UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

216 EAST 29TH STREET TRUST , Plaintiff, v. CITY OF NEW YORK, Defendant.	Case No. 1:24-cv-595 (ER)

NOTICE OF MOTION

Proposed Intervenor, Safe Horizon, Inc., by and through its undersigned counsel, hereby moves, pursuant to Federal Rule of Civil Procedure 24(b), for an Order a) granting it leave to intervene in the above-captioned action and to file the accompanying motion to dismiss and b) granting any other relief that the Court deems just and proper.

The grounds for this motion are set forth in the accompanying declaration of Sebastien Vante, memorandum of law, and Exhibit A (proposed motion to dismiss).

Dated: April 15, 2024
New York, NY

Respectfully submitted,

By: /s/ Evan Henley

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CERTIFICATE OF SERVICE

I, Evan Henley, hereby certify that on April 15, 2024, I caused this Notice of Motion and attached Memorandum of Law, Declaration of Sebastian Vante, and Exhibit A to be filed on the Court's Electronic Case Filing system, which will provide electronic notice to all counsel of record.

/s/ Evan Henley
Evan Henley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

216 EAST 29TH STREET TRUST, Plaintiff, v. CITY OF NEW YORK, Defendant.	Case No. 1:24-cv-595 (ER)

MEMORANDUM OF LAW IN SUPPORT OF SAFE HORIZON, INC.'S MOTION TO INTERVENE

Date: April 15, 2024

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PRELIMINARY STATEMENT

Plaintiff 216 East 29th Street Trust ("the Trust") has filed a lawsuit challenging the constitutionality of the New York City Human Rights Law's ("NYCHRL") prohibition on source of income discrimination against Section 8 voucher holders. Safe Horizon, Inc. ("Safe Horizon") seeks to intervene in this lawsuit, bring its knowledge regarding the operation of the Section 8 program and the NYCHRL to bear, and join Defendant City of New York ("the City") to defend the constitutionality of this critically important law, which not only protects over 125,000 Section 8 voucher holders from discrimination but promotes integration and reduces homelessness.

BACKGROUND

Founded in 1978, Safe Horizon 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. Vante Decl. para. 2. Through its Streetwork Project, Safe Horizon serves homeless, unsheltered, and unstably housed youth. *Id.* para. 3. Among other services, the Streetwork Project offers drop-in centers that provide food, hygiene items, and other resources to homeless youth. *Id.* paras. 4, 13. It also employs housing navigators who assist clients with locating housing opportunities and the housing application and move-in process. *Id.* para. 8. The Streetwork Project alone serves over 200 clients with Section 8 Emergency Housing Vouchers. *Id.* para. 5. It frequently uses the NYCHRL to overcome source of income discrimination. *Id.* paras. 15-16. Safe Horizon has also been a plaintiff in a lawsuit alleging an NYCHRL source of income discrimination claim. *Id.* para. 17.

ARGUMENT

A. Safe Horizon meets the requirements for permissive intervention.

A court may grant permissive intervention when the applicant makes a timely motion that "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention is discretionary, but "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Courts should liberally grant permissive intervention. *Miller v. Silbermann*, 832 F. Supp. 663, 673 (S.D.N.Y. 1993). "To be granted intervention as of right or by permission, 'an applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.'" *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014) (per curiam) (quoting *"R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 240 (2d Cir. 2006)). For permissive intervention motions, courts in this Circuit consider the four factors as a whole and apply them in a "flexible and discretionary" manner. *Bldg. & Realty Inst. v. New York*, No. 19-CV-11285 (KMK); No. 20-CV-634 (KMK), 2020 U.S. Dist. LEXIS 174577, at *14 (S.D.N.Y. Sept. 23, 2020) (citations omitted). "While failure to show inadequate representation may warrant denial of intervention of right, a finding that party representation be inadequate is not required for a district court to grant permissive intervention." *335-7 LLC v. City of New York*, No. 20 Civ. 1053 (ER), 2020 U.S. Dist. LEXIS 102425, at *10-11 (S.D.N.Y. June 11, 2020) (citation and internal quotation marks omitted); *see also Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *36-38 (collecting cases); *Up State Tower Co. v. Town of Cheektowaga*, No. 1:19-cv-280, 2019 U.S. Dist. LEXIS 160084, at *7 (W.D.N.Y. Sept. 17, 2019) (citation and internal quotation marks omitted) ("Rule 24(b) does not

list inadequacy of representation as one of the considerations for the court in exercising its discretion under Rule 24(b) and although a court may consider it, it is clearly a minor factor at most.").

1. *Safe Horizon's motion to intervene is timely.*

Safe Horizon's motion to intervene satisfies the "principal consideration" for permissive intervention: it will not cause undue delay or prejudice. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Factors relevant to whether a motion to intervene is timely include (1) how long the movant had notice of the main action, (2) prejudice to existing parties from any delay, (3) prejudice to the movant if the motion is denied, and (4) any unusual circumstances. *E.g.*, *Commack Self-Service Kosher Meats v. Rubin*, 170 F.R.D. 93, 100 (E.D.N.Y. 1996).

