PHA may perform nearly all inspections required by the HAP contract without implicating the landlord's privacy rights whatsoever.

In limited circumstances, the PHA may need to inspect the systems that “directly service the subsidized unit.” 24 C.F.R. § 5.703(a)(2). 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 in New York City. *E.g.*, N.Y.C. Admin. Code § 27-2003(a); *id.* § 28-116.2. If the PHA has cause to inspect a building system for which an access warrant is needed, it will proceed in the same way as these city agencies do and obtain a warrant for the inspection. *See, e.g.*, N.Y.C. Charter § 398 (NYCHA could request New York City's corporation counsel to seek a warrant); N.Y.C. Admin. Code § 27-2123(a) (HPD is one of New York City's PHAs and could request a warrant itself).<sup>18</sup>

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<sup>18</sup> The procedure that HCR might use to obtain a warrant, (Pl-App.'s Br. 43-44), is irrelevant to this facial challenge. The existence of procedures for NYCHA and HPD means that the Trust has not alleged that there is “no set of circumstances” where the NYCHRL's prohibition on source of income discrimination is valid. *See Cmty. Hous. Improvement Program*, 59 F.4th at 548.

3. The Section 8 program provides various avenues 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.<sup>19</sup> *Patel*, 576 U.S. at 421; *Camara*, 387 U.S. at 538-39; *Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*20. In certain situations, like searches of nonpublic areas of a commercial enterprise, the government generally would seek an administrative warrant. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 320-21 (1978). In others, like records access requests, an administrative subpoena or similar mechanism suffices. *Patel*, 576 U.S. at 421-22; *Donovan v. Lone Steer, Inc.*, 464 U.S. 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 U.S. at 423. In New York City, Section 8's regulatory scheme meets these requirements because there are many avenues for precompliance review.

First, as discussed above, should a PHA wish to perform an administrative inspection of a nonpublic area, including a landlord's computers, it may seek an

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<sup>19</sup> Of course, this assumes that no exception to the precompliance review requirement applies. *See, e.g., Patel*, 576 U.S. at 418-19.

administrative warrant. N.Y.C. Charter § 398; N.Y.C. Admin. Code § 27-2123(a). (The availability of this procedure also means that the initial, pre-HAP contract HQS inspection poses no constitutional problem. If a landlord declines to consent, a PHA may obtain a warrant and perform the inspection. *See, e.g., Paschcow*, 53 N.Y.2d at 688.<sup>20</sup>) Second, should a PHA, HUD, or the Comptroller General seek to audit a landlord's accounts and records to determine compliance with program requirements, it may serve the landlord with an administrative subpoena. For example, the New York City Department of Investigation<sup>21</sup> may conduct investigations and issue administrative subpoenas related to any person or entity who is paid money through any city agency. *See* N.Y.C. Charter § 803(f); N.Y. C.P.L.R. 2308(b); *New York City Dep't of Investigation v. Passannante*, 544 N.Y.S.2d 1, 2 (N.Y. App. Div. 1989). Similarly, HUD's Office of the Inspector General may conduct audits and investigations, obtain warrants, and issue administrative subpoenas, 5 U.S.C. §§ 401(1), 402, 406(a)(4), (f)(1)(C), and the Comptroller General may also issue subpoenas, 31 U.S.C. § 716(c)(1) (“[T]he Comptroller

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<sup>20</sup> To the extent that the Trust argues that the NYCHRL violates the Fourth Amendment due to the initial HQS inspection, it has waived this argument by failing to sufficiently brief it. *See JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005); *Norton v. Sam's Club*, 145 F.3d 114, 117-118 (2d Cir. 1998).

<sup>21</sup> Inspectors General within the New York City Department of Investigations lead investigations regarding NYCHA and HPD. New York City Dep't of Investigations, *Inspectors General*, <https://www.nyc.gov/site/doi/contact/contact-inspectors-general.page> (last accessed June 5, 2025). This is one reason NYCHA's Administrative Plan would not discuss warrants or subpoenas.

General may subpoena [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 . . .”).

4. Precompliance review is available under the HAP contract itself.

Even if PHA chooses not to use any procedure outside those provided by the HAP contract itself, a landlord 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 landlord’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,” (A.207 para. 11(a)), and the constitutional limits discussed above. A landlord faces no statutory or regulatory penalties for failing to comply with paragraph 11. At most, a landlord’s failure to comply with its obligations is a breach of the HAP contract. (A.207 para. 10(a)(1)). In the event of a breach, the PHA must notify the landlord of its determination that the breach has occurred, including a brief statement of its reasoning. (A.207 para. 10(b)). The PHA’s “rights and remedies” in the event of a landlord’s breach of the HAP contract include the suspension, abatement, or termination of housing assistance payments or the termination of the HAP contract.

