

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

PASQUALE PICARO, PRUDENCIO VALLE, JUDITH BRATNICK, SANDY CAUSE, individually and as next friend to minor child S.C., LILLIAN ANTHONY, AMOGHENE UMUDE, DOMINGO OSORIO, OLGA ORTIZ, SHARYAN VASQUEZ, MELISSA VANDERHORST, individually and as next friend to minor child A.V., SHAKEI GADSON, LETITIA JAMES, as Public Advocate for the City of New York, and CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK,

*Plaintiffs,*

v.

PELHAM 1130 LLC, PELHAM 1135 LLC, PELHAM 1540 LLC, MATTHEWS 2160 LLC, JOSHUA GOLDFARB, PHILIP GOLDFARB, MARC GOLDFARB, THOMAS FRYE, GOLDFARB PROPERTIES INC., PELICAN MANAGEMENT INC., NEW YORK CITY DEPARTMENT OF BUILDINGS, and RICK D. CHANDLER, as Commissioner of the New York City Department of Buildings,

*Defendants.*

No. 14 Civ. 07398 (DAB)

**MEMORANDUM OF LAW IN OPPOSITION TO CITY  
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT**

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## INTRODUCTION

This action concerns the role played by the New York City Department of Buildings (“DOB”) and Rick D. Chandler, as Commissioner of DOB (“City Defendants”) in Landlord Defendants’<sup>1</sup> sustained campaign to discriminate against disabled, elderly, and low-income tenants, and ultimately to force them out of apartments, in several properties owned by Landlord Defendants. These properties (collectively, the “Goldfarb Properties”)<sup>2</sup> have undergone over a year of disruptive and unhealthy “luxury conversion” construction designed to harass and endanger the current tenants, with the ultimate goal of forcing them to leave. At every step of the way Landlord Defendants’ illegal acts have occurred under lax oversight of City Defendants, who, by approving Landlord Defendants’ plans, have themselves broken the law and violated their duties to Plaintiffs, causing them substantial injury.

In the motion before the Court, City Defendants concede they do very little, if anything, to ensure the City’s Building and Construction Code provisions are enforced in a manner that protects the ability of individuals with disabilities to enter and exit their homes during times of construction. They claim their practices can be compliant with the Americans With Disabilities Act (“ADA”), Fair Housing Act (“FHA”), and New York City Human Rights Law (“City HRL”), even if they result in the harassment and endangerment of such tenants. Indeed, City Defendants’ brief is a portrait of callous indifference to the plight of disabled tenants. They effectively shut the City’s eyes and plug its ears while approving plans that explicitly trap people with disabilities in their apartments during months of construction, thus aiding and abetting

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<sup>1</sup> Landlord Defendants are: Pelham 1130 LLC, Pelham 1135 LLC, Pelham 1540 LLC, Matthews 2160 LLC, Joshua Goldfarb, Philip Goldfarb, Marc Goldfarb, Thomas Frye, Goldfarb Properties Inc., and Pelican Management Inc. (collectively, “Landlord Defendants”).

<sup>2</sup> The properties are: 1130 Pelham Parkway South, 1540 Pelham Parkway South, 2160 Matthews Avenue, 2166 Matthews Avenue, and 1135 Pelham Parkway North.

discrimination by landlords like Landlord Defendants.

In what is perhaps the most egregious example of these abuses, City Defendants issued permits for Landlord Defendants to shut down *every* elevator at the Goldfarb Properties simultaneously for five months in 2014, starting during the hottest months of the summer—including *both* elevators in the 2160-66 Matthews Avenue complex where the removal of elevator service could have been staggered. Incredibly, in the motion, City Defendants deny that they have any duty to enforce the City’s regulations that ensure disabled tenants access to their apartments. City Defendants contend that they are free to approve elevator work without inquiring whether it will discriminate against disabled tenants, let alone whether such tenants will be stranded in their apartments at great risk to their health and lives.

Plaintiffs Judith Bratnick, Sandy Cause, individually and as next friend to minor child S.C., Lillian Anthony, Amoghene Umude, Domingo Osorio, Olga Ortiz, Sharyan Vasquez, Melissa Vanderhorst, individually and as next friend to minor child A.V., and Shakei Gadson (collectively, “Individual Plaintiffs”) are disabled individuals or the loved ones of those disabled individuals who were denied reasonable access to their homes during several months of elevator construction. Plaintiff Letitia James (“James”) is the Public Advocate for the City of New York. Plaintiff Center for Independence of the Disabled, New York (“CIDNY”) (with Individual Plaintiffs and James, collectively “Plaintiffs”) is an advocacy organization for disabled New Yorkers. All have been harmed by City Defendants’ actions and seek to challenge the inadequate and discriminatory enforcement and oversight of the City’s building and construction laws by City Defendants.

Under those laws, City Defendants are charged with ensuring that tenants—whether disabled or not—are able to safely enter and exit their apartments during times of construction.

City Defendants are not abiding by their legal obligation. They have failed to ensure that disabled individuals—including Plaintiffs—have appropriate access to their homes during construction, resulting in substantial harm to each Plaintiff. As such, City Defendants have denied Plaintiffs the benefit of their municipal services in violation of federal and local law.

To remedy these harms, Plaintiffs bring claims against City Defendants under the ADA, FHA, City HRL, and for a declaration that City Defendants’ practices violate the City’s accessibility standards. Plaintiffs respectfully submit this memorandum of law in opposition to City Defendants’ motion to dismiss Plaintiffs’ First Amended Complaint (“FAC”), and ask that the motion be denied in its entirety.

### **FACTUAL BACKGROUND**

#### **A. Plaintiffs and the Elevator Outages**

Individual Plaintiffs are or were tenants in Goldfarb Properties who suffer from mobility-related disabilities, or are the loved ones of those disabled individuals. FAC ¶¶ 3, 7, 8, 15-22. It is extremely difficult, if not impossible, for Individual Plaintiffs who are disabled to climb or descend stairs. FAC ¶ 93. They rely on the protections of the FHA, the ADA, and the City Housing Accessibility Program to ensure that they have safe access to their homes at all times, including during construction and renovation. FAC ¶¶ 46-48, 52-55, 62, 65, 67-75, 78-80.