Here, the Trust filed its complaint and a motion for preliminary injunction on January 26, 2024, ECF Nos. 1-2, and an amended complaint on March 13, 2024, ECF No. 21. Safe Horizon informed the Court of its intent to seek intervention on March 15, 2024, approximately one week after learning of the main action, and 49 days after the Trust filed its initial complaint. Vante Decl. para. 19; ECF No. 22. The City's deadline to respond to the amended complaint is April 15, 2024, ECF No. 25, and Safe Horizon has met that deadline by filing the proposed motion to dismiss attached as Exhibit A—the Court need not "extend any preexisting deadlines or reschedule any proceedings to accommodate" Safe Horizon's intervention. *Yang v. Kellner*, No. 20 Civ. 3325 (AT), 2020 U.S. Dist. LEXIS 77975, at *4 (S.D.N.Y. May 3, 2020).

While the Court has heard and denied the Trust's motion for a preliminary injunction, the Trust has since amended its complaint, and no other substantive case activity has occurred. Therefore, the main action is in its early stages, and the timing of Safe Horizon's motion to intervene sits comfortably among precedents in this Circuit. *See Ass'n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 102–03 (D. Conn. 2007) (finding motion for intervention timely when

filed "the same day as the original defendants filed their answer"); *Blatch v. Franco*, No. 97-cv-3918, 1998 U.S. Dist. LEXIS 7717, at *18 (S.D.N.Y. May 26, 1998) (finding intervention timely when "[a] discovery schedule . . . was set only recently, and no depositions have yet been taken"); *Commack*, 170 F.R.D. at 100 (finding that "forty-six days [after the filing of the amended complaint] is not an unreasonable amount of time to file a motion to intervene"); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 185 (W.D.N.Y. 1995) (finding that a motion to intervene filed "just ten weeks" after the complaint was timely).

Going forward, "additional briefing and argument will only help to facilitate a speedy, fair and accurate resolution of the case." *Garfield*, 241 F.R.D. at 103. "It may even be the case that efficiency is promoted by intervention, as the proposed [intervenors] may elucidate the peculiar difficulties" that Section 8 voucher holders would face should the Trust's claims succeed. *See McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 250 (S.D.N.Y. 1989). The need for the Trust to respond to two motions to dismiss is not an "appreciable burden"; it would still need to respond to Safe Horizon's legal arguments if Safe Horizon were granted *amicus curiae* status instead. *See 335-7 LLC*, 2020 U.S. Dist. LEXIS 102425, at *9-10.

Conversely (and as discussed more fully below), if the motion is denied, Safe Horizon and the Section 8 voucher holders it serves will be harmed. Safe Horizon's clients—including those who have been rendered homeless due to abuse and domestic violence—number among the most vulnerable members of our society. While the City and Safe Horizon share the goal of upholding the NYCHRL's constitutionality, if the Trust succeeds, Section 8 voucher holders will be the ones who face extended homelessness and loss of their vouchers, and Safe Horizon will face significant increased costs. *Id.* paras. 11-13, 18.

2. *Safe Horizon has a substantial and unique interest in this litigation.*

Rule 24(b)(1)(B) "is satisfied where a single common question of law or fact is involved, despite factual differences between the parties." *McNeill*, 719 F. Supp. at 250. Safe Horizon's proposed defenses share the fundamental question of law with the main action: the constitutionality of the NYCHRL's prohibition of discrimination against Section 8 voucher holders. *See, e.g.*, *Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *26-27 (discussing cases involving constitutional challenges where courts found that the proposed intervenors' defenses shared common questions of law or fact); *Miller*, 832 F. Supp. at 673-74 (granting permissive intervention where the proposed intervenors' "defense raises the same legal questions as the defense of the named defendants—all claims concern the constitutionality of the Housing Court's policies and procedures").

To merit intervention as of right, a party's interest in the litigation must be "direct, as opposed to remote or contingent." *Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *28 (citations omitted). While a party seeking to intervene as a defendant need not establish standing, *Va. House of Delegates v. Bethune Hill*, 139 S. Ct. 1945, 1951 (2019), the "direct interest" requirement bears some similarity to the standing requirement of an injury-in-fact, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *cf. Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *28-30 (discussing facts, such as impact on the proposed intervenors' members and the diversion of resources, that would also support organizational and associational standing); *Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 87 (D. Conn. 2014) (citation and internal quotation marks omitted) ("The inquiry into impairment of interest looks to the practical disadvantage suffered . . . ."). Safe Horizon's interest in the litigation is substantial and buttresses its argument that it should be granted permission to intervene.

Safe Horizon has a strong connection to the Section 8 voucher program and the NYCHRL. Its Streetwork Project has served over 200 clients with Section 8 vouchers, and other Safe Horizon projects have helped their clients obtain vouchers. Vante Decl. paras. 5-6. Section 8 vouchers help the Streetwork Project fulfill its mission of connecting youth to safe and stable housing; however, its efforts are undermined when building owners and brokers refuse Section 8 vouchers or refuse to cooperate with Section 8 program requirements. *See id.* paras. 11-12. This discrimination against Section 8 voucher holders costs Safe Horizon money and resources, as it must pay more application fees for its Section 8 clients and provide more services to its clients, who remain homeless or unstably housed for longer periods (and may lose their vouchers). *Id.* paras. 10, 13.

