

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of:

THE CITY-WIDE COUNCIL OF PRESIDENTS
and AT-RISK COMMUNITY SERVICES INC.,
Petitioners,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

-against-

THE NEW YORK CITY HOUSING AUTHORITY
and SHOLA OLATOYE, as Chair of the New York
City Housing Authority,

Respondents.

Index No. 100283/2018

IAS Part 35
(Edmead, J.)

**PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION**

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Petitioners the City-wide Council of Presidents (“CCOP”) and At-Risk Community Services Inc. (“At-Risk”), by their undersigned counsel, respectfully submit this Memorandum of Law in support of their motion for a preliminary injunction directing Respondents the New York City Housing Authority (“NYCHA”) and Chairperson Shola Olatoye to conduct, within 90 days, inspections for lead—in compliance with applicable lead inspection laws¹—in all apartments where a child under the age of 8 resides and:

1. the apartment was required to receive annual lead inspections at any point in or after 2012;
2. there is an open, unresolved lead-related tenant complaint; or
3. there was a lead-related complaint filed that was closed out by NYCHA within the past three years.

PRELIMINARY STATEMENT

This case involves NYCHA’s well-documented disregard for the health and safety of its tenants and its persistent failure to abide by its legal obligations, including the obligation to inspect for and remediate toxic lead paint. CCOP, the duly elected representative body for the NYCHA tenant community comprised of individuals who are themselves tenants, along with At-Risk, a non-profit organization dedicated to protecting the rights of public housing residents, filed this Article 78 Petition to compel NYCHA’s compliance with its obligations, and for a court-appointed monitor to assure that compliance, which is the only way to protect the health and safety of tenants.

On November 14, 2017, the Department of Investigation for the City of New York revealed that NYCHA had not conducted appropriate testing for lead paint at its housing developments. In the four months following this revelation, NYCHA has admitted to multiple, widespread failures to comply with federal and New York City laws, including the failure to inspect annually for lead

¹ These laws include [42 U.S.C. §§ 1437d\(f\)](#), [4822](#), and [4851](#); 24 C.F.R. Part 35 and [§ 5.703\(f\)](#); and [New York City Local Law 1 of 2004](#).

paint hazards and the use of untrained, unlicensed workers to perform lead paint inspection and remediation work. NYCHA has also admitted that it made false public statements and falsely certified its compliance with federal lead paint laws from 2013 through 2017—violations that are presently the subject of an investigation by the United States Attorney's Office for the Southern District of New York.

Meanwhile, tenants are living with elevated blood lead levels in crumbling, lead-infested apartments on which NYCHA has performed no lead inspections over the past several years; NYCHA refuses to respond to tenant complaints regarding lead paint; and NYCHA falsifies work orders by closing out complaints without actually addressing them. Just two weeks ago, these circumstances prompted United States District Judge William H. Pauley III to declare in a federal class action involving claims regarding lead exposure: "**The bureaucratic malfeasance described in this lawsuit is appalling. NYCHA's numerous problems are well-documented, and this case offers a paradigm of the agency's abject failure to ensure the safety and well-being of its tenants.**" [Paige, et al. v. New York City Housing Authority, No. 17CV7481, 2018 WL 1226024, at *5 \(S.D.N.Y. Mar. 9, 2018\).](#)²

Petitioners move for a preliminary injunction to prevent the continued exposure of vulnerable children to toxic lead as a result of Respondents' willful neglect, chronic lying, and inadequate lead inspection and remediation, which actions violate federal and local law. Every day that passes without proper lead inspections is another day that the health of young NYCHA tenants is irreversibly compromised.

² Judge Pauley denied a motion for preliminary injunction in the federal class action because plaintiffs failed to establish a likelihood of success on the merits of their Fair Housing Act and Due Process claims, which are entirely unlike the Article 78 claims at issue in the present case.

STATEMENT OF FACTS

A. NYCHA's Persistent Failure to Provide Tenants with Lead-Free Homes as Required By Law and NYCHA Management's Knowledge of the Same

Lead-based paint is toxic and causes significant damage to human health, particularly the health of children. Petitioners' Article 78 Petition ("Pet.") Ex. 1 at 1; Pet. ¶ 54. As a result, in 1960, New York City banned the use of lead-based paint in residential buildings, and the federal government instituted a federal ban on its use in 1978. Pet. Ex. 1 at 1. Yet, older buildings still contain lead. Pet. Ex. 1 at 2. NYCHA is the largest landlord in New York City, and many of its buildings constructed before 1978 contain lead paint.

The United States Department of Housing and Urban Development ("HUD") requires all public housing authorities to conduct annual visual assessments of apartments where lead-based paint may be present. *See 24 C.F.R. 35.1355(a)*. Under this regulation, NYCHA was required to inspect approximately 55,000 units in 2016. Pet. Ex. 1 at 2. Because NYCHA receives HUD funding, it must annually certify its compliance with all applicable federal regulations. Pet. Ex. 1 at 2-3.