DOB approved Landlord Defendants’ applications to perform elevator repairs and simultaneously remove all available elevators from service at the Goldfarb Properties for five months. FAC ¶¶ 12, 81. This included removing *both* elevators at the 2160-66 Matthews Avenue complex. FAC ¶ 95. The applications were approved without the requirement of a Tenant Protection Plan (“TPP”), or any other steps to protect the accessibility rights of tenants with mobility impairments. FAC ¶¶ 12, 68-69.

Beginning in the summer of 2014, Landlord Defendants carried out their plan of

simultaneously removing all available elevators from service at the Goldfarb Properties.

FAC ¶ 81. Landlord Defendants or their representatives had notice of each of the disabled Individual Plaintiffs' disabilities, but denied them reasonable accommodations, such as alternating work on the two elevators in 2160-66 Matthews Avenue to allow the use of one elevator while the other elevator was being serviced. FAC ¶¶ 84, 95.

Without elevator service, the disabled Individual Plaintiffs were required to use the stairs—which were often congested with construction workers and their equipment—to travel to and from their apartments, or to remain inside their apartments for weeks or months at a time. FAC ¶¶ 96, 98-181. In an emergency, these tenants would have been unable to vacate their apartment buildings. *Id.*

As Public Advocate, Plaintiff James's mandate is to "investigate and otherwise attempt to resolve . . . individual complaints concerning city services and other administrative actions of city agencies," including through litigation. N.Y.C. Charter § 24(f)(4); *Green v. Safir*, 679 N.Y.S.2d 383, 385 (N.Y. App. Div. 1st Dep't 1998), *appeal denied*, 93 N.Y.2d 882 (1998). Her office's Constituent Affairs Department was first contacted by a tenant in one of Landlord Defendants' buildings regarding the elevator outages on July 15, 2014. FAC ¶ 182. Plaintiff James expended her office's resources conducting an inquiry, including surveying tenants and contacting City Defendants to clarify DOB policy. FAC ¶¶ 182-83, 185-87.

Plaintiff CIDNY is a non-profit organization that provides services and advocacy toward independent living for people with disabilities. FAC ¶ 24. CIDNY's goal is to ensure full integration, independence, and equal opportunity for all people with disabilities by removing barriers to the social, economic, cultural, and civic life of the community. *Id.* Over half of CIDNY's board members and over 70 percent of CIDNY's staff are persons with disabilities. *Id.*

CIDNY regularly expends resources addressing the needs of people with disabilities who require accessible means of egress from their apartments, and will continue to expend resources unless there is a change to DOB's practices. FAC ¶ 222.

**B. The New York City Housing Accessibility Program**

Plaintiffs allege that City Defendants provide a regulatory housing accessibility program in the form of enforcement of a complex scheme of building regulations to ensure accessibility for tenants during construction (regulatory scheme hereinafter referred to as "Housing Accessibility Program"). FAC ¶¶ 63-80. This program is a service provided to all New Yorkers, much like the police department's enforcement of the criminal code. Fundamental to the Housing Accessibility Program are certain sections of the New York City Building and Construction Codes ("the Codes"), codified in Title 27 and 28 of the New York City Administrative Code. FAC ¶ 62. The Codes apply comprehensively to all buildings and to all construction or alterations to buildings. N.Y.C. Admin. Code §§ 27-292.4(a), 28-701.2C1; FAC ¶ 62. The explicit purpose of the Codes is to "provide reasonable minimum requirements and standards . . . for the regulation of building construction in the city of New York in the interest of public safety, health, [and] welfare." §§ 27-102, 28-101.2; FAC ¶ 64.

New York City Public Law 58 ("PL 58") amended the Codes to add several requirements regarding building access for people with disabilities. FAC ¶¶ 70-75. Specifically concerned with "Facilities for People Having Physical Disabilities," sub-article 2 of PL 58 ensures that, as part of the minimum requirements and standards provided by the Codes, "buildings shall be provided with accessible routes, usable or adaptable space and accessible elements and facilities to make buildings accessible and usable by, and to establish a safe environment for" people with

disabilities. § 27-292.1; FAC ¶ 71.<sup>3</sup> PL 58's added accessibility requirements ensure that individuals with disabilities are able to enter and exit their homes at all times. § 27-292.5(a)-(d); FAC ¶¶ 72-74, 231. Moreover, all buildings must have "at least one primary entrance accessible to and usable by individuals who use wheelchairs." § 27-357(d); FAC ¶¶ 75, 231.<sup>4</sup>

Finally, under Title 28 (pertaining to accessibility of elevators), the Building Code contains additional provisions to guarantee that elevator cars are useable by individuals with disabilities. *See* Building Code §§ 1109.6 and 3001.3 (requiring passenger elevators to be "accessible"). By their terms, these provisions govern the suitability of elevator cars for people with disabilities, such as by setting a minimum size for elevator call buttons. *See, e.g.,* Accessible & Usable Bldgs. & Facilities, Int'l Code Council A117.1 § 409.2 (2009) (model code cited in Building Code § 3001.3). These provisions are in contrast to the applicable provisions of Title 27, which deal with construction that may render elevators unavailable.

Defendant DOB is the agency charged with ensuring the safe and lawful use of buildings and properties in the City, and in this capacity it both enforces and interprets the Codes. § 28-103.1; FAC ¶ 38, 66, 213, 230. Among other enforcement activities, DOB reviews and issues certificates of occupancy and building and construction permits. *Id.* Any permits that DOB issues must be in accordance with the provisions of the Codes. *Id.* Specifically, "[a]ll construction documents approved by the commissioner shall be conditioned upon and subject to compliance with the requirements of [the] code and other applicable laws and rules in effect at the time of issuance of the associated work permit." § 28-104.2.4.

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<sup>3</sup> The Codes also protect tenants from diminishing accessibility in older buildings that were grandfathered in, requiring that "facilities . . . shall not be diminished to less than those which would be required were the building" erected now. § 27-292.4(c).

<sup>4</sup> While the DOB Commissioner has the authority to waive these requirements in certain circumstances, the commissioner may only do so "provided . . . that such waiver would not significantly adversely affect provisions for health, safety and security and that equally safe and proper alternatives are prescribed. . . ." § 27-292.6.