Because the NYCHRL proscribes source of income discrimination against Section 8 voucher holders, NYC Admin. Code § 8-107(5)(a), Safe Horizon derives significant benefits from its protections: sharing information about the NYCHRL's prohibition on source of income discrimination is often enough to persuade owners and brokers and connect their clients with stable housing, and the NYCHRL provides recourse if the owner or broker continues to discriminate. Vante Decl. paras. 15-17. Safe Horizon has even been a plaintiff in a case brought pursuant to the NYCHRL that resulted in significant benefits for its clients. *Id.* para. 17.

If the NYCHRL's protections for Section 8 voucher holders were invalidated, Safe Horizon would encounter heightened challenges when seeking to connect youth to housing and would need to devote additional resources to helping its clients find and apply for housing and supporting them while they remained homeless. *Id.* paras. 12, 18; *cf. Centro de la Communidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (stating that an organization shows an injury-in-fact where a policy impedes its ability to carry out its

responsibilities); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (stating that a perceptible impairment of an organization's activities is an injury-in-fact). Safe Horizon's interest in preventing the harm that would result from the invalidation of the NYCHRL is just as direct and substantial as those presented by other successful intervenors.[1] *See, e.g.*, *Miller*, 832 F. Supp. at 671 ("[T]enants may face increased hardship as it becomes easier for landlords to evict tenants and harder for tenants to resist such actions. Therefore, Proposed Intervenors have a significant stake in the outcome of this lawsuit.").

Because Safe Horizon's interest in defending the NYCHRL is direct and substantial, the adequacy of the City's defense of the law should not block Safe Horizon's intervention request. *See id.* at 673-74 (granting intervention even when there was no indication that the government would not "vigorously defend" the case).

B. Safe Horizon will significantly contribute to the just and equitable adjudication of the validity of the NYCHRL's prohibition on source of income discrimination.

For permissive intervention, an important factor is "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Brennan*, 579 F.2d at 191-92 (citation and internal quotation marks omitted). "Courts have often specifically recognized the benefits of intervention by tenant groups whose viewpoint and knowledge of the underlying

[1] While an organization may have a substantial interest in defending a law because it advocated for its passage, this fact supports the organization's interest for a reason akin to associational standing: it shows that the interest the organization seeks to protect is "germane to the organization's purpose." *Cf. Irish Lesbian & Gay Org. v. Giuliani* 143 F.3d 638, 649 (2d Cir. 1998). An organization certainly does not need to have lobbied for a law to have a direct interest in defending it. As explained above, Safe Horizon's direct interest is in preventing harm to itself, akin to organizational standing, and is no different than that of any individual who seeks intervention.

circumstances would assist the court during the course of litigation." *335-7 LLC*, 2020 U.S. Dist. LEXIS 102425, at *9.

Safe Horizon's position is directly analogous to the tenant groups frequently permitted to intervene by courts in this District.[2] *See, e.g.*, *335-7 LLC*, 2020 U.S. Dist. LEXIS 102425; *Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577. Like those tenant groups, Safe Horizon has expertise in how the laws at issue and the Section 8 program actually work—in its case, gained from real-world experience working with its clients. *Cf. Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *32 ("[A]s explained by State Defendants during the Oral Argument, Proposed Intervenors 'have vast experience in the trenches in housing court' . . . . .").

Safe Horizon's Streetwork Project serves over 200 clients with Section 8 Emergency Housing Vouchers. Vante Decl. paras. 5, 8. It assists clients throughout the housing search and each step of the Section 8 subsidy approval process. *Id.* para. 8. Importantly, Safe Horizon has firsthand experience of how the NYCHRL's prohibition on source of income discrimination interacts with Section 8 program requirements. When Streetwork Project housing navigators encounter discrimination against Section 8 voucher holders, they invoke the NYCHRL and advocate for housing providers to comply. *Id.* paras. 11, 15-16. And Safe Horizon has brought a case pursuant to the NYCHRL involving alleged discrimination against Section 8 voucher holders that resulted in significant benefits for its Section 8 clients. *Id.* para. 17. Therefore, like the tenant groups, Safe Horizon's perspective is "unique" and "personal," and it has "specialized expertise and substantial familiarity" regarding both the Section 8 program and the NYCHRL's

[2] The tenant organizations' advocacy for the amendments to the Rent Stabilization Laws was one means by which they developed their "viewpoint and knowledge"; it was not the only basis for the courts' decision to permit intervention. *See, e.g.*, *335-7 LLC*, 2020 U.S. Dist. LEXIS 102425, at *8 (stating that proposed intervenors "closely serve tenants directly impacted by the RSL").

prohibition on source of income discrimination. *See Bldg. & Realty Inst.*, 2020 U.S. Dist. LEXIS 174577, at *33 (citations omitted).