Separately, the New York City Childhood Lead Poisoning Prevention Act ("Local Law 1") requires landlords to annually inspect all apartments built before 1960 when the apartment houses a child under the age of six. [N.Y.C. Admin. Code. § 27—2056.4\(a\)](#). In addition, all apartments built between 1960 and 1978 must be inspected annually where the "owner has actual knowledge of the presence of lead-based paint." *Id.*

Historically, NYCHA performed visual assessments for lead-based paint hazards as part of its HUD-mandated annual inspections of apartment conditions more generally. Pet. ¶ 55. But, in 2012, NYCHA ceased the HUD-mandated annual inspections (including the lead inspection component) in response to a HUD newsletter, which NYCHA now admits it misinterpreted. Pet. ¶¶ 56–57, 102 & Ex. 28 at 15:9-15. As a result, since 2012, NYCHA has flouted its obligations

under both federal and New York City lead laws aimed at protecting tenants and their children from the hazards of lead-based paint. Despite its complete failure to conduct the legally-required lead inspections in NYCHA apartments, beginning in 2013, NYCHA falsely certified to HUD that it was in compliance with the federal law. *See Pet.* ¶ 51 & Ex. 1 at 1.

On November 14, 2017, NYCHA’s failures with respect to lead-based paint hazards, concealed by NYCHA’s false certifications to HUD for years, became public knowledge in a report published by the New York City Department of Investigations (“DOI”) titled, “Investigation into False Certifications of NYCHA Lead Paint Inspections” (the “DOI Report”). Pet. ¶ 52 & Ex.

1. The DOI “determined that NYCHA failed to conduct mandatory safety inspections for lead paint over a four-year period beginning in 2013” in violation of city and federal laws. Pet. ¶ 94 & Ex. 1, Press Release at 1. The DOI further found that NYCHA “submitted false documentation to the United States Department of Housing and Urban Development (‘HUD’) stating that the Authority was in compliance with federal laws that requires these inspections to be performed,” even after its management had knowledge of NYCHA’s shortcomings with respect to its lead obligations. Pet. ¶¶ 94–95 & Ex. 1, Press Release at 1.

B. NYCHA’s False Certifications Despite NYCHA Management’s Knowledge of Noncompliance with Lead Laws

In October 2013, NYCHA submitted its Annual Agency Plan for fiscal year 2014 and the accompanying Form 50077 (“PHA Certifications of Compliance with PHA Plans and Related Regulations”), which was signed on October 11, 2013 by then-Chair of NYCHA John B. Rhea, and certified that NYCHA was “in compliance with all applicable Federal statutory and regulatory requirements,” including those related to lead-based paint. Pet. ¶¶ 39, 59 & Ex. 1 at 3. Because NYCHA had ceased lead inspections of its units in 2012, NYCHA’s certification that it was compliant with federal lead-based paint laws was false. Pet. ¶ 58–60 & Ex. 1 at 3. Similarly, in

October 2014, NYCHA submitted its Annual Agency Plan for fiscal year 2015 and the accompanying Form 50077, which was signed on October 16, 2014 by Respondent (and current NYCHA Chair) Shola Olatoye, and, because NYCHA was still not conducting annual lead inspections, it continued to be noncompliant with lead laws, thereby making the certification to HUD false. Pet. ¶ 61–63.

The evidence cited in the DOI Report shows that NYCHA senior management was generally aware of the suspension of annual lead-based paint inspections, as evidenced by the efforts of the General Manager’s office and others to resume the inspections in the spring of 2015. Pet. ¶ 64 & Ex. 1 at 4. By April 2015, certain NYCHA officials knew that NYCHA was noncompliant with Local Law 1. Pet. ¶ 65 & Ex. 1 at 4. And one senior operations executive stated during an interview with the DOI that “he first learned of the Local Law 1 violation in 2015 when he was working with a group on a plan to switch back to annual inspections, focusing first on apartments with children under six.” Pet. ¶ 66 & Ex. 1 at 4 n.10.

On May 7, 2015, a senior NYCHA operations executive asked another NYCHA official in an email to provide a list of apartments with children under seven years old in connection with lead law compliance. Pet. ¶ 67 & Ex. 1 at 4 n.10. On June 5, 2015, NYCHA managers held a meeting during which they discussed apartment inspections, including the requirement for annual inspections. Pet. ¶ 68 & Ex. 1 at 4 n.10. And, on July 16, 2015, a number of NYCHA managers proposed that development maintenance workers be assigned eight apartment inspections daily with a goal of inspecting “all apartments that may contain lead and have children under the age of six (6) residing in them, every year.” Pet. ¶ 69 & Ex. 1 at 4 n.10.