(A.207 para. 10(c)). Additionally, the PHA may seek additional relief through litigation, such as specific performance or other injunctive relief. (A.207 para. 10(d)).

The worst-case scenario if a landlord refuses to permit a search or respond to a request for information is that the PHA gives the landlord notice that it has determined that a breach of the HAP contract has occurred and informs the landlord that it will stop making payments and/or terminate the HAP contract. This means that the HAP contract itself provides for precompliance review before the landlord experiences any consequence for its breach. The PHA may file a lawsuit seeking specific performance or other injunctive relief. (A.207 para. 10(d)). Or, after obtaining the PHA's written determination, the landlord may file an Article 78 proceeding challenging the PHA's determination. *See Vuksan Realty, LLC v. Olatoye*, 118 N.Y.S.3d 1, 1 (N.Y. App. Div. 2020); *see also Abiele Contracting, Inc. v. New York City Sch. Constr. Auth.*, 689 N.E.2d 864, 866-867 (N.Y. 1997). 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. *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*21 (“Article 78 provides precompliance review similar to that available from a motion to quash an administrative subpoena.”). In either case, the landlord

would obtain judicial review of the reasonableness of the PHA's demand, which would be guided by the legal standards discussed above.

A landlord may bring an Article 78 proceeding to challenge a PHA's determination that it has breached the HAP contract and the suspension, abatement, or termination of payments or termination of the HAP contract. *See Vuksan Realty, LLC*, 118 N.Y.S.3d at 1. If a Section 8 landlord refuses a search, it may obtain precompliance review before facing penalties for failing to comply, just like the landlords in *Hudson Shore Associates*. *See* 2025 U.S. App. LEXIS 13349, at \*21-23 (“Article 78 meets each of the requirements for precompliance review.”). As described above, a PHA must notify a landlord in writing before it exercises any remedy under the HAP contract. (A.207 para. 10(b)). Because Article 78 review of a search's reasonableness is available as soon as a search demand is made, a landlord may file an Article 78 proceeding before a PHA even generates a suspension or termination notice. *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*23. Even if a landlord waits to file the Article 78 proceeding until after receiving a suspension or termination notice, it may seek a stay of the suspension or termination while the proceeding is pending and obtain review before experiencing any negative consequence. *See* N.Y. C.P.L.R. § 7805; *Patchogue-Medford Cong. of Tchrs. v. Bd. of Educ.*, 510 N.E.2d 325, 327 (N.Y. 1987). There is no cause to “speculate about improbable imaginary situations in which a landlord could be penalized before being

able to obtain Article 78 review.” *Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*24. The availability of Article 78 review is enough to defeat the Trust’s facial challenge. *See id.*

HUD and the Comptroller General are not parties to the HAP contract. (A.203, 204 para. 1(a)). If either independently sought to enforce rights under the contract (rather than via a warrant or subpoena), it would have to file a lawsuit and claim third-party beneficiary rights, in which case the landlord would equally obtain judicial review.

The Trust has not identified even one instance where a New York City PHA, HUD, or the Comptroller General has performed a warrantless inspection or search, or where a landlord has faced a penalty for failing to consent to such a search. The Trust’s speculation is not grounded in reality, as there are constitutional means to accomplish searches pursuant to the Section 8 program. Plus, Section 8 searches occur within a contractual framework that is markedly less coercive than the criminal penalty scheme in *Patel*. *See Hudson Shore Assocs.*, 2025 U.S. App. LEXIS 13349, at \*24-28. For these reasons, the Trust’s Fourth Amendment allegations do not state a claim for relief.

*C. Federal law does not preempt the NYCHRL’s prohibition on discrimination against Section 8 voucher holders.*

Every court to consider an identical preemption claim has rejected it. *See, e.g., Austin Apt. Ass’n*, 89 F. Supp. 3d at 894-896; *Comm’n on Hum. Rts. & Opportunities*

*v. Sullivan Assocs.*, 739 A.2d 238, 245-246 (Conn. 1999). This Court should not deviate from that consensus, as there is no conflict between the NYCHRL’s prohibition on discrimination against Section 8 voucher holders and federal law.