Safe Horizon's contribution to this litigation would be "highly relevant" even though it involves a facial challenge. *See id.*; *Bldg. & Realty Inst. v. New York*, No. 19-CV-11285 (KMK); No. 20-CV-634 (KMK), 2021 U.S. Dist. LEXIS 174535, at *11 (S.D.N.Y. Sept. 14, 2021) ("BRI Plaintiffs request that this Court declare the HSTPA as facially unconstitutional and seek an injunction against its enforcement."). Facial challenges do not occur in a vacuum; the factual and legal context matters. This is particularly true for the Fourth Amendment. *See, e.g.*, *Patel v. City of Los Angeles*, 576 U.S. 409, 416 (2015) (stating that Fourth Amendment facial challenges are unlikely to succeed "when there is substantial ambiguity as to what conduct a statute authorizes." (citing *Sibron v. New York*, 392 U.S. 40, 59, 61, n. 20 (1968))). Due to the work of its housing navigators, Safe Horizon shares the vantage of Section 8 participants as they move through the voucher approval process, and its employees have firsthand knowledge of how the Section 8 program operates and how it interacts with the NYCHRL. Vante Decl. paras. 8, 15. This expertise is relevant to the Trust's claims that the interaction between the NYCHRL and the Section 8 program subjects it to unconstitutional searches and that the NYCRHL's source of income protections are preempted by federal law. ECF No. 21, Amended Complaint. Safe Horizon's unique perspective informs its proposed motion to dismiss, *see* Ex. A, and would aid the Court throughout this litigation.

CONCLUSION

For the foregoing reasons, the Court should grant Safe Horizon's motion to intervene.

Dated: April 15, 2024
New York, NY

Respectfully submitted,

By: /s/ Evan Henley

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

216 EAST 29th STREET TRUST, Plaintiff, v. CITY OF NEW YORK and NEW YORK CITY COMMISSION ON HUMAN RIGHTS, Defendants.	Case No. 24-cv-00595 (ER) **DECLARATION IN SUPPORT OF MOTION TO INTERVENE**

I, Sebastien Vante, hereby declare the following under the penalty of perjury:

1. I am the Associate Vice President of Streetwork Programs at Safe Horizon, Inc. and am fully familiar with the goals, activities, and history of the organization.
2. Safe Horizon, Inc. ("Safe Horizon") is a non-profit organization that serves under resourced and vulnerable New Yorkers, including those who are unsheltered, unstably housed, or homeless due to abuse, domestic violence, racism, and other forms of violence. It was founded in 1978.
3. Safe Horizon's Streetwork Project serves homeless, unsheltered, and unstably housed youth through the age of 25 by offering a variety of services, including counseling, food, hygiene items, clothing, public benefits assistance, legal assistance, and housing and shelter advocacy.
4. The Streetwork Project assists clients in crisis by offering two "drop-in" centers, on the Lower East Side and in Harlem, where youth receive emergency support. Drop-in centers offer food, showers, metro cards, personal hygiene items, clothes, space to rest, and other

essential items. Housing navigators also staff drop-in centers to assist clients in locating housing opportunities and moving through the housing application and move-in process.

5. Between 2021 and 2022, Safe Horizon's Streetwork Project helped nearly 300 of its 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. To date, over 200 of the Streetwork Project's clients have received a Section 8 voucher through the EHV program. All of the Streetwork Project's clients have EHVs administered by the New York City Housing Authority (NYCHA).
6. In addition, other Safe Horizon projects also helped their clients apply for and obtain EHVs.
7. Section 8 vouchers, including EHVs, must be used by deadlines set by NYCHA or another administering agency, or they expire. When a client's Section 8 voucher expires, there is a great risk that they will lose it permanently and will have no chance to obtain a replacement voucher.
8. 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 of our clients, the subsidy approval process. We are very familiar with the steps of the "lease-up" process for Section 8 vouchers.
9. We continue to assist clients with EHVs in their search for housing.
10. Safe Horizon also pays the rental application fee for clients who lack the funds to pay themselves. This fee is typically $20 per application, and some clients submit many applications.

11. Our housing navigators and other staff frequently encounter source of income discrimination against our 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. We have 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.
12. Source of income discrimination does not only harm our clients and undermine our mission to connect youth to safe and stable housing. It also drains our resources.
13. When our clients are rejected due to source of income discrimination and their applications are not seriously considered, we do not receive a refund of the application fee that we paid on their behalf. So, source of income discrimination results in us having to pay more application fees. Also, Safe Horizon provides other services to our homeless youth clients that require significant financial expenditures and staffing resources, including food, hygiene items, clothes, shelter, and transportation funds. When our clients are rejected due to source of income discrimination, they stay homeless longer, and their vouchers may expire and be permanently lost, and so we expend more resources to serve them.
14. While source of income discrimination remains a major issue, the prohibitions on source of income discrimination in the New York City Human Rights Law (NYCHRL) have had significant and concrete benefits for our clients.
15. For example, when we encounter source of income discrimination, we start by attempting to educate the landlord, broker, or management company that is discriminating. We frequently share 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.

16. If our initial attempts to educate and advocate do not work, we seek legal advice, provide relevant court decisions to the landlord's attorney, and enlist a lawyer's assistance in reaching out to the landlord, broker, or property manager to explain their legal obligations.

17. Additionally, last year, Safe Horizon and six of our EHV clients filed a lawsuit alleging source of income discrimination claims under the NYCHRL. This lawsuit[1] resulted in the clients being approved for apartments and an agreement to connect other Safe Horizon clients with future available apartments.

18. We and our clients feel the effects of source of income discrimination now. Based on our current experience, and our experience of what occurred before New York City prohibited source of income discrimination, we can confidently say what the result would be if refusing Section 8 vouchers became lawful. Our clients would be homeless for longer. The housing available to them would largely be in areas with few amenities, employment opportunities, and public infrastructure. Even more of our resources would be spent helping our clients find housing and supporting them while they remained homeless.