One such condition is that an applicant's construction documents must include a TPP. § 28-104.8.4; FAC ¶ 68. The TPP must identify "the specific units that are or may be occupied during construction, [and] the means and methods to be employed to safeguard the safety and health of the occupants." § 28-104.8.4; FAC ¶ 68. The TPP must "make detailed and specific provisions" to ensure that "[a]t all times in the course of construction, provision shall be made for adequate egress." § 28-104.8.4; FAC ¶ 69.

### **STATUTORY FRAMEWORK**

The Housing Accessibility Program is provided against the backdrop of two federal remedial statutes—the Americans with Disabilities Act and the Fair Housing Act—and the New York City Human Rights Law.

#### **A. The Americans With Disabilities Act**

The ADA states that no "individual with a disability shall, by reason of such disability, be . . . denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. The ADA's implementing regulations require that public entities "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).<sup>5</sup>

Those regulations further prohibit public entities from denying people with disabilities benefits or services to which they are legally entitled, or from offering them in such a way that makes the services less effective for people with disabilities. 28 C.F.R. § 35.130(b)(1); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003). Indeed, they are phrased in the broadest possible terms, prohibiting governments from limiting a person with a disability "in the enjoyment of *any* right, privilege, advantage, or opportunity enjoyed by others receiving the aid,

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<sup>5</sup> City Defendants do not dispute that they are "public entities."

benefit, or service.” 28 C.F.R. § 35.130(b)(1)(vii) (emphasis added). In other words, the ADA requires that, if an entity provides “a service to the general public, ‘it must use methods or criteria that do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities.’” *Niece v. Fitzner*, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (citation omitted).

## **B. The Fair Housing Act**

The FHA, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.*, and the regulations promulgated thereunder, 24 C.F.R. § 100 *et seq.*, is a remedial statutory and regulatory system enacted in order to prevent housing discrimination, including against people with disabilities. Section 3604(f) of the FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of” the handicap of that person or the handicap of anyone associated with that person. 42 U.S.C. § 3604(f)(2).<sup>6</sup> The FHA further states that discrimination includes, not just the denial of housing market opportunities, but the denial of a reasonable accommodation necessary for the “equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3).<sup>7</sup>

A violation of the FHA may be established on the theory of disparate impact or one of disparate treatment. *Tx. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2525 (2015); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995). A disparate impact analysis examines a facially-neutral policy or practice for its differential impact or effect on a particular group. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d

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<sup>6</sup> This language tracks that of Section 3604(b).

<sup>7</sup> Section 3604(f)(3) is a definitional subsection regarding the meaning of “discrimination” as it is used in Sections 3604(f)(1) and (f)(2). Thus, subsection (f)(3) is enforced through either preceding subsection. *See, e.g., Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995).

926, 933 (2d Cir. 1988). In order to state a disparate impact discrimination claim under the FHA, plaintiffs must show: “(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.” *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565, 575 (2d Cir. 2003) (emphasis and internal citations omitted).<sup>8</sup> A plaintiff must show that the challenged practice actually or predictably results in discrimination. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90 (2d Cir. 2000) (quotation omitted), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). A plaintiff must also “show a causal connection between the facially neutral policy and the alleged discriminatory effect.” *Tsombanidis*, 352 F.3d at 575. The plaintiff need not show that the practice was imposed with discriminatory intent. *Huntington Branch, NAACP*, 844 F.2d at 934.

Congress mandated that the FHA, as a remedial statute, be given broad and liberal construction. *Cabrera v. Jakobovitz*, 24 F.3d 372, 388 (2d Cir. 1994). Indeed, the Supreme Court has long recognized that the FHA has a “broad and inclusive compass,” and therefore accords a “generous construction” to the Act’s complaint-filing provision. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).

### **C. New York City Human Rights Laws**

The City HRL protects against discrimination in housing for people with disabilities. Section 8-107(5) of the City HRL makes it illegal for a landlord to discriminate against any person because of such person’s actual or perceived disability in the furnishing of facilities or services in connection with a rental. N.Y.C. Admin. Code § 8-107(5). Relevant here, Section 8-

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<sup>8</sup> Courts apply the same tests and standards in state and local anti-discrimination statutes, as those applied to review claims under the federal FHA. *See, e.g., Kennedy v. Related Mgmt.*, 2009 WL 2222530, at \*8 (S.D.N.Y. July 23, 2009); *Barkley v. Olympia Mortg. Co.*, 2007 WL 2437810 at \*18 (E.D.N.Y. Aug. 22, 2007).

107(6) adds that to “aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter” is an unlawful discriminatory practice. § 8-107(6).

The City HRL shall be “construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.” § 8-130.

### **STANDARD OF REVIEW**

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must plead sufficient facts “to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). When considering such a motion, the court must accept as true the well-pleaded factual allegations and must draw all reasonable inferences in Plaintiffs’ favor. *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596 (2d Cir. 2011). The standard is particularly liberal in civil rights cases. *Bohmer v. New York*, 684 F. Supp. 2d 357, 360 (S.D.N.Y. 2010) (citing *Patel v. Searles*, 305 F.3d 130, 135 (2d Cir. 2002) (already liberal standard under Fed. R. Civ. P. 8(a) must be applied with particular care where “the complaint alleges a civil rights violation”)); *see also Phillip v. Univ. of Rochester*, 316 F.3d 291, 293-94 (2d Cir. 2003) (“liberal pleading rules apply with particular stringency to complaints of civil rights violations”); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991).

### **ARGUMENT**

#### **I. PLAINTIFFS STATE A CLAIM AGAINST CITY DEFENDANTS UNDER THE ADA**

By signing off on Landlord Defendants’ construction plans, City Defendants failed to meaningfully provide to the disabled Individual Plaintiffs a municipal service that, *inter alia*, ensures that all New York City residents have access to their homes during times of construction.

