25-0465

United States Court of Appeals
for the Second Circuit

216 East 29th Street Trust,

Plaintiff-Appellant,

against

City of New York,

Defendant-Appellee,

[*caption continued on inside cover*]

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR CITY APPELLEE

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June 11, 2025

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[*continued caption*]

SAFE HORIZON, INC.,

Intervenor-Defendant-Appellee,

NEW YORK CITY COMMISSION ON HUMAN RIGHTS

Defendant.

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PRELIMINARY STATEMENT

After rejecting a prospective tenant on the basis that it "does not take housing vouchers," 216 East 29th Street Trust ("the Trust") brought this declaratory judgment action seeking to invalidate a New York City law—known as Local Law 10—that prohibits housing discrimination based on a prospective tenant's source of income. The Trust asserts that the law should be invalidated because if they accept federally funded Section 8 voucher receipts in an effort to avoid such discrimination, they must, under federal regulations, agree to allow administrative inspections of their rental units and business records. The U.S. District Court for the Southern District of New York (Ramos, J.) dismissed the Trust's amended complaint in its entirety based on the *Younger* abstention doctrine and for lack of standing and ripeness.

This Court should affirm. The Trust will have an ample opportunity to litigate its Fourth Amendment and preemption claims before an administrative tribunal and then in state court in connection with the pending civil enforcement proceeding that the New York City Commission on Human Rights (the "Commission") brought against it. The Trust lacks capacity to bring any claims, because it is not a legal entity. The Trust also lacks standing to bring its Fourth Amendment claim, and that claim is not ripe, because it is premised on hypothetical searches that

are not likely to happen. What's more, there is no basis for the Court to meaningfully assess the reasonableness of a hypothetical search without any concrete facts about its scope.

In the alternative, this Court could affirm dismissal on the merits because the Trust fails to state a claim under either of its two legal theories. The Trust's Fourth Amendment claim fails because the Trust lacks a reasonable expectation of privacy in apartments it has placed on the rental market and in its business records. And the availability of administrative search warrants in the event a landlord withholds consent fully addresses any supposed constitutional infirmity. Even if that were not the case, because the Trust is operating in a closely regulated industry in which expectations of privacy are at their nadir, a hypothetical warrantless inspection limited in scope by Section 8 regulations would survive Fourth Amendment scrutiny. The Trust's preemption argument is similarly meritless. Ample caselaw confirms that federal law does not conflict with or preempt local laws that prohibit source-of-income discrimination.

ISSUES PRESENTED

1. Did the district court correctly abstain from reaching arguments that the plaintiff can raise in pending civil enforcement

proceedings in an administrative tribunal and then in subsequent state court review?

2. Did the district court correctly find that the plaintiff lacks capacity to bring this suit and standing to challenge hypothetical inspections that may never occur?

3. If the Court reaches the merits for the first time on appeal, did the Trust fail to state a Fourth Amendment claim, where it does not have a reasonable expectation of privacy and multiple exceptions to the prohibition on warrantless inspections apply?

4. If the Court reaches the merits, did the Trust fail to state a preemption claim, where local and federal law work in harmony together to protect housing access for low-income New Yorkers?

STATEMENT OF THE CASE

A. The interplay between state and federal regulatory regimes designed to provide affordable housing options

1. State and local efforts to combat housing discrimination against people who rely on government rental assistance

New York City is in the midst of a housing crisis.[1] Roughly 120,000 people sleep in the City's homeless shelters and another 4,000 sleep on the streets.[2] With a vacancy rate of 1.4% (compared to 7.1% nationwide) and average monthly rents topping roughly $3,500 (the national average is $1,625), many thousands of low-income households are at risk of losing their housing.[3] "Nearly all low-income New Yorkers are rent-burdened, allocating more than 30% of their income towards rent," and as a consequence, "more New Yorkers are grappling with financial strain,

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[1] NYC HOUS. PRES. & DEV'T, *Press Release: New York City's Vacancy Rate Reaches Historic Low of 1.4 Percent, Demanding Urgent Action & New Affordable Housing* (Feb. 8, 2024), https://perma.cc/NMT9-ZD2Z.

[2] *Homeless Outreach Population Estimate 2024 Results*, NYC DEP'T OF SOCIAL SERVICES, https://perma.cc/2SVA-RJ78; Patrick Spauster, Adrian Nesta & Emma Whitford, *NYC Shelter Count*, CITY LIMITS (Jan 2025), https://perma.cc/BE9V-7HHN.

[3] *Quarterly Residential Vacancies and Homeownership, First Quarter 2025*, U.S. CENSUS BUREAU (Apr. 28, 2025), https://perma.cc/9VFF-TCDN; *New York City's Vacancy Rate Reaches Historic Low*, supra note 1*; Spotlight: New York City's Rental Housing Market*, NYC Comptroller Brad Lander (Jan. 17, 2024), https://perma.cc/9MRW-6KLX; *Rental market trends for United States of America*, REDFIN (May 9, 2025), https://redf.in/rSHSWR.

resulting in an alarming increase in missed rent payments and arrears."[4] "The consequences of this housing insecurity are wide-ranging, with economic, social, physical and mental health impacts."[5]

Government rental assistance is a powerful tool for providing stable housing for low-income families, the elderly, and individuals with disabilities and preventing homelessness.[6] By paying some or all of recipients' rent for market-rate apartments, housing voucher programs enable vulnerable individuals to obtain safe and stable housing without requiring the government to build and operate public housing.[7] Such programs offer a flexible solution that allows recipients to integrate into communities and live in privately-owned housing. The programs also provide landlords with a reliable source of monthly revenue paid directly by the government.

But housing assistance programs can only succeed if landlords actually rent apartments to tenants who rely on government assistance. To help ensure that housing assistance programs serve their fundamental

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[4] *New York City's Vacancy Rate Reaches Historic Low*, supra note 1.

[5] *New Yorkers in Need: The Housing Insecurity Crisis*, OFFICE OF N.Y.S. COMPTROLLER THOMAS P. DINAPOLI (Feb. 2024), https://perma.cc/34Q8-KFL5.

[6] *Spotlight: New York City's Rental Housing Market*, supra note 3.

[7] *Housing Choice Voucher Tenants: HCV Applicant and Tenant Resources*, U.S. DEP'T OF HOUS. AND URBAN DEV'T (HUD), https://perma.cc/2P6P-JPYQ.

purpose of helping low-income families secure stable housing, more than 100 jurisdictions have enacted laws prohibiting discrimination based on prospective tenants' reliance on government subsidies to pay their rent.[8]

In 2008, the City Council of the City of New York passed such a law. See N.Y.C. Local Law 10/2008; N.Y.C. Admin. Code § 8-107(5) ("Local Law 10"). The law, targeted by the Trust in this lawsuit, prohibits landlords from rejecting prospective tenants based on their "source of income." *Id.* Under this law, a landlord cannot discriminate against applicants based on their intent to use government assistance, including Section 8, to pay some or all of their rent. *Id*. The law helps low-income families in avoiding and exiting the City's overburdened shelter system and prevents landlords from raising pretextual objections actually grounded in race- or disability-based discrimination.

2. The federal Section 8 program

One form of housing assistance protected by Local Law 10 is the federal Housing Choice Voucher Program, commonly known as Section 8. The "central objective" of Section 8 is to "ai[d] low-income families in

[8] Antonia K. Fasanelli & Philip Tegeler, *Your Money's No Good Here: Combatting Source Of Income Discrimination In Housing*, 44 HUMAN RIGHTS 16, 17 (2019).

obtaining a decent place to live." *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008) (cleaned up); *see also* 42 U.S.C. § 1437f(a); 24 C.F.R. § 982.1. Under Section 8, the United States Department of Housing and Urban Development ("HUD") provides funding to local public housing authorities ("PHAs"), who administer the program. 24 C.F.R. § 982.1.

In New York City, three different PHAs administer Section 8: (1) the New York City Housing Authority (NYCHA); (2) the New York City Department of Housing Preservation and Development (HPD); and (3) the Subsidy Services Unit of the New York State Division of Housing and Community Renewal (DHCR).[9] While HPD administers a number of rental subsidy programs, the majority of rental assistance is provided through the Section 8 Housing Choice Voucher program, making up 80 percent of the rental assistance administered by HPD. In total, HPD serves over 39,000 households in all five boroughs.[10] NYCHA's Section 8 program is the largest in the country, with over 92,000 households participating.[11]

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[9] Gerald Lebovits, Sateesh Nori, & Jia Wang, *Section 8: New York's Legal Landscape*, 37-2 NYRPLJ 51 (Spring 2009).

[10] NYC HOUS. PRES. & DEV'T, *About Section 8*, https://perma.cc/MMT8-WMX9.

[11] NYC HOUS. AUTH., *Section 8 (HCV) Guide for Applicants and Tenants*, https://perma.cc/X2LW-TK8V.

Voucher recipients are tasked with locating housing for themselves, that must meet specified quality and rent standards. 24 C.F.R. § 982.1. When a voucher recipient signs a lease as a tenant, the landlord must enter into a Housing Assistance Payment ("HAP") contract with a PHA, in which the PHA agrees to pay some or all of the rent directly to the landlord on the tenant's behalf. 24 C.F.R. § 982.1. The tenant is responsible for paying the remainder of the rent. *See id*.