19. We respectfully request that the Court allow Safe Horizon to intervene in this action, as we and our clients are directly threatened by the Plaintiff's attempts to invalidate the NYCHRL's prohibition on refusing to rent to Section 8 voucher holders. We learned of this action in the past week and quickly took steps to intervene.

[1] *Safe Horizon Inc. et al. v. 3823 Carpenter Ave LLC et al.*, Index No. 450373/2023 (N.Y. Sup. Ct.).

20. For the reasons stated above, we believe that our participation in this case will bring a unique perspective to this litigation and contribute to the court's understanding of the issues involved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 13, 2024
New York, NY

SEBASTIEN VANTE

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

216 EAST 29TH STREET TRUST , Plaintiff, v. CITY OF NEW YORK, Defendant.	Case No. 1:24-cv-595 (ER)

NOTICE OF MOTION

Proposed Intervenor, Safe Horizon, Inc., by and through its undersigned counsel, hereby moves, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an Order dismissing the Amended Complaint for lack of standing and failure to state a claim.

The grounds for this motion are set forth in the accompanying memorandum of law.

Dated: April 15, 2024
New York, NY

Respectfully submitted,

By: /s/ Evan Henley

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CERTIFICATE OF SERVICE

I, Evan Henley, hereby certify that on April 15, 2024, I caused this Notice of Motion and attached Memorandum of Law to be filed on the Court's Electronic Case Filing system, which will provide electronic notice to all counsel of record.

/s/ Evan Henley
Evan Henley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

216 EAST 29TH STREET TRUST, Plaintiff, v. CITY OF NEW YORK, Defendant.	Case No. 1:24-cv-595 (ER)

MEMORANDUM OF LAW IN SUPPORT OF SAFE HORIZON, INC.'S MOTION TO DISMISS

Date: April 15, 2024

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PRELIMINARY STATEMENT

Plaintiff 216 East 29th Street Trust ("the Trust") brings a facial challenge to the New York City Human Rights Law's ("NYCHRL") source of income protections, alleging that participation in the Section 8 program compels building owners to waive their Fourth Amendment rights. It also argues that the NYCHRL is preempted by federal law.

The Trust does not have standing to bring this action. Its complaint rests on nothing more than speculative fear, as it fails to allege that it faces an actual or imminent warrantless search (or will at any time in the future). Moreover, its claims are baseless. New York City building owners who participate in the Section 8 program face no infringement of their Fourth Amendment rights, as they have the opportunity to seek "precompliance review" of any search before facing a penalty for failing to allow the search to proceed. A federal regulation establishes that anti-discrimination laws like the NYCHRL are not preempted, and every court to examine the issue has agreed. The Trust's claims should be dismissed.

BACKGROUND

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 exacerbated by COVID, 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 participants in the United States,[1] and over 240,000 in New York.[2] The New York City Housing Authority administers the largest Section 8 program in the country, with approximately 85,000 participants.[3] The New York City Department of Housing Preservation and Development[4] and New York State Homes and Community Renewal[5] 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.[6]

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 ensure that it

[1] U.S. Dep't Hous. & Urban Dev., *Housing Choice Voucher Data Dashboard*, https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/dashboard (summary page) (last accessed Mar. 30, 2024).
[2] *Id.* (filter by state, NY).
[3] New York City Hous. Auth., *About Section 8*, https://www.nyc.gov/site/nycha/section-8/about-section-8.page (last accessed Mar. 30, 2024).
[4] New York City Dep't Hous. Preservation & Dev., *About Section 8*, https://www.nyc.gov/site/hpd/services-and-information/about-section-8.page (last accessed Mar. 30, 2024) (stating that program has over 39,000 participants).
[5] New York State Homes & Cmty. Renewal, *Subsidy Services Bureau*, https://hcr.ny.gov/subsidy-service-bureau (last accessed Mar. 30, 2024).
[6] *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.

complies with Housing Quality Standards ("HQS"). *Id.* §§ 982.305,[7] .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." 24 C.F.R. § 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." ECF No. 21, Compl., Ex. A, part B, para. 11(a). It further states that the "PHA, HUD, and the Comptroller General of the United

[7] The Trust does not appear to challenge the NYCHRL to the extent that it requires this initial, pre-HAP contract inspection. *See* ECF No. 21, Amended Complaint para. 76.

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.* paras. 11(b)-(c).

B. The New York City Human Rights Law's Prohibition on Source of Income Discrimination

The NYCHRL prohibits various forms of discrimination in the rental housing market. NYC 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). Owners are required to bear the administrative burdens associated with accepting Section 8 vouchers. Allowing owners 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).

ARGUMENT

The Court should dismiss the Trust's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6). The Trust describes various federal regulations and provisions of the HAP contract, none of which authorizes a PHA to perform a search of an owner's private property or records without a warrant or subpoena. It does not allege that it faces or has faced a Section 8 inspection or search or that it faces or has faced any penalty for failing to consent to an inspection or search. It does not allege facts regarding even one instance where a PHA or HUD

sought to penalize an owner for failing to consent to a search, let alone allege facts regarding a PHA's or HUD's policies for conducting inspections and searches. Despite the complete lack of factual support, it then claims that participation in the Section 8 program would result in the compelled waiver of its constitutional rights. ECF No. 21 at 10, 12. The Trust's conjecture does not satisfy the constitutional requirement of an actual or imminent concrete and particularized injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and does not plausibly state a claim, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Additionally, there is no basis for its claim that the NYCHRL is preempted by federal law. *See, e.g.*, 24 C.F.R. § 982.53(d).