FAC ¶¶ 12, 66, 68-69. This is a clear violation of Title II of the ADA and of 28 C.F.R. § 35.130(b)(1). Rather than taking Plaintiffs' well-pled ADA claim head on, City Defendants instead try to reframe the dispute by arguing that Plaintiffs are merely challenging DOB's issuance of work permits under a wholly different provision of the C.F.R. than the one Plaintiffs name in the FAC. *See* Mot. 10-12. In response to this imaginary claim, City Defendants argue the ADA claim must be dismissed because a municipal entity cannot be held liable for the discriminatory conduct of its permittees—*i.e.*, Landlord Defendants. This argument misses the point. DOB is not alleged to be solely an issuer of building permits, but more broadly the municipal entity charged with enforcing building regulations to ensure that New York residents have access to their homes during times of construction. FAC ¶ 66. Pursuant to Title II and relevant implementing regulations, City Defendants are thus required to provide that service in a meaningful way to individuals with disabilities. It is City Defendants' failure to provide that service to the disabled Individual Plaintiffs that is the crux of Plaintiffs' ADA claim. Accordingly, the motion to dismiss the Plaintiffs' ADA claim must be denied.

**A. The FAC Adequately Alleges that City Defendants Denied Plaintiffs the Benefits of the City's Accessibility Laws**

The FAC adequately alleges a cause of action under Title II of the ADA, which applies to government entities, premised on City Defendants' failure to provide meaningful access to their program for ensuring that New York residents may enter and exit their apartments during construction. Under Subtitle A of Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

There are three elements to a claim under Title II of the ADA: "(1) plaintiffs are

‘qualified individuals’ with a disability; (2) defendants are subject to the ADA; and (3) plaintiffs were denied the opportunity either to participate in or to benefit from defendants’ services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs’ disabilities.” *United Spinal Ass’n v. Bd. of Elections in New York*, 882 F. Supp. 2d 615, 623 (S.D.N.Y. 2012) (Batts, J.), *aff’d*, 752 F.3d 189 (2d Cir. 2014). City Defendants only dispute the third element, contending without citation to any allegations in the FAC that “Plaintiffs . . . have not been denied the opportunity to participate in or benefit from Municipal Defendants’ services, programs, or activities.” Mot. at 10.

The relevant inquiry here is “whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled.” *Henrietta D.*, 331 F.3d at 273; *see also* 28 C.F.R. § 35.130(b)(1); *Niece*, 922 F. Supp. at 1218; *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F. Supp. 986, 991 (S.D. Fla. 1994). In other words, as long as a service exists for anyone, the ADA requires that it be accessible to the disabled. *Civic Ass’n of Deaf of N.Y.C. v. Giuliani*, 915 F. Supp. 622, 634-35 (S.D.N.Y. 1996).

Plaintiffs allege that City Defendants have committed themselves to providing New York City residents with the service of ensuring access to and from their homes during times of construction. FAC ¶¶ 66, 68-69. Having made such commitments, as a matter of law, City Defendants are barred from enforcing them in a manner that discriminates against individuals with disabilities. *Civic Ass’n of Deaf*, 915 F. Supp. at 635, 637 (once City established emergency service of street alarm box system, plan to remove alarm boxes that were accessible to deaf individuals, leaving only inaccessible boxes, violated the ADA); *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 759-60 (N.D. Tex. 2014) (upholding claim under 28 C.F.R. § 35.130(b)(1) that city enforced its traffic laws in violation of the ADA by enforcing most

provisions, which did not relate to disability accessibility, but not enforcing provision pertaining to the availability of accessible parking spaces for the disabled); *Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013) (upholding claim that county officials responsible for ensuring accessibility during elections discriminated against blind plaintiffs by failing to ensure that voting machines accessible to the visually impaired, which would allow plaintiffs to vote privately and independently, could be activated and operated by poll workers).

Plaintiffs' action is comparable to recent cases successfully brought against New York City and other municipal entities that, like DOB, were alleged to have failed in administering a program lawfully by not accommodating people with disabilities. In *Brooklyn Center for the Independence of the Disabled v. Bloomberg* ("BCID"), the City was recently held liable under the ADA and City HRL for its failure to accommodate the disabled in its emergency preparedness planning. 980 F. Supp. 2d 588, 658-59 (S.D.N.Y. 2013). Significantly, after a bench trial, it was held in *BCID* that the City's emergency planning did not provide for the safe evacuation of disabled tenants from multi-story buildings "if a power outage has rendered the elevators inoperable." *Id.* at 643. In another recent case against the City, *United Spinal Association*, this Court granted summary judgment for plaintiffs on ADA and City HRL claims arising from the New York City Board of Elections' failure to enforce its codified responsibility of identifying and designating accessible poll sites for disabled individuals.<sup>9</sup> *United Spinal Ass'n*, 882 F. Supp. 2d at 617.

City Defendants avoid any discussion of *BCID* or *United Spinal Association* in opposing

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<sup>9</sup> Indeed, enforcement of construction codes or zoning laws in a manner that results in discrimination against disabled people has been found actionable in this and other circuits. *See, e.g., Innovative Health Sys. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997) (upholding ADA challenge to Zoning Board of Appeals' denial of permit for drug and alcohol rehabilitation center), *superseded on other grounds, Zevo v. Verizon N.Y., Inc.*, 252 F.3d 163, 167 n.7 (2d Cir. 2001); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002) (upholding challenge to denial of zoning permit brought under ADA).

Plaintiffs’ ADA claim.<sup>10</sup> Nor, for that matter, do City Defendants grapple with any cases where government entities, once having committed to providing a service, program, or activity, were found liable under anti-discrimination statutes for failing to administer such public benefits in a non-discriminatory manner. *See, e.g., Civic Ass’n of Deaf*, 915 F. Supp. at 635, 637; *Van Velzor*, 43 F. Supp. 3d at 759-60; *Cal. Council of the Blind*, 985 F. Supp. 2d at 1239.<sup>11</sup> City Defendants instead inappropriately dispute Plaintiffs’ well-pled facts. Rather than accept as true, as they must, Plaintiffs’ allegations that City Defendants have themselves—regardless of Goldfarb Defendants’ conduct—engaged in discriminatory conduct, City Defendants attack the very notion that they have committed to providing New Yorkers with an “aid, benefit, or service.” Mot. at 10. Public entities cannot evade their responsibility to provide access to their programs and services merely because another, private entity is also engaging in discriminatory conduct. 28 C.F.R. pt. 35, app. B (2010) (“[T]itle II applies to anything a public entity does. . . . All governmental activities of public entities are covered.”).<sup>12</sup>

### **B. City Defendants Mischaracterize Plaintiffs’ ADA Cause of Action**

Furthering their apparent strategy of obscuring Plaintiffs’ actual allegations, City Defendants attack Plaintiffs’ ADA claim by mischaracterizing it. The cases City Defendants cite in support of their argument rest almost entirely on *subsection 6* of 28 C.F.R. § 35.130(b), a

<sup>10</sup> City Defendants cite *BCID* only for the banal proposition that organizational standing exists where an organizational plaintiffs’ injuries are “fairly traceable” to a defendant’s conduct. Mot. at 17. They do not cite *BCID* outside the context of standing and, inexplicably, do not cite or discuss in any way this Court’s opinion in *United Spinal Association*.