The HAP contract outlines the rental agreement's terms, including rental assistance payments and the parties' responsibilities. 24 C.F.R. § 982.451. Paragraph 11 of the contract provides that the owner must provide access to information "pertinent" to the HAP contract that the housing authority or HUD might "reasonably require" (A120). Additionally, the owner must provide the housing authority, HUD, and the federal Comptroller General access to the contract unit and premises, and to the owner's records "relevant to the HAP contract," including electronic records (*id*.).

Before a PHA can approve a tenant and landlord for participation in Section 8, the PHA must inspect the unit to confirm that it satisfies Section 8's Housing Quality Standards (HQS). 24 C.F.R. § 982.305(b). "The HQS requires that a prospective Section 8 registered apartment meet certain criteria, such as possessing a functioning smoke detector,

appliances in good condition, window guards, properly painted rooms, properly tiled floors, proper ventilation in the bathrooms, and the like." *In re Vanderveer Estates Holding, LLC*, 293 B.R. 560, 565 (Bankr. E.D.N.Y. 2003); 24 C.F.R. § 982.401(a)(2)(ii). Each unit must have a bathroom, 24 C.F.R. § 982.401(b), a kitchen with stove/range and refrigerator of appropriate size for a family, kitchen sink, countertop space and garbage cans, *id.* § 982.401(c), as well as a living room and at least one bedroom for every two people, *id.* § 982.401(d)(2)(i) and (ii), and fire exits, *id.* § 982.401(d)(2)(iii) (*see also* A224).

Nothing in the contract subjects a landlord to any immediate penalty for refusing an inspection or breaching the contract in another manner. Under paragraph 10 of the contract, if the landlord breaches any provision of the contract (including granting access or in connection with maintaining housing quality standards) the government has several options (A120). As relevant here, it can "seek and obtain additional relief by judicial order or action, including specific performance" in the event of a breach, or it can initiate the process to cancel the Section 8 contract after giving the landlord and tenant notice and following a set of administrative procedures (*id.*).

B. The Trust's allegations regarding its refusal to rent to Section 8 recipients, and the City's ongoing enforcement efforts against the Trust

The Trust, the sole plaintiff in this action, alleges that it owns a 48-unit apartment building on East 29th Street in Manhattan (A98; 167). In July 2023, Dmitri Derodel approached the Trust's property manager about renting an apartment in the Trust's building, disclosing that he would be using a housing voucher (A169). The property manager told Mr. Derodel that it did not accept housing vouchers (A108; *see also* A54 (property manager said, via email, "we do not accept vouchers")). Mr. Derodel reported this fact to the New York City Commission on Human Rights ("Commission"), which, in turn, informed the Trust's property manager that the refusal to rent to Mr. Derodel on that basis violated the City's anti-discrimination law (A108).

Allegedly in response to this "pressure" from the Commission, the Trust's property manager took some steps toward renting an apartment to Mr. Derodel, but the Trust—acting through its trustee—repeatedly refused to provide certain information in connection with the Section 8 registration form and declined to sign certain Section 8 forms (A108-09; A55).

On January 24, 2024, the Commission reminded the trustee that Mr. Derodel's Section 8 voucher was in jeopardy of cancellation if the

Trust did not submit the missing, required documentation by January 26 (A56; *see also* A42-43). The Commission warned that it would "proceed with filing a Verified Complaint" if the Trust did not complete the forms by the deadline (A56; *see also* A42). The Trust admits that it refused to sign the paperwork due to an intentional decision "not to participate in the voluntary Section 8 program" (A60).

On January 26—the deadline for the Trust to submit the necessary documentation and signatures—the Trust filed this lawsuit (A2). The Trust also moved for an *ex parte* temporary restraining order and preliminary injunction (A2-3, 48-50), which the district court denied on February 13 (A5).

In late January, exercising its statutory authority and governing rules, the Commission prepared an administrative complaint alleging housing discrimination by the Trust, the trustee, the Trust's property management company, and its agents (A56). On January 31, the Commission finalized the administrative complaint against the building owner and its agents and provided it to Mr. Derodel (*id.*). On February 5, 2024, Mr. Derodel filed the administrative complaint with the Commission by delivering the signed complaint to the Commission (A137). See 47 RCNY 1-11(d). The Commission then served the signed, filed complaint on the named respondents—i.e., the Trust, trustee, property

management company, and agents thereof—on February 14, 2024 (A57; 137). See 47 RCNY 1-04(i).

C. The district court's dismissal of the Trust's amended complaint for lack of subject matter jurisdiction

In April 2024, the Trust filed its amended complaint (A98-113).[12] The district court granted intervention to Safe Horizon, Inc., a non-profit organization that supports individuals in need of housing assistance (A7, A132-36). The City and Safe Horizon moved to dismiss the amended complaint, and the Trust cross-moved for summary judgment (A178).

The district court dismissed the Trust's amended complaint (A236-56). First, the court abstained in favor of the pending OATH administrative proceeding against the Trust under *Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (A247-51). The court rejected the Trust's argument that it was only raising a facial challenge, because its claim rests on specific facts extrinsic to the text of Local Law 10 (A250). The court also concluded that, even if it did not abstain, the Trust's claims are not ripe because there are several contingent future events that would have

[12] The Trust also named the Commission as a defendant, but dropped it in its amended complaint (A98).

to occur before the Trust could face any consequences for resisting a warrantless search (A251-52). The court also found that the Trust lacked standing, because it failed to plausibly suggest in its pleadings that it would suffer an actual or imminent injury as a result of Local Law 10, given that it does not face any impending search (A253-55). Because the court dismissed for lack of subject matter jurisdiction, it did not reach the merits of the City's and Safe Horizon's motions to dismiss (A255).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

On a *de novo* review, this Court should affirm the district court's dismissal of the Trust's claims for lack of subject matter jurisdiction *Disability Rights N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019) (legal determination of whether the requirements for abstention have been met is reviewed de novo). This Court should abstain in favor of the civil enforcement proceeding. Barring that, the Trust lacks legal capacity, and, as the district court correctly found, does not have an injury-in-fact or a ripe claim for review. The Trust's Fourth Amendment and preemption claims are also subject to dismissal on the merits.

First, the district court was right to abstain in favor of the Commission's OATH civil enforcement proceeding. The Trust incorrectly

argues on appeal that the abstention doctrine is inapplicable because the Trust only presses a facial challenge, but *Younger* applies regardless of whether the challenge is characterized as facial or as-applied, so long as the arguments can be adjudicated in the state proceeding. All of the Trust's legal arguments can be resolved in the Commission's ongoing enforcement proceedings and judicial review of any administrative determination. And the Trust's characterization of its claim as only facial is not correct because its theory—that the law is unlawful as it applies to one particular situation—is a quintessential as-applied claim.

Second, although the district court did not reach this point, the Trust lacks capacity to bring this suit because a trust is a legal fiction; the claims belong to the trustee, who is not a named plaintiff in this case. Moreover, the district court correctly found that the Trust's as-applied Fourth Amendment challenge is not ripe and that the Trust lacks standing to bring it. No agency has sought to conduct a warrantless inspection of any of the Trust's properties. Many contingent events would have to occur before the Trust faces any realistic prospect of an administrative inspection, and even more steps stand between the hypothetical attempted inspection and the Trust being subject to any penalties for refusing. Thus, its Fourth Amendment claim is not ripe because it hinges on hypothetical future events that may never occur.

Third, if this Court is to reach the merits, the Trust's Fourth Amendment challenge fails for multiple overlapping reasons. The Trust lacks a reasonable expectation of privacy in the rental apartments it has placed on the market or in business records reflecting transactions with third parties. An administrative inspection under the HAP contract would be reasonable—and thus lawful—notwithstanding any minimal expectation of privacy that the Trust might have, given the availability of precompliance review. If the Trust does not consent to a hypothetical future inspection, the inspector can obtain an administrative warrant—a fact that fully resolves its Fourth Amendment claim. Moreover, there is an exception to the warrant requirement for administrative inspections in closely regulated industries, such as the residential real estate industry in New York City, that also applies.

Finally, on the merits of the preemption issue, the Trust has not overcome the presumption against preemption of core matters of local concern. The federal Section 8 law does not preempt anti-discrimination laws like the City's, as numerous courts have concluded, because the schemes are complimentary. Indeed, HUD has adopted a regulation expressly confirming this. The Trust's preemption claim is a nonstarter.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY ABSTAINED FROM ADDRESSING THE TRUST'S CLAIMS IN FAVOR OF THE ONGOING STATE PROCEEDING

A. *Younger* applies because the Commission is pursuing civil enforcement against the Trust.

The district court correctly found that the *Younger* abstention doctrine required it to abstain from reaching the merits of the Trust's Fourth Amendment and preemption challenges while a state administrative court is hearing a pending enforcement proceeding against the Trust for violating Local Law 10 (A247-51). Although federal courts are generally obliged to decide all cases within the scope of their jurisdiction, there are occasions when "the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). The *Younger* abstention doctrine reflects a longstanding public policy that is grounded in principles of federalism and comity—"that is, a proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 43, 44 (1971). It applies to civil enforcement proceedings. *Sprint*, 571 U.S. at 72-73, 79. In deciding whether to abstain, federal courts consider three "non-dispositive factors," all of

which counsel in favor of abstention here. *Lowell v. Vermont Dep't of Children & Families*, 835 F. App'x 637, 639 (2d Cir 2020) (cleaned up).