A. **The Trust does not have standing to bring its Fourth Amendment claims.**

A plaintiff must adequately plead that it meets all three requirements for constitutional standing, including that it suffered an "injury in fact" and that the injury is "fairly traceable" to the defendant's challenged conduct. *Rynasko v. New York Univ.*, 63 F.4th 186, 193 (2d Cir. 2023) (quoting *Lujan*, 504 U.S. at 560-61). "Injury in fact is the 'first and foremost' element of standing." *Id.* (quoting *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) (emphasis in original) (citation and internal quotation marks omitted).

The Trust alleges that the NYCHRL unconstitutionally impinges its Fourth Amendment rights. To have standing to bring Fourth Amendment claims in the inspection context, a "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 Flynn v. City of Lincoln Park*, No. 2:18-cv-12187, 2020 U.S. Dist. LEXIS 9433, at *13-20 (E.D. Mich. Jan. 21, 2020) (discussing similar

cases); *see also Patel v. City of Los Angeles*, 576 U.S. 409, 413-14 (2015) (stating that Los Angeles stipulated that the hotel owners had been "subjected to mandatory record inspections under the ordinance without consent or warrant").

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; *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 151 (E.D.N.Y. 2017). The Trust does not allege that an owner 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 v. Vill. of Evendale*, 906 F.3d 397, 402 (6th Cir. 2018)). Indeed, the Trust's allegations are even more speculative than those in the cited cases challenging inspection ordinances. It does not directly challenge HUD regulations governing inspections. Instead, it challenges the NYCHRL requirement that owners accept Section 8 vouchers because its signing of a HAP contract could subject it to future warrantless inspections. As explained in *Commission on Human Rights ex rel Watson v. PPC Residential*, this additional layer means that multiple events would need to occur before the Trust could be penalized for preventing an inspection. OATH Index Nos. 2245/19, 2246/19, 2023 N.Y. OATH LEXIS 342, at *12-13 (Sept. 11, 2023). Because the Trust has failed to allege any facts about an imminent inspection or penalty, it has not alleged that it faces a "certainly impending injury," and it fails to meet standing requirements. *Clapper*, 568 U.S. at 409.[8]

[8] For the same reasons, the Trust's claims are not ripe. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) ("Constitutional ripeness, in other words, is really just about the first *Lujan* factor—to say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury, if any, is not "actual or imminent," but instead "conjectural or hypothetical.").

B. **The Trust has failed to state a claim upon which relief can be granted.**

Assuming that the Trust's complaint satisfies standing requirements, the Court should dismiss its complaint for failing to state a claim. "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) (citation and internal quotation marks omitted). While courts must accept all factual statements as true and draw all reasonable inferences in a plaintiff's favor, conclusory statements do not suffice. *Iqbal*, 556 U.S. at 678; *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.

A facial challenge is a claim that "the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Put differently, a plaintiff must establish that "no set of circumstances exists under which the challenged act would be valid." *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 548 (2d Cir. 2023) (citation and internal quotation marks omitted). Even if the 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 *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Given that the NYCHRL does not itself require searches and also prohibits discrimination against users of other subsidy programs—including state and local programs that do not use Section 8's HAP contract, *see* NYC Admin. Code §§ 8-102, 8-107(5)(a)—the Trust's facial

challenge is meritless, *see Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) ("A 'facial challenge' to a statute considers only the text of the statute itself . . . ." (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11 (1988))). However, the Trust's Fourth Amendment claim is not really an "as applied" challenge related to its "particular circumstances," either. It has never signed a HAP contract, ECF No. 21 para. 72, and no Section 8 inspection of its property could occur. Therefore, the Trust does not and cannot plead that it faces or has faced an unreasonable search. *See Wilkinson v. Forst*, 832 F.2d 1330, 1338 (2d Cir. 1987) (stating that the test for reasonableness under the Fourth Amendment "'requires a balancing of the need for the particular search against the invasion of personal rights that the search entails'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979))); *Vonderhaar*, 906 F.3d at 401-02. The Trust's challenge to the NYCHRL's prohibition on source of income discrimination is really a facial challenge to the portions of the HAP contract and Section 8 regulations that relate to property and record inspections, and which are required by the NYCHRL. Its argument is that the NYCHRL results in the compelled waiver of its Fourth Amendment rights because, in the HAP contract, it gives consent to inspections that would otherwise be unconstitutional. Whether the Trust's Fourth Amendment claims are analyzed as facial or as applied challenges, they should be dismissed for failing to state a claim.

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*, 138 S. Ct. 2206, 2213-14 (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).

To prevail on a facial Fourth Amendment challenge in the 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 U.S. at 419, 421; *see also Weisenberg v. Town Bd. of Shelter Island*, 404 F. Supp. 3d 720, 724 (E.D.N.Y. 2019); *Sokolov v. Vill. of Freeport*, 420 N.E.2d 55, 56 (N.Y. 1981). 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)).