Despite the awareness of senior NYCHA staff that NYCHA was noncompliant with federal and local lead laws, in October 2015, NYCHA submitted its Annual Agency Plan for

fiscal year 2016 and the accompanying Form 50077, which was signed on October 12, 2015 by Chair Olatoye. Pet. ¶¶ 70–71 & Ex. 1 at 4. Chair Olatoye and the General Manager of NYCHA claimed they did not know that the certification was inaccurate at the time it was submitted, but the DOI found that they should have known in light of the knowledge of other NYCHA officials. Pet. ¶¶ 72, 95 & Ex. 1 at 4. The DOI further determined that NYCHA’s lack of a process for confirming the accuracy of federal forms before submission constituted “an unacceptable gap in procedures.” Pet. ¶ 96 & Ex. 1 at 5. Further evidence of this lapse in NYCHA’s processes is found in a statement made by one NYCHA operations executive who told the DOI during an interview that, “if asked, he would have answered that NYCHA was not in compliance with applicable lead laws – but he was never asked.” Pet. ¶ 73 & Ex. 1 at 4.

By the summer of 2016, both Chair Olatoye and NYCHA’s General Manager knew that NYCHA was out of compliance with federal and local lead laws. Pet. ¶¶ 75–76 & Ex. 28 at 16:2-6, 16:21-24. In the summer of 2016, a senior advisor at NYCHA concluded that NYCHA was in violation of the Lead Safe Housing Rule (24 C.F.R. § 35) after conducting research into the federal lead requirements. Pet. ¶ 77 & Ex. 1 at 5. In July 2016, a senior NYCHA advisor circulated a draft chart outlining NYCHA’s Local Law 1 and Lead Safe Housing Rule (24 C.F.R. § 35) obligations, including a mention of NYCHA’s obligation to conduct “visual assessments ‘at unit turnover and every 12 months.’” Pet. ¶ 78 & Ex. 1 at 5 n.12. A small group of NYCHA executives were assembled to conduct an urgent assessment of NYCHA’s lead-based paint activity. Pet. ¶ 79 & Ex. 1 at 5. At the end of July 2016, Chair Olatoye received a “lead workflow/game plan” for NYCHA’s lead-related obligations. Pet. ¶ 80 & Ex. 1 at 5 (internal quotation marks omitted).

Despite her full knowledge of the extent of NYCHA’s noncompliance with both federal and local lead laws, on October 18, 2016, Chair Olatoye signed Form 50077, submitted with

NYCHA's Annual Agency Plan for the fiscal year 2017, falsely certifying NYCHA's compliance with federal lead-based paint regulations. Pet. ¶¶ 85–86 & Exs. 1 at 6 and 29. Chair Olatoye admitted that when she signed Form 50077, she was aware that NYCHA was noncompliant with the federal lead-based paint regulations, which she characterized as "obviously a management failure." Pet. ¶ 87 & Ex. 1 at 6.

C. NYCHA's Public Admissions of Its Lead-Related Failures

On July 26, 2017, upon the recommendation of a HUD attorney, NYCHA finally publicly disclosed its noncompliance with lead laws in a revised Form 50077, which was submitted with an unrelated amendment to its Annual Agency Plan for 2017. Pet. ¶ 90. The revised Form 50077 contained the following language regarding NYCHA's compliance with lead-based paint laws:

*As previously discussed with the U.S. Attorney's Office for the Southern District of New York ("SDNY") and HUD, NYCHA has not complied with certain requirements related to lead-based paint but is working to ensure full compliance. NYCHA is cooperating with an investigation by the SDNY regarding conditions in NYCHA housing. We will continue to engage with both the SDNY and HUD regarding our remedial efforts.

Pet. ¶ 90 & Ex. 1 at 6–7.

In July 2017, NYCHA also informed tenants about the lead-based paint issues in NYCHA housing, admitting its failures to properly investigate and address lead-based paint hazards. *See* Pet. ¶ 92 & Ex. 1 at 7.

During a December 5, 2017 hearing conducted by the New York City Council regarding NYCHA's violations of federal and local laws governing lead safety, Chair Olatoye admitted that "[i]n August 2012, annual apartment inspections were suspended" by NYCHA in its units, and that her signing of Form 50077 in 2016 "was a mistake[], given what we know" about NYCHA's noncompliance with lead laws. Pet. ¶¶ 102, 104 & Ex. 28 at 15:9–10, 28:11–13.

D. Households Impacted by NYCHA's Noncompliance with Federal and Local Lead Laws

As of 2016, there were approximately 55,000 NYCHA apartments for which the possibility of lead-based paint had not been ruled out, and thus, NYCHA is required to conduct visual assessments of these apartments annually, pursuant to the Lead Safe Housing Rule (24 C.F.R. § 35). Pet. ¶ 113; *see also* [24 C.F.R. 35.1355\(a\)](#). Of the approximately 55,000 NYCHA apartments requiring visual assessments under federal regulations in 2016, approximately 4,200 units had tenants that reported the presence of a child under the age of six years, requiring annual visual inspection pursuant to Local Law 1. Pet. ¶ 113; *see also* [N.Y.C. Admin. Code. § 27—2056.4](#). This number has more than doubled to 8,900 for 2017, with part of that increase due to young children that have just moved into units, but with the other portion of the jump in number (likely the larger portion) attributable to “apartments that were previously exempt from inspection” that were “considered free of lead paint last year, but for some reason are not now.” Pet. ¶ 113 & Exs. 36, 37.