<sup>11</sup> City Defendants’ citation to the unpublished, out-of-circuit and 15-year-old *Alford v. City of Cannon Beach*, 2000 WL 33200554 (D. Ore. Jan. 17, 2000) warrants little, if any, deference. *First*, the claim at issue in *Alford* was premised on 28 C.F.R. § 35.130(b)(6)—a provision not at issue here—and upon only a cursory analysis of that provision. *Alford*, 2000 WL 33200554, at \*22. Second, the benefit denied in *Alford*—access to a restaurant and wine shop—is a far cry from the indispensable benefit of accessing one’s home.

<sup>12</sup> *Cf. Henrietta D.*, 331 F.3d at 286 (“[A] State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II’s requirements.” (citing 28 C.F.R. pt. 35, app. A, at 517 (2002)); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 317-18 (E.D.N.Y. 2009) (“It is immaterial that [Plaintiff’s] constituents are receiving mental health services in privately operated facilities . . . . The State cannot evade its obligation to comply with the ADA by using private entities to deliver some of [its] services.”).

provision of the administrative code that directs government entities to issue permits to applicants on a non-discriminatory basis.<sup>13</sup> Plaintiffs do not, however, sue under that provision or even allege that City Defendants have denied or granted a building permit on the basis of a permit applicant's disability status. Plaintiffs bring a claim to enforce *subsection 1* of 28 C.F.R. § 35.130(b), which requires a government entity to provide disabled individuals with equal access to government programs, services, and activities. FAC ¶¶ 53, 214. City Defendants' argument is not only flawed because it attacks the truth of Plaintiffs' well-pled allegations, but also because it appeals to legal authority under which Plaintiffs do not plead a cause of action.

In short, none of the cases relied on by Defendants involve an entity—like DOB—that is explicitly charged with ensuring building accessibility for disabled individuals, and whose disregard of this obligation directly resulted in denial of a benefit to individuals with disabilities. The Second Circuit's holding in *Noel*, for example, was based on the fact that the Taxi & Limousine Commission ("TLC") was "merely" charged with regulating and licensing *taxi operators* but had no duty to ensure a minimum standard of accessibility for *taxi passengers*. *Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 72 (2d Cir. 2012). By its regulations, then, the TLC was prohibited only from refusing to grant licenses to taxi operators with disabilities, but was charged with no obligation to protect disabled passengers. *Id.* at 69. By contrast, City Defendants are required to ensure that enforcement of their rules does not result in discrimination against disabled individuals.<sup>14</sup> Their failure to provide Plaintiffs with

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<sup>13</sup> See, e.g., *Clark v. Va. Bd. of Bar Examiners*, 880 F. Supp. 430, 443 (E.D. Va. 1995) (question asking applicants to the bar, as a condition of licensing, whether they had been treated or counseled for mental disorders in the past five years discriminated against applicant on the basis of disability in violation of 28 C.F.R. § 35.130(b)(6)).

<sup>14</sup> For analogous reasons, City Defendants also improperly rely on *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1187 (D. Colo. 1998) (public entity not liable for failure of licensed transportation carrier to provide disability access to buses, without mention of whether public entity was separately charged with enforcing accessibility requirements), and *Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994) (public liquor-licensing entity not liable for alleged discrimination by liquor stores).

meaningful access to their programs and benefits, even if the result of “benign neglect,” violates the ADA. *BCID*, 980 F. Supp. 2d at 597. Their motion to dismiss should be denied.

## **II. PLAINTIFFS STATE A CLAIM AGAINST CITY DEFENDANTS UNDER THE FHA**

Plaintiffs plead a well-founded disparate impact claim against City Defendants for violation of the FHA and the regulations promulgated thereunder. Specifically, the FAC alleges that City Defendants discriminated against disabled tenants in their execution of the Codes and Housing Accessibility Program, the administration of which is both a privilege and a service the City extends to all New York tenants. 42 U.S.C. § 3604(f)(2). As noted *supra*, the Codes and Housing Accessibility Program provide minimum requirements to protect the safety, health, and welfare of tenants, including by ensuring that buildings have safe and accessible routes for people with disabilities at all times, whether during construction or not. N.Y.C. Admin. Code §§ 27-102, 27-292.1, 27-292.5(a), 28-101.2. The FAC alleges that City Defendants’ facially neutral policy of approving construction and elevator permits without requiring a TPP or other protections for tenants with disabilities discriminates against people with disabilities. The FAC further alleges that the City Defendants’ approval of Landlord Defendants’ applications to simultaneously remove every elevator in the Goldfarb Properties denied Individual Plaintiffs’ equal opportunity to use and enjoy their homes. *See* 42 U.S.C. § 3604(f)(3).

### **A. The Fair Housing Act Reaches Housing Discrimination Suffered by People With Disabilities Before and After They Have Acquired Housing**

As noted, the FHA makes it illegal to discriminate against any person, not only in the denial of housing market opportunities, but also in providing unequal services or facilities in connection with housing, 42 U.S.C. § 3604(f)(2), or in the denial of “equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3). Thus, contrary to the assertion in City Defendants’ motion, Mot. at 14-15, the FHA’s broad scope prohibits discrimination in not only

the “pre-acquisition” availability of housing, but also in the “post-acquisition” privileges or services, like those administered by City Defendants. *Davis v. City of New York*, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012); *see also Human Res. Research & Mgmt. Grp., Inc. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 253-54 (E.D.N.Y. 2010).