First, courts consider whether there is a pending and ongoing state proceeding in favor of which the federal court should abstain. *Id.* Here, the Trust does not dispute that the pending civil enforcement action that was initiated by the Commission and commenced by the prospective tenant who the Trust turned away is precisely the sort of pending civil enforcement proceeding that triggers federal abstention. The Commission's action was "pending" for purposes of *Younger* abstention because, although it was formally commenced a few days after the Trust filed its federal complaint, the enforcement action was "commenced before any proceedings of substance on the merits have taken place in the federal court" or while the federal litigation was still "in an embryonic stage and no contested matter has been decided." *For Your Eyes Alone, Inc v. City of Columbus*, 281 F.3d 1209, 1217-18 (11th Cir. 2002); *see also Aaron v. Target Corp.*, 357 F.3d 768, 775 (8th Cir. 2004); *Crazy Eddie, Inc. v. Cotter*, 666 F. Supp 503, 512-13 (S.D.N.Y. 1987).

Second, courts consider whether the state proceeding "implicates an important state interest," *Lowell*, 835 F. App'x at 639. (2d Cir 2020) (cleaned up). The purpose of the source-of-income antidiscrimination law is to prevent homelessness and discrimination. There can be no

doubt that both are "sufficiently important state interest[s] to justify *Younger* abstention." *Univ. Club v. New York*, 842 F2d 37, 40 (2d Cir 1988) (cleaned up) (eliminating discrimination is a state interest).

Finally, courts consider whether the state proceeding "affords an adequate opportunity for judicial review of federal constitutional claims." *Lowell*, 835 F. App'x at 639 (cleaned up). An "adequate opportunity to raise constitutional claims does not have to include the opportunity to raise them before the administrative tribunal; subsequent judicial review is sufficient." *Univ. Club*, 842 F.2d at 40-41. The proceeding—currently pending before OATH with judicial review available under Article 78 of the New York Civil Practice Law and Rules—provides an adequate opportunity for review all of the Trust's federal challenges to Local Law 10.[13]

B. The Trust is incorrect that *Younger* does not apply to facial challenges, and in any event, it brings an as-applied challenge.

The Trust concedes, as it must, that the Commission's civil enforcement action triggers *Younger* abstention and bars federal court

[13] OATH hears constitutional and preemption challenges. *See*, *e.g.*, *Comm'n on Human Rights ex rel. Shmushkina v. New Brooklyn Realty*, OATH Index Nos. 2541/08, 2542/08, 2543/08, Memorandum Decision (Jan. 2, 2009), https://archive.citylaw.org/wp-content/uploads/sites/17/oath/08_Cases/08-2541md.pdf.

adjudication of its as-applied claims. The Trust mistakenly argues that *Younger* abstention does not bar this Court from resolving its purported facial challenges (App. Br. 24-27). But *Younger* does not distinguish on these grounds; the Court should abstain from reaching any of its claims. In any event, the Trust's Fourth Amendment claim is best viewed as an as-applied challenge.

1. *Younger* applies to facial challenges.

The Trust wrongly argues that *Younger* abstention does not apply to facial challenges, relying on *University Club*, 842 F.2d 37 (App. Br. 20, 24). But that reliance is misplaced because there is no prohibition on dismissing facial challenges under *Younger*. *See Lawson v. City of Buffalo*, 52 F. App'x 562, 563 (2d Cir. 2002) ("Although not specifically addressed by the district court, it was also proper to dismiss the [plaintiff's] facial challenge … on *Younger* grounds).[14]

In *University Club*, this Court surveyed New York procedural law and found that "constitutional claims arising from the *application* of a statute may be raised in an Article 78 petition." 842 F.2d at 40-41. Thus,

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[14] Circuits across the country are in accord. *Greco v Bruck*, No. 21-1035, 2022 U.S. App. LEXIS 13074, at *12 (3d Cir. May 13, 2022) (unpublished) (finding that there is no "exception to *Younger* abstention" for "facial challenges to the constitutionality of a state law"); *San Jose Silicon Val. Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1094-95 (9th Cir. 2008) (same); *Norfolk S. Ry. Co. v. McGraw*, 71 F. App'x 967, 971-72 (4th Cir 2003) (same).

this Court concluded that "there can be no question that adequate judicial review is available in New York for [the plaintiff] to assert its as-applied constitutional claims," and applied *Younger* abstention. From this, the Trust mistakenly argues that the inverse is true: that a facial challenge to a legislative enactment cannot be raised on appeal from state administrative proceedings (App. Br. 20). But, in *University Club*, this Court had no occasion to reach that question because the plaintiff there "stresse[d]" that it was raising only an as-applied and not facial challenge. 842 F.2d at 40.

The Court observed in passing in *University Club* that "constitutional challenges to legislative enactments may not be raised in an Article 78 proceeding to review an administrative action." *Id.* While it is technically correct that an Article 78 is not the right vehicle for raising affirmative claims seeking relief based on the asserted facial invalidity of a statute, state courts can—and routinely do—declare statutes invalid when reviewing administrative actions. *E.g.*, *Matter of MHC Greenwood Vil. NY, LLC v. Cnty. of Suffolk*, 58 A.D.3d 735, 735 (2d Dep't 2009) (declaring Suffolk County's Local Law 1534 (2006) partially

invalid in hybrid proceeding seeking to enjoin its enforcement against retirement community).[15]

Under settled New York Law, if a petitioner in an Article 78 proceeding seeks "to raise a facial challenge to the constitutionality of a regulation," the court "will convert the matter to a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment" to allow full review. *Matter of Carney v. N.Y. State Dep't of Motor Vehs.*, 133 A.D.3d 1150, 1151, n* (3d Dep't 2015); *see also Tamagni v. Tax Appeals Trib.*, 91 N.Y.2d 530, 534 (1998) (affirming, where lower court "partially convert[ed] the proceeding to a declaratory judgment action" to address Article 78 petitioners' claim that the law was unconstitutional "both facially and as applied to them"). And a party can always interpose a claim about the facial invalidity of a pertinent statute as a defense to an enforcement action in an Article 78 proceeding. *E.g.*, *Junk'n Doughnuts Inc. v. Dep't of Consumer Affairs of the City of N.Y.*, 49 A.D.3d 464, 464-65 (1st Dep't 2008) (finding plaintiff, who'd been issued violations for operating as an unlicensed secondhand dealer, should have raised

[15] *See also Matter of Rochester City Sch. Dist. v. City of Rochester*, 175 A.D.3d 1775, 1776 (4th Dep't 2019) (invaliding Rochester's Local Law 4 (2019) relating to charter schools in hybrid article 78 proceeding and declaratory judgment action); *Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park*, 152 AD3d 1234, 1235 (4th Dep't 2017) (invalidating Orchard Park's Local Law 9 (2014) relating to drive-through restaurants in hybrid proceeding).

alleged constitutional infirmity of the statute as a defense in his Article 78 proceeding following administrative enforcement).

Because the Trust will have the opportunity to raise the alleged facial invalidity of Local Law 10 in its civil enforcement proceeding in state courts, the district court providently dismissed the Trust's amended complaint under *Younger*. *See Helms Realty Corp. v. City of N.Y.*, 820 F. App'x 79, 81 (2d Cir. 2020) (applying *Younger* abstention, where plaintiff sought a declaration that short-term-rental law was invalid, because "[w]hatever constitutional claims [landlord] raised … may be decided first in the state court [civil enforcement] proceedings"); *see also HSBC Bank USA v. N.Y. City Comm'n on Human Rights*, 673 F. Supp. 2d 210, 215-16 (S.D.N.Y. 2009) (abstaining under *Younger* from reaching preemption arguments, where the Commission was enforcing its antidiscrimination law before OATH).

2. The Trust's theory is best characterized as an as-applied challenge.

Because *Younger* abstention applies to both facial and as-applied constitutional challenges, the Trust's insistence that it has raised a facial challenge is a red herring. But in any event, the Trust also mischaracterizes its claim as a facial challenge, when it is plainly an as-applied challenge. The Trust does not seek to invalidate the text of Local Law 10, in

whole or in part. The law does not, directly or indirectly, require that landlords submit to unreasonable, warrantless searches. Rather, the Trust challenges the law only as it applies to the Trust's particular situation involving a prospective tenant with a Section 8 voucher, and only because of the current terms of the federal HAP contract—a quintessential as-applied theory.

A facial challenge "considers only the text of the statute itself, not its application to the particular circumstances of an individual," while an as-applied challenge "requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). The Trust admits that nothing in the text of Local Law 10, on its own, is unlawful. The law does not speak about searches or seizures. It simply makes it an "unlawful discriminatory practice" to refuse to rent an apartment to a prospective tenant on the basis of, among other things, "any lawful source of income." N.Y.C. Admin. Code § 8-107(5)(a)(1)(a). Nothing about this law, on its face, implicates the Fourth Amendment.

The Trust argues that it is the interplay between Local Law 10 and the HAP contract that it seeks to challenge (App. Br. 24). But that is

simply another way of saying that it is challenging the application of Local Law 10 to one particular set of facts (that is, as it applies to prospective tenants using Section 8 vouchers and only insofar as the federal government current HAP contract provides for inspections). But "[a] facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015).

