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

GLEN OAKS VILLAGE OWNERS, INC., ROBERT FRIEDRICH, 9-11 MAIDEN, LLC, BAY TERRACE COOPERATIVE SECTION I, INC., and WARREN SCHREIBER, Plaintiffs, -against- CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, and ERIC A. ULRICH, in his official capacity as Commissioner of the New York City Department of Buildings, Defendants.	Index No. 154327/2022 Motion Sequence No. 001

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Dated: New York, New York
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PRELIMINARY STATEMENT

This action challenges the legality of New York City's Local Law No. 97 of 2019, as amended ("Local Law 97"), on multiple, independent grounds. Local Law 97 is an ill-conceived, illegal, and unconstitutional municipal law that purports to address climate change but, in reality, does no such thing, imposing draconian fines and destroying owners' businesses and property values in the process. Moreover, it is preempted by the comprehensive regulatory scheme that New York State law already imposes in this regard.

While Plaintiffs are supportive of clean energy, Local Law 97 irrationally imposes enormous and unavoidable annual "penalties" on tens of thousands of the City's building owners, landlords, and shareholders, even when they have acted as model environmentally-conscious citizens. Specifically, Local Law 97 purports to combat climate change by setting strict caps on emissions and "penalizing" owners, landlords, and shareholders every year for non-compliance. But in reality, these "penalties"—which are either grossly excessive fines rendered in violation of due process or else improperly City-imposed taxes that lack the requisite delegation of taxing authority from New York State (the "State")—will do absolutely nothing to reduce greenhouse gas emissions. And Local Law 97 is unconstitutionally vague in multiple key respects, creating uncertainty among owners, landlords, and shareholders.

Local Law 97 will ensnare in its net, among others, owners like Plaintiff 9-11 Maiden, LLC, who lease to small businesses—such as restaurants and grocery stores—whose raw energy usage is unavoidably large, even if efficient, due to the nature of their business activities, driving these critical mom-and-pop enterprises out of the City. ¶¶ 170-177.[1] It will similarly cripple working class condominium and cooperative associations, owners, and shareholders throughout

[1] References to "¶ __" are to the Complaint (Dkt. 2).

the City—such as Plaintiffs Glen Oaks Village Owners, Inc., Robert Friedrich, Bay Terrace Cooperative Section I, Inc., and Warren Schreiber—who will have to pay massive "penalties" simply because their buildings have a high density of full-time residential usage and are more reliant on natural gas than commercial buildings. Or else it will force those owners to shoulder millions of dollars of expenses to entirely redo their buildings' electrical systems and structures. ¶¶ 152-169, 178-188. This law's draconian penalties will gobble up buildings and businesses that have already spent many millions of dollars to fully comply with the City's environmental regulations in effect at the time their buildings were built or upgraded, including buildings whose owners went above and beyond what the City and State previously required. ¶ 2. Such owners should be lauded for their environmental leadership, rather than being punished with crippling fines and tagged as law-violators and energy scoundrels.

As explained in Plaintiffs' Complaint, Local Law 97 is unconstitutional for five independent reasons:

First, Local Law 97 is preempted by New York State law. The State enacted S6599, the Climate Leadership and Community Protection Act ("CLCPA"), in 2019 with the express intent that it would serve as a "comprehensive regulatory program to reduce greenhouse gas emissions" across New York State. CLCPA sets ambitious targets for the reduction of greenhouse gas emissions statewide and lays out a clear and all-encompassing plan by which New York State will implement these goals over the next several decades. It therefore preempts the field and leaves no room for localities to legislate in this area. *See Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983). Indeed, the City *concedes* that "CLCPA intends to *lead* to regulations that control GHG emissions" on a statewide basis. Br. 13[2] (emphasis in original). The City cannot

[2] References to "Br." are to the Memorandum of Law in Support of City Defendants' Motion to Dismiss (Dkt. 6).

evade this dispositive concession, nor get around Plaintiffs' well-pleaded and detailed preemption allegations, simply by claiming in conclusory fashion that the State's regime "has not yet occurred" or is not yet "comprehensive." *Id*.