E. NYCHA's Continued Deficiencies in Its Efforts to Inspect for and Abate Lead Paint and Misstatements About Its Conduct

1. Uncertified Lead Inspectors and Abatement Workers

At the December 5, 2017 City Council hearing, Chair Olatoye said that, in 2016, NYCHA did inspect for and abate, where necessary, the 4,200 units for which lead had not been ruled out and that had residents under the age of six. Pet. ¶ 105 & Ex. 28 at 37:15-19. But she acknowledged that, although 30 NYCHA staff members had the requisite EPA certification that allows them to abate apartments found to have lead above legal standards, “[t]he remaining staff that conducted those 4,200 did not have that training” at the time they did this work. *Id.* & Ex. 28 at 37:15–19

Chair Olatoye assured the City Council, however, that all NYCHA lead inspectors conducting inspections of the 4,200 units had the HUD certification required in order to conduct

visual assessments for lead-based paint and lead-based paint hazards. Pet. ¶ 106 & Ex. 28 at 39:20-40:5. This was a lie. Pet. ¶ 108. On January 24, 2018, the DOI issued a letter stating that, while under oath at the December 5, 2017 City Council hearing, Chair Olatoye made misstatements about the HUD certifications of the NYCHA staff who conducted the lead inspections in the 4,200 units with children under the age of six in 2016. *Id.* & Ex. 26. The DOI compared the list of NYCHA employees who conducted the 4,200 inspections to a list of all NYCHA HUD-certified employees. Pet. ¶ 109 & Ex. 26. The DOI found that “none of the (lead paint) inspections were conducted by employees who NYCHA reported as having the HUD certification.” Pet. ¶ 109 & Ex. 26 (quoting DOI letter). The DOI contacted a random sampling of 86 NYCHA employees who were part of the group that conducted the 4,200 inspections and learned that “while a handful had received some form of low level training, 85% ‘denied ever receiving the HUD visual assessment course and certificate.’” Pet. ¶ 110 & Ex. 26 (quoting DOI letter).

NYCHA claims that, starting in October 2017, it stopped using workers untrained and uncertified in lead paint inspection and abatement, but the Resident Association President of Throggs Neck Houses in the Bronx reported that, in mid-December, the certification issue persisted, with repainting being performed by what appeared to be an untrained worker. Pet. ¶ 116 & Ex. 36.

Despite NYCHA’s public promises to remedy its mistakes, it is still failing to inspect apartments contaminated by lead paint, including those inhabited by young children. Affidavit of Jaquelin Luciano (“Jaquelin Aff.”) ¶ 3; Affidavit of Devon Hunt (“Hunt Aff.”) ¶ 6. The failure to inspect for and abate lead is causing serious harm to these tenants.

2. Incomplete Inspections and Failure to Disclose Inspection Results and Other Information to Tenants

NYCHA also failed to inspect the common areas of developments on an annual basis, in

violation of the law. Pet. ¶ 117 & Ex. 38. Moreover, NYCHA is failing to report the results of lead inspections to tenants, including, most egregiously, when those results show the presence of lead in their apartments. Pet. ¶ 118. NYCHA found lead in 78 apartments in the Throggs Neck Houses at the end of 2017 but did not inform the tenants who live in these apartments of the findings. *Id.* & Ex. 36.

NYCHA's disregard for its tenants is also clear from its treatment of those whose homes must undergo abatement. A NYCHA tenant recently complained that NYCHA inspectors forced her and her six children to leave their Harlem apartment for a last-minute emergency cleanup. Pet. ¶ 119 & Ex. 39. NYCHA inspectors told the tenant to "find a place to stay for a while," and when the tenant began asking questions, she said she was told that if she did not comply, NYCHA "would drill her locks and move her out." Pet. ¶ 119 & Ex. 39.

3. Non-Responsiveness to Tenant Complaints and Requests for Lead Inspections, Resulting in No Lead Inspections in Units Likely to Contain Lead

Despite the existence of a federal investigation into NYCHA's handling of toxic lead, and despite the intense public scrutiny now ongoing over NYCHA's abject failures, NYCHA continues to ignore lead hazards. NYCHA continues to be non-responsive to tenant reports of lead hazards in their homes and requests for lead inspections even when NYCHA is presented with evidence of lead-related harm to children and others living in the NYCHA units at issue.

For example, Jacquelin Luciano, a NYCHA tenant living in Melrose Houses in the Bronx with her three children (ages 2, 8, and 16), has filed over 10 complaints with NYCHA regarding lead-related hazards in her apartment, and NYCHA has never attempted to fix any of the problems or inspect for lead. Luciano Aff. ¶ 6. The hallways, kitchen, bathroom, and radiator in Ms. Luciano's apartment are covered in lead paint that is peeling and falling off in chips. *Id.* ¶ 4 & Ex. A. Her apartment hallway has a hole in the wall that has existed for years and is crumbling onto

the floor where her children play. Luciano Aff. ¶ 4 & Ex. A. Ms. Luciano's bathroom also has mold growing in it. *Id.* Luciano Aff. ¶ 4 & Ex. A.