There are two branches of conflict preemption: “impossibility” and “obstacle.” *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 152 (1982); *Figueroa v. Forster*, 864 F.3d 222, 234-235 (2d Cir. 2017). “Impossibility occurs when state law penalizes what federal law requires, or when state law claims directly conflict with federal law.” *Figueroa*, 864 F.3d at 234. The obstacle branch “precludes state law that poses an actual conflict with the overriding federal purpose and objective.” *Id.* at 234-235. The NYCHRL poses no conflict under either branch.

To meet its burden regarding impossibility conflict preemption, the Trust needs to show that it could not comply with federal law if it also complied with the NYCHRL. *Id.* at 234. Its citations to various Section 8 regulations miss the point. *Cf.* 24 C.F.R. § 982.53(d) (stating that Section 8 regulations are not intended to preempt laws that prohibit source-of-income discrimination like the NYCHRL). The NYCHRL prohibits discrimination against people because of their status as Section 8 voucher holders, including the refusal to comply with program requirements. *See Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 21 N.Y.S.3d 221, 226, 228 n.5 (N.Y. App. Div. 2015); *Rakhman*, 916 N.Y.S.2d at 582. It is possible to comply with both the NYCHRL and the Section 8 regulations. If a landlord or unit is categorically

ineligible for the Section 8 program, with respect to that landlord or unit, there would be no discriminatory intent. In such a case, the PHA would be unable to approve the rental because of an independent legal requirement that the PHA must follow. Put differently, the voucher holder would not be “otherwise qualified” to rent the unit using the voucher. *See, e.g., Soules v. U.S. Dep’t of Hous. & Urban Dev.*, 967 F.2d 817, 821-822 (2d Cir. 1992).

For obstacle conflict preemption, the Trust needs to demonstrate that “the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.” *Figueroa*, 864 F.3d at 235. There is no support in the legislative history for the claim that Congress made the “voluntary” nature of the Section 8 program its “overriding purpose,” *see id.* at 234-235, or sought to prohibit state and local governments from requiring the acceptance of Section 8 vouchers, *see Austin Apt. Ass’n*, 89 F. Supp. 3d at 885-886.

At the federal level, the Section 8 program is “voluntary” to the extent that federal law does not obligate landlords to participate, but neither does federal law prohibit states and localities from making participation mandatory. *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1109 (N.J. 1999). On the contrary, HUD has explicitly stated that states and localities may make participation mandatory. *See* 24 C.F.R. § 982.53(d).

Finally, “Congress’s decision to repeal the ‘take one, take all’ and ‘endless lease’ provisions provides no support for a conflict preemption argument. The provisions in question were repealed in order to encourage landlords to participate in the voucher program such that more housing would be available to voucher holders, not to protect landlords from being required to rent to voucher holders.” *Austin Apt. Ass’n*, 89 F. Supp. 3d at 895. Plainly, the intent of the amendments was to reduce the federal government’s involvement and streamline the Section 8 program so as to “remove disincentives for owner participation and to expand the number of housing choices available to section 8 families,” “not to excuse discrimination against Section 8 voucher holders.” *See* S. Rep. 105-21, at 36 (1997), 1997 WL 282462<sup>22</sup>; *see also Rosario v. Diagonal Realty, LLC*, 872 N.E.2d 860, 864 (N.Y. 2007) (citing this Committee Report). Indeed, the purpose of the Section 8 program is to aid “low-income families in obtaining a decent place to live” and to promote “economically mixed housing.” 42 U.S.C. § 1437f(a). As SafeHorizon’s experience with Local Law 10 demonstrates, Argument Section I, *supra*, requiring landlords to accept Section 8 furthers both of these purposes, *Sullivan Assocs.*, 739 A.2d at 246. There is no obstacle conflict preemption.

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<sup>22</sup> The Committee explicitly acknowledged that state and local protections would serve the same functions as prior federal anti-discrimination provisions: “the Committee does not anticipate that the repeal of these rules will adversely affect assisted households because protections will be continued under State, and local tenant laws . . . .” S. Rep. 105-21, at 36.

**IV. The District Court correctly denied the Trust's motion for summary judgment.**

Because the District Court properly dismissed the Trust's complaint, its motion for summary judgment is moot. *See Bigio v. Coca Cola Co.*, 675 F.3d 163, 178 (2d Cir. 2012). And for the reasons discussed above, the Trust has in any event failed to establish that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*. There are no facts in the record that support its claims that Section 8 landlords must consent to unreasonable searches or face penalties.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court's judgment dismissing the Trust's complaint and its denial of the Trust's summary judgment motion.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A). It contains 11,654 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

/s/ Evan Henley  
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