Although the Second Circuit has not expressly spoken on the issue of whether the FHA reaches post-acquisition discrimination, “[d]istrict courts in this Circuit that have addressed the issue have concluded that the FHA applies to post-acquisition claims.” *Viens v. Am. Empire Surplus Lines Ins. Co.*, 2015 WL 3875013, at \*9 (D. Conn. June 23, 2015).<sup>15</sup> As one such district court decision, *Davis v. City of New York*, held, Section 3604 “is best understood to prohibit post as well as pre-acquisition discrimination in the provision of housing-related services.” *Davis*, 902 F. Supp. 2d at 436.

The *Davis* court reasoned that (1) the term “privileges” in the statute implicates continuing rights; (2) the Second Circuit, in *Cabrera*, 24 F.3d at 388, held that Section 3604 of the FHA should be given a broad construction; and (3) such a reading comports with the interpretation of the Department of Housing and Urban Development, the federal agency tasked with implementing the FHA, which explicitly recognizes post-acquisition claims. *Davis*, 902 F. Supp. 2d at 436-37; *see also* 24 C.F.R. § 100.65; *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984) (agency’s interpretation to be given “controlling weight” unless unreasonable); *Shapiro*, 51 F.3d at 335 (same). District courts in the Second Circuit have also held that the FHA prohibits discriminatory licensing, inspection, and registration regimes,

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<sup>15</sup> However, the Second Circuit considered an example of post-acquisition discrimination in *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333, 335 (2d Cir. 1995), where implicit recognition of the FHA’s prohibition on discriminatory post-acquisition conduct was necessary to the panel’s holding. In that case, the Second Circuit held that an appropriate parking space which had been denied to a plaintiff years after she acquired her apartment was a service or facility offered in connection with the dwelling under Section 3604(f)(2), and that the denial of the plaintiff’s reasonable accommodation request was an FHA violation. *Id.*

*Human Res. Research & Mgmt. Grp.*, 687 F. Supp. 2d at 266-67, and prohibits “discrimination . . . in the provision of repairs or maintenance,” *Miller v. 270 Empire Realty LLC*, 2012 WL 1933798, at \*4 (E.D.N.Y. Apr. 6, 2012) (citing 42 U.S.C. § 3604(b); 24 C.F.R. § 100.65(b)(2)), *adopted by* 2012 WL 1940829 (E.D.N.Y. May 29, 2012), holdings which required an assumption that the FHA applied to post-acquisition conduct.

Outside of the Second Circuit, the overwhelming majority of circuit courts that have directly addressed the question of whether the FHA reaches post-acquisition discrimination have found that it does. *See, e.g. Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009); *Mehta v. Beaconridge Improvement Ass’n*, 432 F. App’x 614, 616-17 (7th Cir. 2011). Indeed, the D.C. Circuit (in a case upon which City Defendants rely for a separate point) explained that Section 3604(b) “very clearly applies” to post-acquisition conduct. *Davis*, 902 F. Supp. 2d at 435 n.174 (citing *Clifton Terrace Assoc. v. United Techs. Corp.*, 929 F.2d 714, 719 (D.C. Cir. 1991)). Likewise, the Fourth Circuit, in *Jersey Heights Neighborhood Ass’n v. Glendening*, “strongly suggested” that it would apply Section 3604(b) to post-acquisition housing services. *Id.* (citing 174 F.3d 180, 192 (4th Cir. 1999)).<sup>16</sup>

To accept City Defendants’ conception of the FHA as a pre-acquisition statute only is to invite absurd and unjust results that would endanger the societal gains minority and disabled citizens have enjoyed since the FHA’s enactment. Indeed, under such a reading, minority and disabled tenants could “win the battle” to rent housing but “lose the war” to live in their new home free from invidious discrimination. *See Bloch v. Frischholz*, 533 F.3d 562, 571 (7th Cir. 2008) (Wood, J., dissenting), *rev’d en banc*, 587 F.3d 771 (7th Cir. 2009). City Defendants

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<sup>16</sup> Despite a multitude of cases decided in this Circuit and four other sister circuits, City Defendants’ reliance on a single outlying opinion from the Fifth Circuit, *Cox v. City of Dallas*, and its progeny for the proposition that the FHA only “speaks to the conveyance of a rental or ownership interest in a dwelling unit” is unavailing. *See Mot.* at 14 (citing 430 F.3d 734 (5th Cir. 2005)). This argument is unavailing for the reasons set forth in *Davis*, 902 F. Supp. 2d 405, and inconsistent with the holding in *Shapiro*. 51 F.3d at 333, 335.

simply cannot be heard to argue that the Fair Housing Act would tolerate a landlord or a municipal policy that offered leases to allcomers, but then raised rents on African-American tenants only, denied parking spaces to Jewish tenants only, or denied the use of elevators to disabled tenants only—all of which City Defendants’ preferred reading of the Act would allow. Simply put, the precedent set by *Shapiro, Davis*, and the overwhelming majority of circuit courts is necessary to the proper functioning of the FHA.

**B. The Housing Availability Program and Permitting Procedures Are Essential City Services Provided in Connection with Housing**

Despite their argument to the contrary, Mot. at 15-16, the FHA clearly applies to City Defendants. Since the FHA’s inception, the Supreme Court, the Second Circuit, and district courts have held that the Act applies to municipal defendants. *See, e.g., City of Edmonds*, 514 U.S. at 731; *Kennedy Park Homes Ass’n v. City of Lackawanna, N. Y.*, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Human Res. Research & Mgmt. Grp., Inc.*, 687 F. Supp. 2d at 253-54. Indeed, the comprehensive purpose of the FHA would be diluted if it were held to apply only to private actors, and no intent for such a restriction may be gleaned from the language of the Act. *United States v. City of Parma, Ohio*, 661 F.2d 562, 572 (6th Cir. 1981) (cited in *LeBlanc-Sternberg*, 67 F.3d at 425).

As a key component of the FHA’s comprehensive structure, the portions of Sections 3604(b) and (f) which address the discriminatory provision of housing services apply to municipal defendants. Indeed, as City Defendants admit, the FHA can regulate services “of the kind usually provided by municipalities” in connection with housing. *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984); Mot. at 16 (citing *Glendenning*, 174 F.3d at 193 (same)). Such services can include inspection and permitting regimes, garbage collection, police and fire protection, or the provision of utilities connections. *Davis*, 902 F. Supp. 2d at 437 (police

protection); *Human Res. Research & Mgmt. Grp.*, 687 F. Supp. 2d at 266-67 (inspection and permitting); *see also Mackey*, 724 F.2d at 424 (garbage collection); *Glendenning*, 174 F.3d at 193 (same); *Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.*, 743 F.2d 1207, 1210 (7th Cir. 1984) (fire, police and garbage services); *Cooke v. Town of Colorado City, Ariz.*, 934 F. Supp. 2d 1097, 1113 (D. Ariz. 2013) (water, electricity, and sewer connections).