Because lead paint was falling from the radiator and NYCHA refused to fix the problem, Ms. Luciano has wrapped the radiator in towels and a blanket. *Id.* ¶ 5. Although this is a fire hazard, Ms. Luciano has taken this risk to prevent lead paint from falling on the floor where her 2-year-old crawls. *Id.* Ms. Luciano filed her last lead-related complaint to NYCHA two months ago, and NYCHA told her that it would send a worker to her apartment to address the problem. *Id.* ¶ 7. No one from NYCHA has come to Ms. Luciano's apartment to do so. *Id.* Ms. Luciano's 2-year-old son has developed serious respiratory problems, and at times stops breathing altogether. *Id.* ¶ 8. Ms. Luciano is extremely concerned by the predicament she and her children find themselves in, with no help from NYCHA. *Id.* ¶ 9.

Devon Hunt, a NYCHA tenant living in Ingersoll Houses in Brooklyn with her three sons (ages 2, 3, and 4), has experienced similar difficulties in getting NYCHA to inspect for and remediate lead in her apartment. Hunt Aff. ¶¶ 1–10. In fact, NYCHA has never inspected Ms. Hunt's apartment since she moved into it in 2014. *Id.* When Ms. Hunt moved into the apartment, paint was peeling from the walls throughout the unit, especially in the bedrooms, and there were holes in the apartment walls. *Id.* ¶ 3. The holes in the walls of her children's room were so deep that they went past the concrete, leaving the heavy-duty wire at the base of the wall visible. *Id.* Ms. Hunt contacted NYCHA and asked for repairs to the wall plaster in the apartment, and NYCHA representatives told her she would have to wait 8 to 10 months for any repairs. *Id.* ¶ 4. Worried about the health risks posed by the conditions in the apartment, Ms. Hunt's family decided to hire a private contractor to complete the wall repairs in the unit. *Id.*

Ms. Hunt's apartment continues to have peeling paint on the walls and other health and safety issues, such as a lack of heat and hot water, broken light fixtures, cracked and rusted door

frames, mold, and leaking radiators. *Id.* ¶ 5. NYCHA has failed to repair the peeling paint or inspect for lead, and efforts undertaken by NYCHA to fix the other damage to the unit have been woefully insufficient. *Id.* ¶ 6. As a result of the unsafe condition of her apartment, Ms. Hunt's family members have become sick. *Id.* ¶ 7. One of her sons needed an X-ray of his chest, and another of her sons was diagnosed with lung disease and asthma. *Id.* An older member of Ms. Hunt's family, who lived in the apartment, also developed lung disease. *Id.*

On January 31, 2018, suspecting that there was lead in her apartment, Ms. Hunt reached out to NYCHA to schedule a lead inspection. *Id.* ¶ 8. A NYCHA representative scheduled an inspection appointment for February 7, 2018, but no one from NYCHA ever came, nor did NYCHA contact her to reschedule. *Id.* Ms. Hunt called again and rescheduled the inspection for February 13, 2018. Again, no one from NYCHA arrived to conduct the inspection or contacted her about the second-missed inspection. *Id.* When Ms. Hunt called NYCHA to follow up, no one answered or returned her calls. *Id.*

Understandably frustrated and concerned, Ms. Hunt decided to reach out to others for assistance. *Id.* ¶ 9. She contacted Assemblyman Walter Mosley, whose staff member connected Ms. Hunt with NYCHA official Ebony Johnson. *Id.* Ms. Johnson scheduled a call between Ms. Hunt and two senior NYCHA officials: Brian Honan, NYCHA's Director of Intergovernmental Relations, and Shireen Riazi-Kermani, a Senior Advisor to the General Manager of NYCHA. *Id.* The call took place on March 19, 2018. *Id.* ¶¶ 9–10.

On the March 19 call, Ms. Hunt described to Mr. Honan and Ms. Riazi-Kermani the conditions of her apartment and their impact on her family. *Id.* ¶ 10. She also requested a lead inspection for the apartment. *Id.* Without explaining why two scheduled inspections were ignored by NYCHA, Mr. Honan told Ms. Hunt that—because there was no lead at Ingersoll Houses—her apartment would not be inspected. *Id.* Mr. Honan also stated, as a general matter, that NYCHA

tenants may not request lead paint inspections and that NYCHA was only required to conduct such inspections upon unit turnover.³ *Id.* That statement is incorrect: where units are subject to NYCHA lead inspection, the law requires that such inspections take place at least annually. *See 24 C.F.R. 35.1355(a); see also N.Y.C. Admin. Code. § 27—2056.4.*

On March 21, 2018, New York State Health Commissioner Howard Zucker, at the direction of Governor Andrew Cuomo, sent a team to Ms. Hunt's home to conduct an emergency inspection of her apartment for lead-based paint. Contrary to Mr. Honan's assurances that an inspection was unnecessary because lead was not present at her housing development, the inspection revealed the presence of lead in Ms. Hunt's apartment. Affidavit of Inshan Rahim ¶ 3. Because of NYCHA's failure to conduct legally required lead inspections, and its decision to ignore her valid complaints and provide her with recklessly false assurances, Ms. Hunt's young children have been exposed to toxic lead for the past several years without her knowledge.