Moreover, by admitting that there are lawful applications of Local Law 10 beyond the single set of circumstances it sets its sights on, the Trust effectively concedes that it could not bring a meritorious facial challenge. There's no dispute that Local Law 10 lawfully prohibits landlords from engaging in source-of-income discrimination outside the context of Section 8 vouchers (A140). And, even as to Section 8 specifically, there is nothing inherent in Section 8 that requires inspections; that requirement comes from the current version of the HAP contract that HUD uses to implement Section 8. Inspections are neither addressed by the text of Local Law 10 nor inherent in Section 8 as a matter of federal statutory law.

For all of these reasons, the Trust's Fourth Amendment contentions do not frame a facial challenge to Local Law 10. "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019).

Such an attack requires a plaintiff to "establish that no set of circumstances exists under which the [challenged] Act would be valid," and is considered "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008). The Trust's admission that there are lawful applications of Local Law 10 defeats its assertion that it brings only a facial challenge, because such a challenge would be doomed from the start.

The Trust mistakenly argues that, after the Supreme Court's discussion in *Patel*, a plaintiff can lodge a facial challenge to attack a law only as it applies to a subset of individuals "for whom the law is a restriction" (App. Br. 25-26 (cleaned up)). But in *Community Housing Improvement Program v. City of New York*, this Court rejected this exact argument, holding that "[a] close reading of *Patel* makes clear that, when the Supreme Court referenced 'the group for whom the law is a restriction,' it meant those to whom the law *actually applies*, not those for whom it has no plausible application—that is, those for whom the law is 'irrelevant.'" 59 F.4th 540, 548-49 (2d Cir. 2023) (quoting *Patel*, 576 U.S. at 418). Thus, *Patel* does not alter the longstanding rule that a plaintiff bringing a facial challenge must establish "unconstitutionality

in all applications of the statute *in which it actually authorizes or prohibits conduct*." *Id.* at 549 (cleaned up).

The mere fact that other landlords in the exact same position as the Trust would be able to make the same arguments does not make it a facial challenge. Even if Local Law 10 "might operate unconstitutionally under some conceivable set of circumstances," this would be "insufficient to render it wholly invalid," *Salerno*, 481 U.S. at 745 (cleaned up), because there is no dispute that it "*actually applies*" to other voucher programs and lawfully prohibits discrimination on the basis of those other vouchers, *Community Hous.*, 59 F.4th at 549.

As yet more proof that the Trust's challenge is as-applied, the Trust's theory of unconstitutionality hinges on acts of non-parties that are outside of the City's control and subject to change at a federal agency's whim. The Trust's theory depends on the present workings of the Section 8 program and the content of the current HAP contract. The federal government could change the language in its HAP contract tomorrow, eliminating the factual predicate for the Trust's challenge. *See Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 301 (2d Cir. 1998) (Section 8 amendments "have been effected on a yearly basis," there has been a downward "trajectory of regulation," and the future trajectory of regulation cannot be predicted). By definition, Local Law 10

cannot be struck down "on its face" on the Trust's theory. The Trust thus has advanced an as-applied challenge—a type of challenge that it admits is barred by *Younger*.

POINT II

THE TRUST LACKS BOTH LEGAL CAPACITY TO BRING ITS CLAIMS AND LACKS STANDING TO BRING ITS FOURTH AMENDMENT CLAIM

To the extent it does not abstain, the Court should affirm the dismissal of the Trust's claims because the Trust lacks legal capacity to bring suit. The Trust also cannot satisfy the requirements of standing and ripeness under Article III for purposes of its Fourth Amendment claim.

A. The Trust lacks legal capacity to bring a lawsuit.

Although the district court did not reach it, as the City argued below, the Trust lacks legal capacity to assert any claims (S.D.N.Y. Case No. 24-cv-00595, Dkt. No. 28-1 at 18). Under New York law, a trust is not a formal legal entity capable of suing or being sued. *See, e.g.*, N.Y. Gen. Const. L. § 37 (definition of "person" includes corporations but not trusts). Rather, a trust is a contractual arrangement under which trustees hold and administer property on behalf of the trust's beneficiaries.

See Revitalizing Auto Cmtys. Env't Response Trust v. Nat'l Grid USA, 10 F.4th 87, 98 (2d Cir. 2021) (citing *Ronald Henry Land Trust v. Sasmor*, 44 Misc. 3d 51 (N.Y. App. Term 2014)); *Orentreich v. Prudential Ins. Co. of Am.*, 275 A.D.2d 685, 685 (1st Dep't 2000) (affirming dismissal, "since the policies in question are owned by a trust, only the trustee, who was not named as a plaintiff in that capacity, may seek their rescission"); *see also* 76 Am Jur 2d Trusts § 601 ("a trust cannot sue or be sued because it is not a juristic person").[16] Trusts have no legal capacity to assert rights in court. And this lack of capacity, alone, is a sufficient basis to affirm the district court's decision to dismiss the Trust's claims for lack of standing. *Orentreich*, 275 A.D.2d at 685.

Moreover, as a mere contractual relationship without a legal identity, the Trust has no protected Fourth Amendment rights. Below, the Trust conceded as much (A139-45). The trustee—who is not a party to this litigation—admitted that the "[t]he Fourth Amendment rights at issue in this litigation are, in reality, mine as trustee and my sister's as beneficiary of the Trust" (A139). But the Trust cited no legal basis for a

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[16] "Traditionally, a trust was not considered a distinct legal entity, but a fiduciary relationship between multiple people" and "not a thing that could be haled into court; legal proceedings involving a trust were brought by or against the trustees in their own name." *Americold Realty Trust v. ConAgra Foods, Inc.*, 577 U.S. 378, 383 (2016); *see also Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 722 (2d Cir. 2017) (for purposes of diversity jurisdiction, claims by or against "traditional trusts are effectively brought by or against their trustees").

New York trust to sue on behalf of its trustee or beneficiary; and precedent directly on points holds that it cannot. *E.g.*, *Revitalizing Auto Cmtys.*, 10 F.4th at 98. Thus, the Trust—the only plaintiff in this litigation—is not a legal entity and not capable of enjoying Fourth Amendment rights.

B. The Trust does not have standing to bring its Fourth Amendment claim because it has not suffered an injury-in-fact and its claim is not ripe.

Aside from the Trust's lack of capacity to sue, it also failed to plead facts supporting an inference that it has standing to bring its Fourth Amendment claim and that this claim is ripe. The Trust speculates that signing a HAP contract to comply with Local Law 10 might end with the government searching its apartments or corporate records, but these fears are not concrete enough to constitute an injury or to present a live controversy. The only part of the Trust's claim that is not attenuated is that the Trust is required to sign the HAP contract, but merely signing does not pose a concrete Fourth Amendment injury.

A foundational principle of Article III is that federal courts cannot give advisory opinions and must weigh in only on live cases or controversies. *Trump v. New York*, 592 U.S. 125, 131 (2020) (per curiam). Two related justiciability principles are at play here: standing and

ripeness. Standing requires the plaintiff to have a concrete stake in the outcome of the case, by showing, among other things, an injury-in-fact, which is an "invasion of a legally protected interest" that is "actual," "imminent," "concrete and particularized," and "not conjectural or hypothetical." *Spokeo, Inc. v Robins*, 578 U.S. 330, 339 (2016). A threatened injury is imminent when it is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[A]llegations of possible future injury" are not enough. *Id.*

Ripeness is a related concept that prevents courts "from entangling themselves in abstract disagreements" by adjudicating disputes too early. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). Courts must wait until the facts present "a real, substantial controversy, not a mere hypothetical question." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (cleaned up). "A claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (cleaned up). Ripeness and standing doctrines overlap in the requirement that the injury alleged must be "actual and imminent," and "[o]ften, the best way to think of constitutional ripeness is as a specific application of the actual injury aspect of Article III standing." *Id.* at 688-89 & n.6; *see also N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 n.8 (2d Cir. 2008).

The Trust has failed to plead an injury-in-fact, because it does not face any imminent unlawful searches of its physical premises or books or accounts. It does not allege in its pleadings that there has been a single instance of a City housing agency *ever* invoking the terms of a HAP contract to search any apartment unit or any corporate records over a landlord's objection in connection with a Section 8 housing voucher.[17] The amended complaint does not state that the Trust's building or records *will* be searched; the Trust's sole objection is that signing the HAP contract "would waive" its rights in the abstract (A109). The pleadings reveal that it faces no realistic prospect of suffering any concrete injury.

The conclusory statements made in the trustee's and beneficiary's declarations and reply declarations in support of the Trust's motion for summary judgment cannot save its pleadings (A139-44, 152-56, 232-35). The trustee predicts that the HAP contract's access clauses "would undoubtedly be used" by the government to access Trust property, that "such consent would be interpreted as broadly as written," and that "[i]nspectors are likely to review every single record and search every

[17] Applicable laws allow the government to obtain a warrant or subpoena if the Trust declines an inspection of the Trust's property or records. These include the City's warrant laws, the Department of Investigation's subpoena powers, the federal government's subpoena powers, and judicial proceedings under the HAP contract. See, e.g., NYC Admin. Code § 27-2123(a); NYC Charter §§ 398, 803(b), (f); N.Y. C.P.L.R. 2308(b); 5 U.S.C. § 406(a)(4); 31 U.S.C. § 716(c)(1).

corner of facilities to determine whether the items they are reviewing are relevant to the goals of their inspection" (A142-43). He suggests that signing the HAP contract is the same thing as "handing the government a general warrant" (A232). But speculative allegations like this that are "wholly conclusory and unsupported by any facts" cannot support standing. *Treiber v. Aspen Dental Mgmt.*, 635 F. App'x 1, 3 (2d Cir 2016). The Trust's hypothetical fear of possible searches in the future is not enough. *Wirth v. City of Rochester*, No. 17-CV-6347-FPG, 2020 US Dist LEXIS 180289, at *13 (W.D.N.Y. Sep. 30, 2020) (finding no standing where there was no "evidence that a landlord or tenant in the City has ever acquiesced to a warrantless inspection due to a threat of penalty; or that the City has ever conducted an inspection without obtaining a warrant where consent was not given").