City Defendants' Housing Accessibility Program and permitting procedures are essential services provided by the City that are directly related to housing, as in the cases cited *supra*. For example, the enforcement of the Codes (including the Housing Accessibility Program) is a key component of the City's duty to ensure the safety of tenants, akin to the provision of police and fire protection in *Davis* or *Southend*. Further, this aspect of DOB's Code enforcement through the inspection and permitting process is analogous to the municipal inspection program struck down as a violation of the FHA in *Human Resources Research*. 687 F. Supp. 2d at 253-54. Thus, DOB's activities are services of a type already recognized as being regulated by Section 3604(f)(2) by courts within this Circuit and in other jurisdictions. As such, Plaintiffs' allegations that City Defendants discriminated in their administration of the Housing Accessibility Program and construction permits are sufficient to withstand a motion to dismiss.

Unable to find support for their motion from within the Second Circuit, City Defendants again rely *entirely* on out-of-context phrases cherry-picked from decisions by other circuits to argue that the FHA does not create a duty for cities to furnish services in a non-discriminatory manner, and alternatively, that the permitting activity in question is too removed from housing concerns to be cognizable under the Act. Mot. at 15. Both arguments fail.

City Defendants' motion relies on a phrase from a factually inapposite aspect of the D.C. Circuit case of *Clifton Terrace* standing for the proposition that, as between a landlord and a

third-party vendor, the duty “to furnish housing services in a nondiscriminatory manner . . . resides primarily with [the] landlord.” Mot. at 15 (citing 929 F.2d at 719). Plaintiffs do not dispute that, in a situation like that presented by *Clifton Terrace*, where a landlord sued a vendor who performed repair work for a former landlord, it is the landlord, and not the former vendor, who is responsible for FHA compliance. *Id.* at 716. Here, however, Plaintiffs’ claims are against Landlord and City Defendants, all of whom are directly and uniquely responsible for the provision of different types of services relating to housing.

Similarly, City Defendants’ reliance on *Glendening* for the proposition that application of the FHA to City Defendants would create a general discrimination statute is misplaced. That case merely held that the effect of the construction of a highway on housing was too attenuated to be cognizable as a “service” under section 3604(b). 174 F.3d at 193. In so doing, however, the court reaffirmed the core holding from *Mackey*, in which the Fourth Circuit held that “services” encompassed “such things as garbage collection and other services of the kind usually provided by municipalities.” 724 F.2d at 424.

City Defendants’ Housing Accessibility Program and permitting procedures are services of the kind usually provided by municipalities, and indeed the City is their *only* provider. Moreover, City Defendants’ argument that such services are too attenuated from Individual Plaintiffs’ dwellings or tenancy therein is, at best, a factual matter that is inappropriate for decision on a motion to dismiss in the absence of a developed factual record. City Defendants’ motion to dismiss should be denied on this basis alone.<sup>17</sup>

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<sup>17</sup> Indeed, the factual record must be developed and examined for each of the Plaintiffs’ claims, as discrimination cases are “inherently fact specific.” *See, e.g., K.F. v. Guardsmark, LLC*, 2006 WL 2785303, at \*7 (N.D. Cal. Sept. 26, 2006) (employment discrimination cases are “inherently fact specific”); *Martin v. Taft*, 222 F. Supp. 2d 940, 974 (S.D. Ohio 2002) (evaluation of plaintiffs’ ADA claim “is a matter than can be resolved only by a careful examination of all of the facts and circumstances in this case, and not on the basis of pleadings”); *cf. Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 (3d Cir. 1988) (“We emphasize that . . . discrimination cases are inherently fact-bound.”). In *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000), the Second Circuit noted that a “more

**III. PLAINTIFFS STATE A CLAIM UNDER THE NEW YORK CITY HUMAN RIGHTS LAW OVER WHICH THIS COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION**

**A. Plaintiffs State a City HRL Claim**

The FAC alleges that DOB’s approval of Landlord Defendants’ elevator applications was the proximate cause of their deprivation of Individual Plaintiffs’ rights under the City HRL. FAC ¶ 219. Specifically, City Defendants aided and abetted Landlord Defendants’ violation of the City HRL, which had two components: (i) removing the elevators from service, thereby denying each Individual Plaintiff an equal opportunity to use and enjoy the dwelling, FAC ¶¶ 81-93, 207, and (ii) refusing reasonable accommodations. FAC ¶ 206.

City Defendants’ motion focuses on only the second element of Landlord Defendants’ violation. However, as noted above, there can be no violation of the reasonable accommodation provision, 42 U.S.C. 3604(f)(3), without underlying discrimination. *See supra* at 8 & n.7. Moreover, through its discriminatory administration of the Codes, including approving Landlord Defendants’ applications to remove elevators from service without requiring a TPP, City Defendants aided and abetted *both* actions. Had City Defendants required a TPP, as mandated under Section 28-104.8.4 of the Codes, with “detailed and specific provisions” to ensure that “[a]t all times in the course of construction provision shall be made for adequate egress,” Landlord Defendants would have been unable, by definition, to deny Individual Plaintiffs access to their apartments *or* to unreasonably withhold reasonable accommodations.<sup>18</sup>

At the very least, further development of the factual record is needed to, *inter alia*, take

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complete record” was necessary before evaluating plaintiffs’ ADA claim at the preliminary injunction stage. The Second Circuit noted that the Supreme Court, in *Alexander v. Choate*, 469 U.S. 287 (1985), reached a similar conclusion regarding health care discrimination. *Wright*, 230 F.3d at 548-49 (citing *Alexander*, 469 U.S. at 303).