1. *The Trust fails to identify the policy it purports to challenge.*

The Trust is required to plead that "the law or policy at issue is unconstitutional in all its applications," *Bucklew*, 139 S. Ct. at 1127, but it has failed to allege any facts regarding what the relevant policies regarding property and records inspections actually are. Without delineating the policies at issue, the Trust cannot plausibly allege that there is no set of circumstances under which the policies would be valid. *See Cmty. Hous. Improvement Program*, 59 F.4th at 548.

Of course, the NYCHRL itself does not require or authorize a warrantless search. NYC Admin. Code § 8-107(5)(a). The HUD regulations discussed above do not mandate or authorize inspections or audits without a warrant or subpoena, nor do they establish penalties for the failure to consent to inspections. *See, e.g.*, 24 C.F.R. § 982.405. The only "facts" regarding inspections pleaded by the Trust are the contents of the HAP contract; the 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 . . . ," ECF No. 21 para. 42; *id.* Ex. A, part B, para. 11. Based solely on this paragraph, the Trust concludes that signing the HAP contract would serve as consent for Fourth Amendment purposes[9] and result in the compelled waiver of its Fourth Amendment right to be free from unreasonable searches. *Id.* paras. 42-46. What is missing from the complaint 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 an owner's private property. 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.*, NYC Charter § 398, administrative subpoenas, *e.g.*, *id.* § 803(f); N.Y. C.P.L.R. 2308(b), and contract enforcement actions, ECF No. 21, Ex. A, part B, para. 10(d). At minimum, there is substantial ambiguity about what conduct the HAP contract authorizes, meaning that the Trust cannot succeed on this facial challenge. *See Patel*, 576 U.S. at 416.

2. *The NYCHRL does not violate the Trust's Fourth Amendment rights.*

Assuming that the Court deems the terms of the HAP contract definite enough to analyze the Trust's Fourth Amendment challenge, the Trust's complaint still fails to state a plausible claim. Participation in the Section 8 program does not subject an owner to searches and penalties

[9] 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 F.3d 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 F.3d 418, 422 (2d Cir. 1995))).

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, an owner does not have a privacy interest in the rented premises or the common areas. A PHA in New York City 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 U.S. at 419.

a. The "consent" given in the HAP contract is congruent with constitutional limits, so there is no infringement of the Trust's Fourth Amendment rights.

The foundation for the Trust's claim is a 1981 New York Court of Appeals decision, *Sokolov v. Village of Freeport*, 420 N.E.2d 55. *See* ECF No. 21 para. 61. In *Sokolov*, the New York 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 obtaining 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),[10] *Sokolov*, 420 N.E.2d at 57 (citing *United States v. Chicago, M., S. P. & P. R. Co.*, 282 U.S. 311, 328-29 (1930)); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013)). When the unconstitutional condition automatically imposes a penalty or blocks

[10] The same day, the New York 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 v. Town of Babylon*, 53 N.Y.2d 687, 688 (N.Y. 1981). In *Pashcow*, there was no unconstitutional condition because the warrant option meant that a rental permit applicant's Fourth Amendment rights were respected.

someone from obtaining a benefit, courts will declare the law containing the condition unconstitutional and invalidate it.[11] *E.g.*, *Sokolov*, 420 N.E.2d at 59. 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 consent" to searches, because this would be an unconstitutional condition of obtaining the public housing benefit. *Cox v. Dawson*, No. 3:18-cv-578 (JBA), 2020 U.S. Dist. LEXIS 4826, at *17 (D. Conn. Jan. 10, 2020); *Gutierrez v. City of East Chicago*, No. 2:16-CV-111-JVB-PRC, 2016 U.S. Dist. LEXIS 138374, at *23-24 (N.D. Ind. Sept. 6, 2016).

This is not an unconstitutional condition claim. The Trust is not receiving a "benefit" from the government akin to a permit or employment. However, the same principles that animate the unconstitutional conditions doctrine influence courts' interpretations of government contracts. Notably, courts have held that 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 Alabama Bank, N.A. v. Donovan*, 692 F.2d 714, 719-20 (11th Cir. 1983); *United States v. Harris Methodist Ft. Worth*, 970 F.2d 94, 100-101 (5th Cir. 1992); *cf. Anobile*, 303 F.3d 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).[12]

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*,

[11] Assuming, of course, that the plaintiff has standing to bring the claim.
[12] *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 U.S. 624, 628 (1946) (stating that defense contractor agreed to permit inspection "in order to obtain the Government's business").

303 F.3d at 124. Therefore, were the question of the scope of the HAP contract's access provisions to come before a court, the court would find that the consent given in the HAP contract only extends to reasonable searches.[13] The rest of the court's analysis would depend on the particular facts of a given situation. So, there is no legal basis for the Trust to claim that the NYCHRL and HAP contract result in a compelled waiver of its constitutional rights. Moreover, as explained below, the Trust's consent is not needed for PHAs and HUD to conduct the inspections contemplated by the HAP contract.

b. Because the HAP contract is signed in conjunction with the lease, an 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 C.F.R. § 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 (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 owner does not have an expectation of privacy with respect to those areas, either, given that they form part of

[13] The reason that access terms are needed in the HAP contract, despite HUD 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.