Nor is the Trust's claim ripe. At best, its theory rests on the following series of contingencies. It argues that if it is required to sign a HAP contract as part of renting out a unit to a Section 8 voucher holder, a housing agency could possibly invoke the HAP contract later to seek warrantless access to the Trust's property or records to confirm that the apartment complies with Section 8's program requirements. At that point, the Trust might refuse access and, rather than pursue an administrative warrant quieting any Fourth Amendment objections, the

housing agency may cancel the voucher and turn the case over to the Commission. The Commission might then, after an investigation into the specific facts to determine whether the refusal to allow an inspection was motivated by discrimination, lodge a discrimination complaint. The Trust would then have to lose in the administrative court and lose again during any judicial review, before it would finally be subject to penalties for refusing to allow the search. But these "contingent future events" may never happen, and the only thing on the table as of yet is signing the contract. *Nat'l Org. for Marriage*, 714 F.3d at 687 (cleaned up).

Recognizing that any claim challenging a possible future inspection is premature, the Trust urges that the relevant injury is signing the contract (App. Br. 33). But signing a HAP contract is a prototypical abstract, hypothetical injury.[18] "[T]he Supreme Court has long expressed

[18] The Trust does not rely on *Stavrianoudakis v. U.S. Fish & Wildlife Serv.*, 108 F.4th 1128, 1138 (9th Cir 2024), which found in favor of putative licensees required to give a blanket waiver of their Fourth Amendment rights to obtain a falconry license. The Ninth Circuit rejected the government's arguments that the plaintiffs "surrender nothing unless and until an unlawful inspection occurs" and that a blanket waiver of rights was "in fact, entirely superfluous." *Id.* But the plaintiffs there were required to consent to "unannounced, warrantless inspections without any consideration of [their] reasonableness." *Id.* There was no ambiguity about the scope of the consent, as the challenge was lodged directly at the text of the licensing law. Here, by contrast, the Trust's claim focuses on a contractual provision, and paragraph 11 of the HAP contract is not a broad waiver of Fourth Amendment rights. Rather, its purpose is to specifically limit the scope of administrative inspections under the federal scheme to those areas and records that are relevant to Section 8 tenancy and to outline the landlord's obligations that can be remedied by a suit for breach of contract. Moreover, all Local Law 10 does is prohibit discrimination, not mandate a broad blanket waiver of all Fourth Amendment rights.

a preference for case-by-case analysis in the Fourth Amendment context." *United States v. Lewis*, 62 F.4th 733, 743 (2d Cir. 2023) (cleaned up). If the Trust ever faces even a remotely realistic prospect of a warrantless search, at that point, it can object to the scope of the search or on the grounds that its consent was not effective. *See Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2001) (refusing to construe plaintiffs' blanket waiver of its right to object to searches as "effective consent" where the specific search the government tried to perform was unreasonable). But the Trust's claim is not ripe where "it is not entirely clear that the [searches that the Trust] fears will actually occur." *Lacewell v. Off. of the Comptroller of the Currency*, 999 F.3d 130, 144-45 (2d Cir. 2021) (fear of "possible" future events too speculative to support standing and renders claim unripe). At bottom, the Trust has failed to allege any scenario under which a warrantless government search is "certainly impending." *Clapper*, 568 U.S. at 409.

Indeed, every case the Trust cites involved concrete, non-hypothetical attempts to search specific property with an actual looming threat that the individuals would be punished if they did not give consent (App. Br. 28-33). For instance, in *Camara v. Municipal Court of San Francisco*, the occupant of an apartment was actually arrested for refusing entry to a government official without a warrant. 387 U.S. 523

(1967). In *Patel*, the parties stipulated that motel operators had been "subjected to mandatory record inspections under the ordinance without consent or a warrant," and could be "arrested on the spot" if they refused. 576 US 409, 414, 421 (2015). And in *Sokolov v Village of Freeport*, the challenged inspection had to occur before a permit allowing the owner to rent out the unit could issue and renting a unit without an inspection subjected landlords to a fine of $ 250 per day—meaning either a search or consequence would occur. 52 N.Y.2d 341, 344 (1981). Here, by contrast, the searches that the Trust fears are entirely hypothetical. Because the Trust hasn't plausibly pled any actual or imminent Fourth Amendment injury, it lacks standing to pursue its unripe claim based on searches that are nowhere on the horizon.

POINT III

THE TRUST'S FOURTH AMENDMENT CLAIM ALSO FAILS ON THE MERITS

Although the district court correctly granted dismissal without reaching the City's merits arguments, the Trust's Fourth Amendment claim is subject to dismissal on the merits too. Whether properly characterized as a facial or an as-applied challenge, the Trust fails to plausibly allege a Fourth Amendment violation.

At the threshold, as explained above (*supra* Point I.B.2), the Trust purports to bring only a facial Fourth Amendment claim, but it concedes that nothing on the face of Local Law 10 requires landlords to submit to searches and that it is not unlawful in every application, defeating that claim as a matter of law. *Salerno*, 481 U.S. at 745.

Relatedly, the Trust's bid to facially invalidate the City's regulatory scheme to the extent it mandates signing a HAP contract is not a remedy available to it, given its heavily fact-dependent theory. In advancing that argument, the Trust misrepresents *Anobile* as "essentially invalidating the statute requiring the waiver" (App. Br. 37). To the contrary, the Court expressly upheld the licensing scheme that allowed for administrative searches of horse-racing related facilities, but held that, in an as-applied challenge, the licensing scheme's blanket consent to searches did not extend to employees' dormitories. *Anobile*, 303 F.3d at 110. Even if the Trust were right that the interplay between Local Law 10 and the HAP contract requires them to consent in advance to unlawful inspections, the remedy would not be to prospectively invalidate part or all of the legislative scheme. Rather, as *Anobile* illustrates, the right approach would be to find that their consent is ineffective to the extent an inspector attempts to invoke it to perform an unlawful administrative search. *Id*. Put differently, *Anobile* demonstrates that it is not the giving

of consent that's problematic, but a subsequent unreasonable search. The Trust's request for sweeping relief only reinforces that it has not stated a cognizable Fourth Amendment injury.

Putting to one side the Trust's failure to state a facial challenge, the Trust has not stated a Fourth Amendment claim for three reasons. *First*, the HAP contract requires a landlord to consent only to limited Section 8-related inspections, clearly delineated in the CFR. The Trust does not have any reasonable expectation of privacy as to the subject matter of a Section 8-related inspection.

Second, in the event that the landlord refuses to permit a specific inspection, there is an administrative process in place that ensures that no inspection violating the Fourth Amendment takes place. If the landlord refuses to permit a specific inspection, then the inspector will not be able to force an inspection. Instead, the inspector would need to obtain an administrative warrant. Neither Local Law 10 nor the HAP contract provides for the landlord to be penalized for refusing to permit a specific inspection without first providing an administrative process subject to judicial review, at which the Trust's Fourth Amendment objection could be addressed.

Third, even if the Trust's argument that inspections might take place without consent or an administrative warrant were credited (and

it should not be), then there would still not be a Fourth Amendment violation, as such inspections would pass muster as administrative needs searches. If this Court reaches this question, it should hold that New York City's residential real-estate industry is a closely regulated industry. Because the City's residential rental market is so pervasively regulated, participants reasonably expect to be subject to warrantless inspections of a limited scope—like the inspections contemplated by the HAP contract.

A. No property in which the Trust has a reasonable expectation of privacy is subject to inspection under the HAP contract.

The Fourth Amendment claim fails at the threshold on the ground that the Trust has no reasonable expectation of privacy in the rental premises in question or in its business records relating to them. Whether a person has a cognizable interest under the Fourth Amendment "depends upon whether the person has a legitimate subjective expectation of privacy in that area that society is prepared to accept as objectively reasonable." *United States v. Barrios-Moriera,* 872 F.2d 12, 14 (2d Cir. 1989) (finding no legitimate expectation of privacy in a common hallway). The Trust has no more than a negligible expectation of privacy in the property that the government might possibly seek to inspect in

connection with a hypothetical Section 8 tenancy—whether that be the "apartment unit the Trust puts up for rent," other parts of the building, or its business records (App. Br. 37).

First, the Trust cannot reasonably have any expectation of privacy in units it places on the rental market. With respect to units it owns that are occupied by Section 8 tenants, or any other tenant, it is the lawful occupant of a residential unit, not the landlord, who has a reasonable expectation of privacy in their own home. *See Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlords have no privacy interest in tenant's apartment); *Georgia v. Randolph*, 547 U.S. 103, 110 (2006).