<sup>18</sup> Moreover, the City HRL requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. N.Y.C. Admin. Code § 8-130; *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 31 (N.Y. App. Div. 1st Dep’t 2009). Thus, “aiding and abetting” must be construed broadly, with an analysis targeted to understanding and fulfilling the City HRL’s “uniquely broad and remedial” purposes. *Williams*, 872 N.Y.S.2d at 31.

discovery on the contacts and communications between DOB and Landlord Defendants, and examine TPPs submitted for other types of construction projects to assess City Defendants' participation in the violation by not requiring one here. *Cf. Feingold v. New York*, 366 F.3d 138, 158, 159 (2d Cir. 2004) (finding a question of fact as to whether individual defendants aided and abetted by "actually participat[ing]" in the conduct giving rise to a discrimination claim in violation of the City HRL). For this reason alone, City Defendants' motion to dismiss the City HRL claim should be denied.

**B. The Court Should Assert Jurisdiction Over the City HRL and the Declaratory Judgment Claim**

The Court has supplemental jurisdiction over the City HRL claim and the declaratory judgment claim pursuant to 28 U.S.C. § 1367(a), because the causes of action are so related to the federal claims against City Defendants that they form part of the same case or controversy. *Lederer v. BP Products N. Am.*, 2006 WL 3486787, at \*7 (S.D.N.Y. Nov. 20, 2006); *Cabrera v. New York City*, 2004 WL 2053224, at \*8-9 (S.D.N.Y. Sept. 13, 2004). The city and federal claims share a common nucleus of operative fact—City Defendants' discriminatory administration of the Codes. Indeed, the facts underlying City Defendants' violation of the City HRL and their violations of the FHA and ADA completely overlap. *See supra* 3-7. Thus, trying these claims together would promote judicial efficiency and economy.

**IV. PLAINTIFFS JAMES AND CIDNY HAVE STANDING TO SUE CITY DEFENDANTS**

Plaintiffs James and CIDNY have standing to maintain this action against City Defendants. To establish standing, Plaintiffs must have (1) suffered an actual or imminent injury in fact, (2) caused by defendants' actions, that (3) will be redressed by a favorable decision in this action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The practical application of each of these elements is well-settled. When evaluating the

first element, actual or imminent injury, a court may consider past wrongs as evidence if they are accompanied by continuing, present adverse effects. *See Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Further, the standard for satisfying this element is not high for organizations—only “scant” evidence of a “perceptible impairment” of an organization’s activities is necessary. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011). The second element requires that plaintiff’s injury “fairly can be traced” to defendant’s conduct. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). The third element requires that it must be likely, rather than speculative, that plaintiff’s injury will be remedied by the court if she prevails. *Lujan*, 504 U.S. at 561.

Plaintiffs James and CIDNY have standing to sue on their own behalf. James has sufficiently alleged injury-in-fact because—as City Defendants acknowledge in their brief—she has expended resources in an attempt to redress the accessibility problems experienced by her constituents, Individual Plaintiffs, *see* Mot. at 17, and because her mandate gives her an ongoing interest in resolving her constituents’ complaints. *Supra*, at 4. Likewise, CIDNY has expended and continues to expend resources assisting disabled New Yorkers in obtaining reasonable accommodations when affected by long-term elevator shutdowns in furtherance of its mission. FAC ¶¶ 25-27; *cf. Nnebe*, 644 F.3d at 157 (standing where plaintiff counseled “a few suspended drivers,” incurring an opportunity cost where resources could be spent on other activities).<sup>19</sup>

Further, James and CIDNY have sufficiently alleged that City Defendants caused them injury by failing to enforce the Codes and improperly issuing permits. FAC ¶¶ 23-27. Finally, the injury to James and CIDNY will be redressed by a favorable outcome in this case. Not only is City Defendants’ behavior ongoing, *see* FAC ¶ 187, but the Public Advocate also cannot fully

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<sup>19</sup> City Defendants seek to distinguish this action from *BCID*. Mot. at 17. However, not only was CIDNY a plaintiff in that case, but City Defendants’ actions here directly parallel the actions challenged therein. As in *BCID*, Plaintiffs challenge the City’s systematic administrative failure to address the needs of persons with disabilities. *BCID v. Bloomberg*, 290 F.R.D. 409, 413-14 (S.D.N.Y. 2012).

resolve Individual Plaintiffs' complaints, and CIDNY cannot meet the needs of its community, as long as City Defendants continue to deprive them of the benefit of accessibility laws.

Finally, it is clear that Landlord Defendants and other New York City landlords will continue to apply for permits, such that James and CIDNY have alleged a credible threat of ongoing harm. *See Baur v. Veneman*, 352 F.3d 625, 641 (2d Cir. 2003). Without enforcement of the Codes in the permit process, James and CIDNY will continue to be forced to divert resources to advocate for tenants.<sup>20</sup>

### **CONCLUSION**

In light of the foregoing, Plaintiffs respectfully request that the Court deny City Defendants' motion to dismiss the Amended Complaint.

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<sup>20</sup> CIDNY also satisfies the independently sufficient ground of associational standing. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2011); *BCID*, 290 F.R.D. at 416-17. This Court has already found that CIDNY "has sufficient indicia of membership to function effectively as a membership organization" for standing purposes. *BCID*, 290 F.R.D. at 417. Thus, CIDNY must establish that: (a) its members would themselves have standing; (b) the interests it seeks to protect are germane to its purpose; and (c) the suit does not require the participation of individual members. *Disability Advocates, Inc. v. N.Y. Coal. For Quality Assisted Living*, 675 F.3d 149, 157 (2d Cir. 2012). It has done so. Because CIDNY's board and staff have disabilities, they would have standing. *BCID*, 290 F.R.D. at 416-17; FAC ¶ 24. CIDNY seeks to protect interests germane to its advocacy for people with disabilities. FAC ¶ 24. And the participation of any one member is unnecessary because such a requirement is only prudential, focusing on administrative efficiency. *Open Soc'y Int'l v. U.S.AID*, 651 F.3d 218, 229 (2d Cir. 2011). This case will examine Defendants' conduct, not CIDNY members' individualized proof. *Id.*

Dated: New York, New York  
July 30, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Susan J. Kohlmann, an attorney, hereby certify that on this 30<sup>th</sup> day of July 2015, I caused a true and correct copy of the foregoing Memorandum of Law in Opposition to City Defendants' Motion to Dismiss the Amended Complaint to be served by ECF on all counsel of record.

Dated: July 30, 2015

/s/ Susan J. Kohlmann

Susan J. Kohlmann