F. **NYCHA's Practice of Falsifying Work Orders**

When NYCHA tenants file a complaint regarding peeling lead paint, crumbling walls, or other health and safety hazards, a work order is generated to trigger a NYCHA response. Affirmation of Jim Walden ("Walden Aff."), Ex. B at 4-5. NYCHA's policy since 2013 has been to close out these work orders if the tenant is not at home when the NYCHA worker arrives, even though the complained-of problem has not been fixed. *Id.* at 13. At the end of January 2018, there were over 150,000 open work orders for problems reported by tenants, including those involving lead paint. Walden Aff., Ex. C. A NYCHA whistleblower recently revealed during an on-camera interview that NYCHA is enforcing, to this day, a policy of obfuscation concerning work orders:

³ NYCHA has since scheduled yet another lead inspection appointment with Ms. Hunt on Monday, March 26, although it remains completely unclear whether anyone will actually show up this time.

workers respond days in advance of scheduled appointments when nobody is home, and fraudulently close out the work orders as if the work has been completed. *Id.*⁴ NYCHA officials are instructing workers to engage in this deception in order to lower the number of unaddressed complaints and make it appear as if NYCHA is resolving tenants' problems. *Id.*⁵ This is unconscionable, although sadly not surprising given NYCHA's long history of deceit, mismanagement, and disregard for the health and safety of its tenants. This fraudulent practice might explain why the repeated lead-related complaints made by countless tenants, including Ms. Hunt and Ms. Luciano, have gone unaddressed. What is surprising: NYCHA is so brazen that it enforced this corrupt policy despite the continuing federal probe by the Department of Justice.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction should be granted where, as here, (1) Petitioners have shown a likelihood of success on the merits, (2) the tenants—whom Petitioners represent—will suffer irreparable harm in the absence of a preliminary injunction, and (3) the balance of equities tips in Petitioners' favor. [*City of New York v. Untitled LLC*, 51 A.D.3d 509, 511 \(1st Dep't 2008\)](#); [*Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 \(1st Dep't 2016\)](#).

Although ordinarily the function of a preliminary injunction is to preserve the status quo until a final determination on the merits can be made, “there is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies.” [*McCain v. Koch*, 70 N.Y.2d 109, 116 \(1987\)](#) (collecting cases). Accordingly, where, as here, individuals are harmed by the government’s failure to comply

⁴ Video of the NYCHA whistleblower’s interview with CBS New York appears online at <http://newyork.cbslocal.com/2018/03/19/cbs2-nycha-investigation/>.

⁵ See video at 1:39-2:07.

with the law, courts do not hesitate to compel compliance through preliminary injunctive relief. See *McCain*, 70 N.Y.2d at 120 (holding that Supreme Court was empowered to issue preliminary injunction forcing compliance with minimal standards of sanitation, safety, and decency in housing for homeless families with children); *Doe v. Dinkins*, 192 A.D.2d 270, 276 (1st Dep’t 1993) (holding that Supreme Court did not abuse its discretion in granting plaintiffs’ motion for preliminary injunction directing municipal defendants to comply with their obligations to aid, care for, and support the needy by reducing the population of two homeless shelters to 200 beds each, enforcing 30-bed limit in the dormitory room in one of the shelters, and curing existing fire code violations); *New York Cty. Lawyers’ Ass’n v. State*, 192 Misc. 2d 424, 438 (Sup. Ct. 2002) (granting plaintiff bar association a mandatory preliminary injunction directing payment of an interim rate of \$90/hour in order to prevent ineffective assistance of counsel); *Barnes v. Koch*, 136 Misc. 2d 96, 101–02 (Sup. Ct. 1987) (granting preliminary injunction in response to lead paint hazards at homeless shelter “[d]irecting the city to apply the maintenance and inspection plan outlined in open court, including a 24-hour maintenance crew, daily inspection, wet mopping by the staff of public areas three times daily and wet mopping by the staff of the residents’ rooms daily;” and “[d]irecting the city to prominently display signs in English and Spanish to advise that pregnant women and their unborn children are at risk if they remain at the shelter and they must report to their social worker”); see also *Wyckoff Heights Med. Ctr. v. Rodriguez*, 191 Misc. 2d 207, 209 (Sup. Ct. 2002) (“Thus, where a party is engaged in unlawful conduct which is continuous then a mandatory injunction is proper.”).