Below, the Trust vaguely gestured at the idea that it might have a reasonable expectation of privacy in its vacant units before a tenant signs a lease (A233-34). But the HAP contract is executed in conjunction with the Section 8 receipt's lease, which means that only the tenant has an interest in the unit itself for the entire term of contract. 24 C.F.R. § 982.309(b)(1). Before there is a lease and executed HAP contract, the unit is only subject to a limited HQS inspection. On appeal, the Trust objects to searches authorized under paragraph 11 of the HAP contract as potentially violating its Fourth Amendment rights, but it has not argued that pre-contract HQS inspections implicate its protected rights, so has waived that argument on appeal, assuming it was even preserved

(App. Br. 37-39); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 52 (2d Cir. 2004) (arguments raised below, but not mentioned on appeal, are waived); *Barbour v. City of White Plains*, 700 F.3d 631, 634 (2d Cir. 2012) (arguments "[l]acking specificity or citation to legal authority" are insufficient to preserve an argument for appeal).

In any event, HQS inspections are explicitly limited to allow the PHA to assess the unit for basic habitability. "[W]hat a person knowingly exposes to the public" is not protected by the Fourth Amendment. *Borg v. Town of Wesport*, 685 F. App'x 10, 11 (2d Cir. 2017) (collecting cases). And the Trust admits that it "posts videos and photographs of available apartments on the Internet and allows prospective tenants to visit them in person" (A233). Whether the unit complies with Section 8's housing quality standards, because it has, for example, a refrigerator, smoke alarms, and a fire escape, is not a matter about which the Trust can reasonably expect privacy, given that the Trust openly advertises these very facts online and in person.

Second, the Trust cannot have an expectation of privacy in other areas of its building. There is generally no expectation of privacy in shared common areas, such as porches, hallways and elevators. *United States v. Lewis*, 62 F.4th 733, 742-43 (2d Cir. 2023) (collecting cases about shared common areas, finding no expectation of privacy on a

shared porch). And, with respect to utility areas not open to tenants (App. Br. 40), the Trust, as a residential landlord, cannot seriously contend that it expects privacy about whether its building has electricity, heat, and hot water.

Indeed, inspection of utilities in residential buildings is authorized under a host of state and local laws to the same extent that the HAP contract would allow for an inspection. See, e.g., NYC Admin. Code § 27-2033 (requiring that boiler rooms be "readily accessible" to building code inspectors). The Trust is "on especially infirm footing" in its challenge to hypothetical inspections of utilities in its "business, rather than [its] home," because privacy expectations in a business' property is limited. *United States v. Harry*, 130 F.4th 342, 349 (2d Cir. 2025) (collecting cases); *see also Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) ("the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home").

The Trust speculates that the HAP contract might authorize invasive inspections, using, for example, "drug-sniffing animals" (A233). But nowhere in the HAP contract does a landlord purport to waive the right to object to the *scope* of an inspection. The current HAP contract provides that the "owner must maintain the contract unit and premises

in accordance with the housing quality standards (HQS)," and "owner must provide any information *pertinent to the HAP contract*" and provide the PHA "full and free 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*, including the right to examine or audit the records and to make copies" (A204, 207 (emphasis added)). Thus, it contemplates inspections that are limited in scope—and does not, as the Trust suggests, grant the government access "to review every single record and search every corner of facilities …" (A142). Indeed, this Court has held that even a far more broadly worded "blanket waiver of the right to object to any future searches" is not effective if the inspector conducts an unreasonable search outside the scope of the administrative scheme. *See Anobile*, 303 F.3d at 124-25 (blanket consent to inspect horse-racing facilities was not consent to searches of on-site employee dormitories).

Third, the Trust has not alleged a reasonable expectation of privacy in its general corporate records. It does not identify any specific types of business records to which it believes the HAP contract grants the government access, though the trustee affirmed below that he wished to keep the business' rental rates secret (A234). But there is no expectation of privacy in rental rates, which reflect payments made by

third-party tenants that are transacted through third-party banks. *Carpenter v. United States*, 585 U.S. 296, 308 (2018) (explaining there could be no expectation of privacy in negotiable instruments and bank statements that were exposed to, among others, bank employees); *United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank records); *United States v Zodhiates*, 901 F.3d 137, 143 (2d Cir. 2018) (same, in cell phone records); *Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir. 2020) (same, in business records containing rate "information landlords already disclose in other contexts").

Perhaps recognizing it has no privacy interest in any specific records, the Trust suggests that the HAP contract exposes the trustee's and trust beneficiary's personal devices and homes up to limitless, warrantless searches because those are the locations where they choose to store their business records relating to their rental apartments (App. Br. 37-38).[19] But, as noted, the HAP contract does not purport to authorize limitless searches, nor does it waive objections to the scope of a search or its method. No privacy rights are at stake here.

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[19] This argument only further reenforces that the Trust is not a legal entity; it does not have custody of its own records and does not have capacity to sue, *see supra* Point II.A. And even if it were, it cannot raise the Fourth Amendment rights of third parties, because, generally, "a litigant must assert its own rights, not those of a third party." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 42 (2d Cir 2015).

B. The availability of precompliance review defeats the Trust's Fourth Amendment claim.

Even if the Trust had some limited expectation of privacy in its rental units or business records, its claim would still fail, given the availability of precompliance review before any search would occur. If a landlord who has signed the HAP contract withholds consent for a specific inspection, then the inspector could not force entry or impose immediate penalties. Instead, the inspector would need to obtain an administrative warrant before carrying out the inspection. It is settled that a scheme that does not impose penalties for refusal, but instead provides for precompliance review passes constitutional muster.

Administrative inspections "involve a relatively limited invasion of the urban [landlord's] privacy," since they are "neither personal in nature nor aimed at the discovery of evidence of crime." *Camara*, 387 U.S. at 537. Thus, regulatory schemes that employ administrative inspections are not held to the same probable cause standards that apply to searches and seizures for law enforcement purposes. *Id.* While the government must obtain either consent or an administrative warrant before inspecting a premises, a warrant need not be based on individualized suspicion of wrongdoing. *Id.* Instead, the predicate for issuing an administrative warrant "will vary with the municipal program being

enforced" and "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.* at 538.

All that is required is that the subject of an inspection who withholds consent is "afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420; *See v. Seattle*, 387 U.S. 541, 544-45 (1967) (holding that the Constitution requires availability of pre-penalty judicial review of administrative subpoenas); *see also Mamakos v. Town of Huntington*, 715 F. App'x 77, 78 (2d Cir. 2018). The Supreme Court has not prescribed the exact form precompliance review must take, but it is essential that the subject can challenge "the reasonableness of the demand prior to suffering penalties for refusing to comply." *Patel*, 576 U.S. at 414, 420 (cleaned up).

The Court's recent decision in *Hudson Shore Associates v. New York* is on all fours here. --- F.4th ----, 24-cv-1678, Slip Op. at 15-19 (2d Cir. June 2, 2025) ("*Hudson* Slip Op."). This Court rejected a Fourth Amendment challenge to a provision of the Emergency Tenant Protection Act that allows municipalities to demand landlords' business records, including rent rolls and vacancy rates, or face a $500 civil penalty. The Court upheld the law's warrantless inspection provision on the grounds that landlords have an adequate opportunity to obtain precompliance review, because rather than being immediately assessed a

penalty, they can challenge the inspection demand in an Article 78 proceeding akin to a motion to quash an administrative subpoena. *Id.* at 17-19.

The same procedure applies here. Since the Trust's case is entirely hypothetical and painted with the broadest brushstrokes, it is helpful to walk through how a hypothetical HAP inspection might play out in the real world and result in the imposition of penalties under Local Law 10. Paragraph 11 of the HAP contract provides that a landlord must give access to the premises or records relevant to the Section 8 tenancy at the request of certain government entities (NYCHA, HPD, HUD and the Comptroller General) (A120). Contrary to the Trust's suggestion, the HAP contract is not the same "a general warrant," and does not allow entry by force (A232).

Nothing in the contract subjects the landlord to an immediate penalty for refusing an inspection—the prospect of which was a critical fact in *Patel*. *See Hudson* Slip Op. at 21-22 (distinguishing *Patel* because delayed penalties pose a "significantly lower risk of abuse and coercion"). If the landlord refuses to provide access to the premises or records, the government has two choices: (1) it can seek an administrative warrant, either under local law or under the terms of the HAP contract, which allows the PHA to "seek and obtain additional relief by judicial

order or action, including specific performance" in the event of a breach, or (2) it can initiate the process to cancel the Section 8 contract—following the procedures provided in paragraph 10 of the HAP contract (*id.*).

Thus, before conducting an inspection over the landlord's objection (or, issuing any penalty for refusal), the government must obtain an administrative warrant that is judicially enforceable and subject to judicial review. Section 8 operates in conjunction with the City's and State's robust regulatory scheme for overseeing residential rental housing, housing assistance, and low-income housing. The legislative scheme includes multiple avenues for securing administrative warrants and subpoenas. *See, e.g.*, NYC Admin. Code § 27-2123(a); NYC Charter §§ 398, 803(b), (f); N.Y. C.P.L.R. 2308(b). Moreover, federal regulation of Section 8 also allows for judicial review of HAP contracts and agency action. 5 U.S.C. § 406(a)(4); 31 U.S.C. § 716(c)(1). And the HAP contract, itself, provides that the HPA can seek "additional relief by judicial order or action, including specific performance" (A206).