the leased premises and tenants can access them. *See, e.g.*, *Holland*, 755 F.2d at 255.[14] 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 C.F.R. § 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 in New York City. *E.g.*, NYC 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,[15] it will proceed in the same way as these city agencies do and obtain a warrant for the inspection. *See, e.g.*, NYC Charter § 398; NYC Admin. Code § 27-2123(a); *see also See v. Seattle*, 387 U.S. 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."); *cf. Mamakos v. Town of Huntington*, 715 F. App'x 77, 79 (2d Cir. 2018) (unpublished opinion) ("In each case [that analyzed the constitutionality of a rental permit scheme], the dispositive factor was whether the ordinance requires either consent or a warrant before a search is conducted.").[16]

[14] This is a different question from whether tenants may have a reasonable expectation of privacy in some common areas, which form part of their homes. *United States v. Lewis*, 62 F.4th 733, 743-44 (2d Cir. 2023).

[15] 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 F.3d 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.

[16] If the Trust's complaint does challenge the initial Section 8 inspection, the agency's option to seek a warrant if the owner does not consent similarly satisfies constitutional requirements.

For these reasons, inspections of the premises under the HAP contract pose no constitutional concerns.

c. 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.[17] *Patel*, 576 U.S. at 421; *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967). In certain situations, like searches of nonpublic areas of a commercial enterprise, the government may need an administrative warrant.[18] *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 would suffice. *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 ("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, Section 8's regulatory scheme meets these requirements.

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.

[17] Of course, this assumes that no exception to the precompliance review requirement applies. *See, e.g.*, *Patel*, 576 U.S. at 418-19.
[18] An administrative warrant still requires probable cause, but the standard is relaxed compared to the criminal context. *See Camara*, 387 U.S. at 538.

E.g., NYC Charter § 398.[19] 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, 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); 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 and the Comptroller General may conduct audits and investigations and issue administrative subpoenas. 5 U.S.C. §§ 401, 402, 406(4); 31 U.S.C. § 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 . . . .").

Third, even if the PHA chose not to use any procedure outside those provided by the HAP contract itself, the owner is nonetheless afforded 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." *See* ECF No. 21, Ex. A, part B, para. 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.* para. 10(a)(1). In

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

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.* para. 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.* para. 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.[20] 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 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. 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

[20] 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 U.S. 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. *Cf. Wyman v. James*, 400 U.S. 309, 324-25 (1971) ("So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.").

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

For all of these reasons, the NYCHRL's requirement that an owner sign a HAP contract does not violate the Fourth Amendment.

3. *The NYCHRL's prohibition on source of income discrimination is not preempted by federal law.*

Courts have universally rejected the Trust's argument that the NYCHRL's prohibition on source of income discrimination is preempted by federal law. *See, e.g.*, *People v. Ivybrooke Equity Enters., LLC*, 107 N.Y.S.3d 248, 251 (N.Y. App. Div. 2019); *Tapia*, 915 N.Y.S.2d at 22; *Kosoglyadov v. 3130 Brighton Seventh, LLC*, 863 N.Y.S.2d 777, 779 (N.Y. App. Div. 2008); *see also Austin Apt. Ass'n*, 89 F. Supp. 3d at 895 (The "argument has been rejected by every court which has confronted it."). A federal regulation establishes that state and local laws that prohibit discrimination against Section 8 voucher holders, like the NYCHRL, are not preempted. 24 C.F.R. § 982.53(d).

Despite this overwhelming authority, the Trust argues that conflict preemption bars enforcement of the NYCHRL because federal regulations categorically exclude certain units[21] and owners from the program and because Congress intended the program to be voluntary. ECF No. 21 paras. 80-81. Both of these arguments are meritless.

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, 234-35 (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 (citation

[21] The Trust is wrong about some of the unit exclusions it cites; for example, there are separate regulations regarding the use of Section 8 vouchers in special housing types such as Single Room Occupancy (SRO) units, which have different HQS. *See* 24 C.F.R. §§ 982.601-.618.

and internal quotation marks omitted). The obstacle branch "precludes state law that poses an actual conflict with the overriding federal purpose and objective." *Id.* at 234-35. 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. In support of this claim, it cites various Section 8 regulations. But its citations miss the point. The NYCHRL prohibits discrimination against people because of their status as Section 8 voucher holders, including the refusal to comply with program requirements. *Cadet-Legros v. New York 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 not impossible to comply with the NYCHRL and the Section 8 regulations. If an owner or unit is categorically ineligible for the Section 8 program, with respect to that owner or unit, there would be no discriminatory intent. In such a case, the owner would not be refusing to rent to a Section 8 voucher holder; rather, the PHA would be unable to approve the rental because of an independent legal requirement that the PHA must follow.

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. The HUD regulation providing that the NYCHRL and similar laws are not preempted should be dispositive on this point. *See* 24 C.F.R. § 982.53(d). Moreover, 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 Figueroa*, 864 F.3d at 234-35, 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 885-86. Indeed, the Section 8

program consciously operates against the backdrop of state and local landlord-tenant law. *See Rosario v. Diagonal Realty LLC,* 872 N.E.2d 860, 864 (N.Y. 2007).

Therefore, the Court should also dismiss the Trust's preemption claims.

CONCLUSION

For the foregoing reasons, the Court should grant Safe Horizon's motion to dismiss the Trust's complaint.

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Respectfully submitted,

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