The relief requested here—lead inspections in apartments with young children—is mandated by federal and local law, which NYCHA, by its own admission, has violated by failing for years to perform required inspections and then hastily performing limited inspections using

individuals who lacked proper training and credentials. Moreover, the evidence is clear that apartments with lead paint hazards are continuing to go uninspected, thus threatening the lives of tenants, particularly young children. Under these extraordinary circumstances, where the health and safety of individuals exposed to toxic lead are jeopardized with each passing day, the Court should impose mandatory preliminary injunctive relief to force compliance with the law and protect lives.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

To establish a likelihood of success on the merits, “[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner’s claims should be left to a full hearing on the merits.” *Barbes*, 140 A.D.3d at 431 (internal quotation marks omitted) (citing cases). A likelihood of success on the merits may be sufficiently established “even where the facts are in dispute and the evidence need not be conclusive.” *Id.* (citing cases). Petitioners more than satisfy that standard here.

“A governmental entity’s serious substantive and procedural violations of applicable laws are in and of themselves sufficient to establish a likelihood of success on the merits.” *Lee v. New York City Dep’t of Hous. Pres. & Dev.*, 162 Misc. 2d 901, 909, (Sup. Ct. N.Y. Cty 1994). That is because success in an Article 78 proceeding, like the one here, simply requires showing that Respondents “failed to perform a duty enjoined upon it by law.” *CPLR § 7803*. The evidence here conclusively establishes that NYCHA is failing to comply with federal and local lead inspection laws on a staggering scale. NYCHA has publicly admitted as much. For example, Chair Olatoye stated at a December 5, 2017 New York City Council hearing: “In August 2012, annual apartment inspections were suspended This was done in accordance with a new published HUD rule that relaxed the obligation of public housing authorities to perform annual inspections. NYCHA’s interpretation of HUD’s guidance was wrong, and we now know that lead

paint inspections were also not performed.” Pet. Ex. 28 at 15:9-15.

The evidence of NYCHA’s noncompliance includes: (1) DOI findings that NYCHA ceased legally-required lead inspections in its units in 2012, while in subsequent years falsely certifying its compliance with federal lead laws to HUD, and that Chair Olatoye misrepresented the certification status of lead inspectors who resumed limited inspections in 2016 (*see* Pet. ¶¶ 93–98, 108–10 & Exs. 1 and 26); (2) admissions by Respondents that NYCHA stopped the legally-mandated lead inspections and continued to represent to HUD that it was in compliance with the law, despite NYCHA management’s awareness of NYCHA’s lead law violations (*see* Pet. ¶¶ 102–04 & Ex. 28 at 15:9–15, 16:2–7, 16:21–24, 28:11–13, 56:24–57:10); (3) sworn testimony by tenants that lead inspections have never been performed in their apartments, despite their complaints and evidence of the presence of lead (*see* Luciano Aff. ¶¶ 6–7; Hunt Aff. ¶¶ 6–10); (4) a sworn statement by a New York State Department of Health contract lead inspector demonstrating that an apartment in a building NYCHA claims is lead-free did, in fact, test positive for lead (*see* Rahim Aff. ¶ 3); and (5) revelations by NYCHA staff that work orders are being falsified to ensure that tenant complaints go unaddressed (*see* Walden Aff., Ex. C).

Because Petitioners have easily made a “[a] *prima facie* showing of a reasonable probability” that NYCHA is failing to comply with its lead inspection obligations, they have unquestionably established a likelihood of success on the merits.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION

New York state and federal courts have long recognized that the threat of lead poisoning represents irreparable harm. *Paige*, No. 17CV7481, 2018 WL 1226024, at *2 (“There is no doubt that lead poisoning constitutes irreparable harm.”); *New York City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 342–43 (2003) (“The dangers of exposure to lead-based paint,

especially to young children, are well documented and pose a serious public health problem. Lead is a poison that affects virtually every system in the body and is particularly harmful to brain and nervous system development. Even low levels of blood lead have been linked to diminished intelligence, decreased stature or growth and loss of hearing acuity.” (quotation marks and citation omitted)); [Barnes, 136 Misc. 2d at 100](#) (“Lead paint ingestion and the associated health problems of kidney disease, increased risk of cardiovascular disease and stroke amount to irreparable harm.”).

Indeed, NYCHA’s sister agency, the New York City Department of Health, makes those irreparable injuries abundantly clear:

- “Lead is particularly harmful to children. It can cause learning and behavior problems, as well as delay physical growth and mental development.”⁶
- “Pregnant women who are exposed to lead can in turn expose their unborn baby. Lead exposure during pregnancy can cause: High blood pressure[;] Miscarriage[;]
Babies born too soon or too small[;]
Learning and behavior problems in a child.”⁷
- “Lead poisoning in adults can cause serious health effects, such as high blood pressure, nerve disorders, brain damage, kidney damage and reproductive damage. Symptoms of lead poisoning include headaches, stomach cramps, constipation, muscle/joint pain, trouble sleeping, fatigue, irritability, and loss of sex drive. Most adults with lead poisoning don’t look or feel sick.”⁸

⁶ NYC HEALTH: LEAD POISONING PREVENTION, <http://www1.nyc.gov/site/doh/health/health-topics/lead-poisoning-prevention.page>.