To be sure, the HAP contract does not explicitly provide that a landlord can demand that an inspector return with an administrative warrant. But "[i]f in a particular case …, the federal or state constitution requires the City to seek a warrant to conduct an inspection without landlord consent, the City will need a warrant whether or not [the local

law] addresses that explicitly," and "ordinance is not invalid for failure to spell that out." *City of Vincennes v. Emmons*, 841 N.E.2d 155, 162 (Ind. 2006); *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 872 (2d Cir. 2008) (courts should read statutes to avoid constitutional defects, and may "revise[] statutory provisions to avoid or overcome constitutional defects"); *see also Tobin v. City of Peoria*, 939 F. Supp. 628, 633 (C.D. Ill. 1996) (reading an inspection ordinance to incorporate a warrant requirement in order to avoid finding the ordinance facially unconstitutional).[20] By implicitly incorporating mechanisms for the government to seek administrative warrants, the scheme provides an adequate pre-compliance safeguard. *See Comm'n v. PPC Residential*, OATH Index Nos. 2245/19, 2246/19, at 5–6 (rejecting Fourth Amendment challenge

[20] The Trust speculates that non-City entities (HUD, the Comptroller General of the United States, or DHCR) might attempt hypothetical inspections without following the City's administrative procedures for seeking administrative warrants (App. Br. at 43-44). The Trust's pleadings are devoid of any factual support for the suggestions that those entities conduct inspections over landlords' objections without an administrative warrant. HUD's administrative scheme delegates most Section 8-related inspections to PHAs. *See* 24 C.F.R. §§ 982.401 – 982.407. Nor does the Trust provide support for its claim that federal and state agencies do not have the independent authority to obtain administrative warrants. If there were such a limitation, the law should be read to "avoid or overcome constitutional defects." *Mukasey*, 549 F.3d at 872.

because New York City's procedures for obtaining inspection warrants provide sufficient precompliance review).[21]

The Trust's claims also fail because the Trust would not be subject to any immediate penalty for refusing an inspection. There would first have to be an administrative process in which the Trust's Fourth Amendment rights could be aired. Local Law 10 does not speak to searches or impose any penalties for refusing a search. In the event that the Trust refuses a search and the PHA cancels the contract, many further steps would need to take place before the Trust could face any penalties. The Commission would need to commence and prevail in a civil enforcement proceeding, during which the Trust could explain that it refused to cooperate with the inspection to protect its Fourth Amendment rights and not because of any discriminatory animus towards prospective tenants based on their source of income. Any penalty in such a hypothetical action would come only after an OATH proceeding, which is subject to judicial review under Article 78, just like the law in *Hudson Shore Associates*.

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[21] *Comm'n Human Rights ex rel. Watson, et al. & Fair Housing Justice Center, Inc. v. PPC Residential, LLC, Parkchester Preservation Management LLC & Parkchester Preservation Company LP, et al.*, OATH Index Nos. 2245/19, 2246/19, Memorandum Decision (Sept. 11, 2023), https://archive.citylaw.org/wp-content/uploads/sites/17/oath/19_cases/19-2245md.pdf.

Because of the availability of multiple layers of precompliance and pre-penalty review here, the Trust's reliance on cases such as *Sokolov*, *Patel*, and *Camara* is misplaced (App. Br. 34-35, 39). It is settled law that an inspection regime that provides an alternative warrant procedure in cases where the owner refuses consent is permissible. *Mamakos*, 715 F. App'x at 79. In *Sokolov*, *Patel*, and *Camara* the challenged laws were impermissible because they did not include a release valve allowing the inspector to return with a warrant if refused access; the penalty was immediate. *E.g.*. *Patel*, 576 U.S. at 421 (refusal met with "on the spot" arrest). Because there is an opportunity to refuse an inspector entry until they return with a warrant, Local Law 10 withstands scrutiny. *Mamakos*, 15 F. App'x at 79 (collecting cases); *Palmieri v. Town of Babylon*, 277 F. App'x 72, 75 (2d Cir. 2008).

C. The exception to the warrant requirement for reasonable inspections in closely regulated industries applies in any event.

Even if the Trust's speculation that signing the HAP contract could subject a landlord to warrantless searches were credited, that still would not establish a violation. A hypothetical warrantless inspection—limited in scope to the Section 8-related issues addressed in the HAP contract—

would be lawful because the rental industry in New York City is pervasively and closely regulated.

Precompliance review is not necessary for reasonable warrantless administrative inspections in a closely regulated industries. *W. Oilfields Supply Co. v. Secretary of Labor & Fed. Mine Safety & Health Review Comm'n*, 946 F.3d 584, 590 (D.C. Cir. 2020); *New York v. Burger,* 482 U.S. 691, 693 (1987); *see also Hudson*, Slip Op. at 14. This exception reflects the commonsense notion that while expectations of privacy in a business' property are generally "different from, and indeed less than, a similar expectation in an individual's home," this "expectation is particularly attenuated in commercial property employed in 'closely regulated' industries" over which the government has a deep history of "pervasive[] and regular[]" oversight. *Burger*, 482 U.S. at 699-700. The residential real estate industry is such an industry, and the inspections contemplated by the HAP contract are reasonable, and thus constitutional.

1. The residential rental market in New York City is a closely regulated industry.

A closely regulated industry is one in which the regulatory framework is so "comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v.*

Dewey, 452 U.S. 594, 600, 606 (1980) (cleaned up). A wide range of industries are closely regulated, including mines, pawn brokers, alcohol distributors, restaurants, firearms dealers, and junkyards. The Northern District of New York recently found that this includes the "industry of leasing and property management," given the "long history of heavy regulation of this enterprise—especially in the State of New York." *Hudson Shore Assoc. LP v. New York*, No. 1:24-CV-370 (LEK/MJK)]), 2024 US Dist LEXIS 115086, at *18 (N.D.N.Y. May 28, 2024) (upholding EPTA's warrantless inspections of landlord's records because residential rental market is a closely regulated industry), *aff'd on other grounds*, *Hudson*, Slip Op.

Local Law 10 should be viewed against the backdrop of over a hundred years of robust regulation of rental housing at the state and local level. *See Community Hous.*, 59 F.4th at 544-46 (describing history of rental housing regulation in New York). From the first tenant safety protections in the New York State Tenement House Acts of 1867, ch. 908, 1867 N.Y. Laws (setting minimum safety standards for rental housing in Manhattan and Brooklyn), through the present day, the safety and affordability of rental housing has been a critical area of policymaking in New York, *See Community Hous.*, 59 F.4th at 544-46.

To be sure, more than forty years ago, the New York Court of Appeals concluded that residential rental property in New York City was not so closely regulated that "warrantless administrative search may be implied from the choice of the appellants to engage in this business." *Sokolov*, 52 N.Y.2d at 346 n.1.[22] But if it was ever true, it no longer is.

Nowadays, New York City has a comprehensive regulatory scheme for rental housing, made of a patchwork of federal, state, and local laws, which govern nearly all aspects of rental property in New York. State law regulates a wide range of issues particular to the rental of housing, including lease terms, the size of rooms, gas meters, hallway lighting, car storage, and doormen. Local laws and regulations govern rental housing and set housing standards in the City. *See, e.g.*, N.Y.C. Admin. Code §§ 26-401 – 26-811, 26-1301 – 26-1306, 26-3001 – 26-3007, 26-3101 – 26-3104 (covering rent control, stabilization, eviction, rent increases, conversion to condos, provision of civil legal services, fees, and more). And, in addition to Section 8, federal laws regulate many aspects of rental housing in New York, such as the Fair Housing Act, 42 U.S.C. §§ 3601 – 3619, and its related regulations, 24 C.F.R. Part 100.

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[22] *Sokolov* may well have been wrongly decided from the start. Indeed, a few years later, the U.S. Supreme Court reversed a different New York Court of Appeals' decision for applying an unduly narrow understanding of the closely regulated business exception. *Burger*, 482 U.S. at 712-18.

Indeed, in 1981, when *Sokolov* was decided, the Section 8 law was at its infancy. It was only in 1970 that Congress created the first tenant-based rental housing assistance program. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, sec. 504, 84 Stat. 1770, 1786-88, in 1970; *Cuyahoga Metro. Hous. Auth. V. K&D Group, Inc.*, 618 F. App'x 842, 843-45 (6th Cir. 2015) (outlining the history of Section 8). In 1974, Congress amended the Housing Act to enlarge HUD's role in creating housing nationwide, and authorized Section 8 as the first permanent tenant-based rental housing assistance program. *Cuyahoga*, 618 F. App'x at 843-44. The voucher program was made permanent in 1988. Housing and Community Development Act of 1987, Pub. L. No. 100-242, sec. 143, 101 Stat. 1815, 1850-51 (1988). Since then, federal vouchers for housing assistance have become a critical tool in our Nation's battle against homelessness. *Cuyahoga Metro. Hous. Auth.*, 618 F. App'x at 844. New York City now provides such a comprehensive, closely regulated scheme to oversee the rental housing business "that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *New York v. Burger*, 482 U.S. 691, 700 (1987).

2. A warrantless inspection of rental housing and records of rental rates in New York City is reasonable and does not offend the Fourth Amendment.

Just because a business operates in a closely regulated industry does not automatically mean that any warrantless search of its business is permissible; the touchstone of the Fourth Amendment is reasonableness. *Anobile*, 303 F.3d at 117-18; *see also Hudson*, Slip Op. at 14 (explaining the exception excuses the requirement for precompliance review but "comes with its own set of additional requirements"). And inspections under the HAP contract are reasonable.

Because the owner of commercial premises in a closely regulated industry has an acutely reduced expectation of privacy, a warrantless inspection of their commercial premises will be deemed "reasonable within the meaning of the Fourth Amendment" so long as three criteria are met: (1) a substantial governmental interest informs the regulatory scheme; (2) warrantless inspections are necessary to further the scheme; and (3) the regulatory scheme provides "a constitutionally adequate substitute for a warrant," meaning that the law "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the

discretion of the inspecting officers." *Burger*, 482 U.S. at 702-03 (cleaned up); *see also Anobile*, 303 F.3d at 117-18.

All three criteria are met here. First, the City's substantial interest in preventing source-of-income discrimination is acute. The City—with a 1.4% vacancy rate and an average $3,500 month rent for apartments—is facing an acute housing crisis. There is a profound scarcity of available, affordable homes for rent, and widespread housing insecurity, with "[n]early all low-income New Yorkers allocating more than 30% of their income towards rent."[23] Roughly 125,000 people are experiencing homelessness.[24] Housing insecurity has dire economic, social, physical and mental health impacts in our communities.[25] NYCHA and HPD administer the country's largest Section 8 program, with over 130,000 Section 8 voucher holders and over 25,000 unit owners currently participating in the program.[26] Put bluntly, ending recalcitrance among landlords relating to rental assistance programs including Section 8 is absolutely critical to keeping New Yorkers in their homes.

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[23] *New York City's Vacancy Rate Reaches Historic Low*, supra note 1.

[24] *Homeless Outreach Population Estimate 2024 Results*, supra note 2; NYC Shelter Count, supra note 2.

[25] *New Yorkers in Need: The Housing Insecurity Crisis*, supra note 5.

[26] *About Section 8*, supra note 10.

Second, a warrantless administrative inspection scheme is necessary. Most landlords and tenants will grant consent when an inspector shows up, because they have a shared interest in maintaining a unit's eligibility for a housing voucher. Setting the default to allow inspectors to arrive without a warrant and return with one only if there is a refusal keeps the system from being overwhelmed and reduces the cost of operating a public housing program, allowing PHAs to focus on the important work of providing housing to low-income families. Given the ongoing statewide housing emergency, the time-consuming nature of these alternatives underscores the reasonableness of allowing for warrantless administrative inspections under Section 8.

Finally, as discussed above, the City's housing regulations include robust protections for landlords, who can challenge agency action in an Article 78 proceeding and the Section 8 regulations clearly delineate the scope of an inspection and limit inspector's discretion (supra pages 46-49). *See Comm'n v. PPC Residential*, OATH Index Nos. 2245/19, 2246/19, at 5–6. Thus, a Section-8-related inspection to ensure that the building meets minimal safety standards falls within the exception for administrative inspections in closely regulated industries. Local Law 10 thus complies with the Fourth Amendment for this independent reason.

POINT IV

SECTION 8 DOES NOT PREEMPT LOCAL ANTI-DISCRIMINATION LAWS LIKE LOCAL LAW 10, AS COURTS HAVE UNIVERSALLY AGREED

The district court was right to abstain from reaching the Trust's preemption argument, which the Trust can raise in its civil enforcement proceeding. The Trust also lacks capacity to bring the claim. But if this Court reaches the merits, Local Law 10 is not preempted. Regulating local housing is a core area of local concern in the heartland of the City's police powers. There is a presumption against preemption such areas. *N.Y. SMSA LP v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir 2010); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1209 (9th Cir. 2009) (applying to presumption against preemption to local law regulating residential rental leases as a core area of local concern). The Trust cannot overcome it.

Local Law 10 and Section 8 work in tandem to achieve a shared purpose. An astounding number of New York City residents are housing insecure. With a vanishingly small number of vacancies and surging rents, more and more New Yorkers are being squeezed out of their homes. The federal government's Section 8 voucher program is one powerful tool among many in the City's battle against homelessness, and

it plays a pivotal role in the larger rental housing market for low-income New Yorkers.[27] But to ensure that the City's approach works, City Council adopted Local Law 10 to prevent landlords from discriminating against housing voucher holders, including Section 8 holders. The express purpose of Section 8 is "aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing" 42 U.S.C. § 1437f. By prohibiting discrimination, Local Law 10 "will advance rather than denigrate [Section 8's] objective." *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008) (cleaned up).

Recognizing that communities across the nation have different problems and have adopted varying approaches to tackling local unavailability of low-income housing, Congress created Section 8 to be a flexible puzzle piece. Section 8, on its face, does not contain an express preemption clause, 42 U.S.C. § 1437f, and "explicitly contemplates state and local participation in the Section 8 program," *Comm'n on Human Rights & Opportunities v. Sullivan Ass'n*, 250 Conn. 763, 773 (1999).

More than 16 states and 90 local governments have adopted source-of-income anti-discrimination laws over the past years and

[27] *Spotlight: New York City's Rental Housing Market*, supra note 3.

decades.[28] These laws have been uniformly upheld by state and federal courts because "a non-discrimination requirement would not stand as an obstacle to the Housing Choice Voucher Program's central objective." *Bourbeau*, 549 F. Supp. 2d at 88. Preemption arguments like the Trust's have "been rejected by every court which has confronted [them]." *Austin Apt. Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 895 (W.D. Tex. 2015) (collecting cases upholding source-of-income antidiscrimination laws from D.C., Maryland, New Jersey, Connecticut, and Massachusetts).

And HUD has expressly approved of local ordinances like Local Law 10. 24 C.F.R. § 982.53(d). Specifically, § 982.53(d) provides that "[n]othing in [Section 8] is intended to preempt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder." *Id.* That is exactly what Local Law 10 does. Against this judicial and regulatory backdrop, Congress, which "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 64 (2d Cir. 2020) (cleaned up), has repeatedly amended Section 8 during over the last two decades without revisiting

[28] Fasanelli, supra note 8 at 17.

its choice not to expressly preempt state and local non-discrimination laws, 42 U.S.C. § 1437f (history).

For all these reasons, the Trust's conflict preemption argument is a nonstarter (App. Br. 45-52; *see also* A22, 111). Conflict preemption applies if a state or local law "actually conflicts with" federal law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). The Trust advances two preemption theories: (1) that it is impossible for landlords who are ineligible for Section 8 to comply with Local Law 10, because the law prohibits from disclosing their ineligibility (App. Br. 45-46), and (2) that Local Law 10 poses an obstacle to Section 8, because Congress intended that participation in Section 8 be voluntary, while Local Law 10 makes participation mandatory (*id.* 46-52). Neither has any merit.

The Trust cannot prevail on its impossibility theory (*id.* 45-46), because compliance with both federal and local law is not a "physical impossibility." *Hillsborough Cnty.*, 471 U.S. at 713. At the threshold, the Trust lacks standing to bring this claim because it has admitted that it is not impossible for the Trust to comply with both federal and local law (A69, admitting at oral argument that "[w]e're not in this situation"). In any event, there is no impossibility. If a landlord is not eligible to participate in Section 8, then its decision to turn away Section 8

voucher holders would not constitute discrimination in violation of Local Law 10. *See Brown v. N.Y. City Dep't of Ed.*, 513 F. App'x 89, 91 (2d Cir 2013) (finding that ineligibility to work under federal law is a "legitimate, nondiscriminatory reason" to terminate employment).

Nor can the Trust prevail on its theory that Local Law 10's mandate is an obstacle to Section 8's voluntary scheme (App. Br. 46-52), because it cannot show that Local Law 10 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough Cnty.*, 471 U.S. at 713. The Trust mistakenly argues that a key "purpose" of Section 8 "was to create a voluntary program" (App. Br. 47). As noted above, Section 8's express purpose is to prevent housing insecurity and homelessness nationwide, 42 U.S.C. § 1437f, and HUD has expressly confirmed that antidiscrimination laws are not an obstacle to its goals, 24 C.F.R. § 982.53(d).

In arguing otherwise, the Trust misplaces its reliance on *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 297 (2d Cir 1998) (App. Br. 47-48). In *Salute*, the Court relied on the fact that participation in the Section 8 scheme was intended to be voluntary to resolve an interpretive ambiguity about how a now-repealed provision should be construed to avoid an absurd result. 136 F.3d at 297. While the decision says nothing at all about federal preemption, it does confirm that the

federal and City laws have the same overarching purpose of promoting access to housing for low-income households. *See Salute*, 136 F.3d at 297, 299 n.4.[29] The Trust's preemption argument is utterly meritless.

CONCLUSION

This Court should affirm.

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Respectfully submitted,

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[29] The Trust misreads the First Department's decision in *Mother Zion Tenant Association v. Donovan*, 55 A.D.3d 333 (1st Dep't 2008). As that court has since explained, the holding of *Mother Zion* is that "the Section 8 program, while voluntary in nature, did not preempt local antidiscrimination laws." *Tapia v. Successful Mgt. Corp.*, 79 A.D.3d 422, 424 (1st Dep't 2010) (rejecting preemption challenge to Local Law 10).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 13,852 words, not including the table of contents, table of authorities, this certificate, and the cover.

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