⁷ NYC HEALTH: LEAD POISONING IN CHILDREN AND PREGNANT WOMEN, <http://www1.nyc.gov/site/doh/health/health-topics/lead-poisoning-children-and-lead-poisoning.page>.

⁸ NYC HEALTH: ADULTS AND LEAD POISONING, <http://www1.nyc.gov/site/doh/health/health-topics/lead-poisoning-adults-and-lead-poisoning.page>.

These dangers are not run-of-the-mill financial losses compensable in monetary damages. They are permanent, irreversible, severe, debilitating, and life-altering physical and cognitive injuries. That is the epitome of irreparable harm. *See Dinkins, 192 A.D.2d at 275* (“Human safety is in issue. The ultimate relief may be rendered inadequate, as the loss of one life would render permanent injunctive relief, granted at a later date, ineffective.”); *Reis v. J.B. Kaufman Realty Co., LLC, 54 Misc. 3d 1225(A) (Sup. Ct. Qns. Cty. 2017)* (holding that “the threat due to the lack of heat and safety concerns, for which there is no monetary award, satisfies the irreparable harm prong”); *New York Cty. Lawyers’ Ass’n, 192 Misc. 2d at 433* (finding irreparable harm based on, *inter alia*, the suffering of children and parents).

Without an injunction compelling NYCHA to conduct proper lead inspections of apartments that have gone uninspected, the safety of tenants, particularly young children, will remain threatened. Notably, previous—and unsuccessful—government efforts to abate and obviate the threat of exposure to lead do not preclude a finding that irreparable harm is likely. *See, e.g., Concerned Pastors for Soc. Action v. Khouri, 217 F. Supp. 3d 960, 974 (E.D. Mich. 2016)* (rejecting an argument that “leaving water filters at residents’ doorsteps” precluded a finding of irreparable harm since “[t]he likelihood that some of the filters are installed improperly and Flint residents are continuing to consume lead is quite high under the circumstances”).

IV. THE BALANCE OF EQUITIES WEIGHS ENTIRELY IN PETITIONERS’ FAVOR

“The balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief.” *Barbes, 140 A.D.3d at 432*. Here, the prejudice to NYCHA tenants from a denial of the requested relief is obvious and overwhelming, while the prejudice to Respondents from granting the relief is non-existent.

Absent interim relief, thousands of children, as well as adults (including pregnant women),

will experience continued exposure to lead, causing or worsening physical and cognitive injuries, which are often irreversible. By contrast, grant of interim relief requiring Respondents to perform lead inspections cannot constitute prejudice because it requires no more than performing duties already mandated by law. Merely because Respondents have spent years flouting that law does not render their compliance today prejudicial. *See Dinkins, 192 A.D.2d at 276* (“The balance of equities also lies in the plaintiffs’ favor. The defendants’ strenuous objection to the court’s order because of their alleged inability to absorb the displaced men, and because services currently provided for the homeless will be interrupted, is unavailing. . . . [Defendants’] hardship was caused by their own inaction.”). Thus, the balance of equities weighs entirely in Petitioners’ favor.

V. THE COURT SHOULD GRANT THE RELIEF REQUESTED

Because of the serious health risks associated with lead exposure, immediate relief is necessary. Because of NYCHA’s admitted and well-documented failure to conduct annual lead inspections since 2012, its admitted and well-documented history of misrepresenting compliance with lead inspection laws, its continued refusal to conduct lead inspections in apartments that require it, and its practice of closing out tenant complaints without resolving, or even addressing, them, the only way to ensure the immediate inspection of all apartments with possible lead hazards and young children is to order that within 90 days NYCHA must properly conduct inspections for lead in all apartments where a child under the age of 8 resides and:

- (1) the apartment was required to receive annual lead inspections at any point in or after 2012;
- (2) there is an open, unresolved lead-related tenant complaint; or
- (3) there was a lead-related complaint filed that was closed out by NYCHA within the past three years.

Such an order is necessary to protect the health and safety of thousands of children living in public housing who cannot wait another day for relief. It is also narrowly tailored to alleviate the ongoing harm and lack of transparency perpetrated by NYCHA. Further, the scope and timeframe of the requested order is reasonable and consistent with preliminary injunctive relief granted in analogous circumstances. *See Dinkins, 192 A.D.2d at 276-77* (affirming order for defendants, within 60 days, to reduce population at homeless shelter to 200 beds each, and within 10 days to cease placement of homeless men in certain portions of a second shelter and to cure existing fire code violations in both shelters); *McCain, 70 N.Y.2d at 120* (upholding Supreme Court's equitable powers to compel compliance with minimal standards of sanitation, safety and decency, including standards set by the court and those guaranteed by law).

Conclusion

Petitioners have shown a likelihood of success on the merits, a risk of irreparable harm posed by NYCHA's continuing non-compliance with federal and local law, and a balance of equities in Petitioners' favor. The preliminary injunctive relief requested by Petitioners is not only urgently needed, it is also required by law. Accordingly, Petitioners' motion should be granted.

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