Second, Local Law 97 is impermissibly vague and ambiguous in violation of due process. Among other things, it fails to specify the additional emissions limits to which building owners, landlords, and shareholders will be subject in the future; whether and how any aggravating or mitigating factors will be applied; the eligibility of particular owners, landlords, and shareholders to apply for adjustments; the requirements for any adjustment applications; or the likelihood that an adjustment application will be granted. The open-ended nature of these and other key provisions renders it impossible for owners, landlords, and shareholders to reasonably "'understand what conduct [the law] prohibits'" and "makes the law unacceptably vulnerable to arbitrary enforcement." *United States v. Hilliard*, 2022 WL 2803356, at *1 (E.D.N.Y. July 18, 2022) (quoting *United States v. Demott*, 906 F.3d 231, 237 (2d Cir. 2018)). The City concedes that this due process question is statute-specific but, curiously, tries to defend this statute by reference to other separate statutes and so-called "common sense" meanings in them. Br. 17. And the City ignores that one of this statute's key ambiguities—concerning owners' "good faith efforts" to comply with the law—has been the subject of robust public debate and criticism, including among members of the City Council and the new Adams Administration.

Third, Local Law 97 is unconstitutionally retroactive in violation of owners, landlords, and shareholders' due process rights. Although styled as a forward-looking law, the law in fact "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1944). Specifically, Local Law 97 punishes building owners, landlords, and shareholders for having already designed, constructed, and renovated their

buildings, in order to comply with the environmental requirements that were in place at the time, and for "failing" to predict what new and different requirements the City might enact in the future. For many buildings—including some of the greenest buildings in New York City—the law's requirements will simply be impossible to meet and thus will necessarily result in massive annual penalties—all because of an irrational and counterproductive regulatory regime that they had no reason to anticipate at the time of construction. The City again seeks to sidestep the relevant allegations, focusing only on the purported cap on "future" emissions while ignoring the fact that owners' compliance with past regulations is now being penalized under this new regime. The City even goes so far as to cite distinguishable, century-old caselaw for the untenable proposition that laws "requiring changes to existing buildings" can never be deemed retroactive. Br. 28. The City is wrong.

Fourth, Local Law 97 violates due process because its self-styled "civil penalties" are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). It subjects thousands of building owners, landlords, and shareholders—who, despite their best efforts, will be unable to bring their buildings into compliance within this law's impracticably short timeframe—to these penalties, which are imposed at the discretion of tribunals that lack even rudimentary guidelines for how to apply enumerated mitigating and aggravating factors. Moreover, the metrics used to determine penalties do not measure or consider a building's efficiency, density, or energy-using activity, but are instead based on raw energy usage alone. The result is that Local Law 97 penalizes more efficient buildings that have densely populated tenant spaces and longer hours of operation (increasing their raw energy totals) or that house smaller businesses vital to City residents (such as grocery stores, laundromats, bakeries, and restaurants) that necessarily use a significant amount

of raw energy. But it permits *less* efficient buildings to operate without penalty simply because their limited operating hours, sparse occupancy, or partially vacant space allows them to meet overall emissions caps that do not take into account use of space. The City asks the Court to disregard these well-pleaded allegations as mere policy preferences, when, in fact, they reveal the inherent disproportionality between the massive penalties and the "violations" they are purportedly designed to deter.

Fifth, Local Law 97 is illegal, either as an excessive penalty in violation of due process or else, necessarily, as an unauthorized and improper tax. *See N.Y. Tel. Co. v. City of Amsterdam*, 200 A.D.2d 315, 317-18 (3d Dep't 1994) (explaining that the "label which is attached to an assessment is not dispositive of its true nature"). The funds collected are not reasonably necessary to the accomplishment of the law's regulatory purpose, as the government can reduce emissions without taxing owners, landlords, and shareholders who do not—or cannot—comply with strict annual limits. This is especially apparent here given that the City is not required to put the resulting revenue toward *any* environmental goal. The law simply provides a mechanism for the City to fill its coffers. In other words, it amounts to the imposition of a new carbon tax on building owners, landlords, and shareholders. And the funds collected are untethered to any benefit building owners, landlords, or shareholders receive from the government. Because the State has not authorized the City to tax greenhouse gas emissions, Local Law 97 amounts to an unauthorized tax, in violation of Municipal Home Rule Law mandates requiring the State Legislature's approval before implementing such a local tax. The City has no answer to these allegations and is thus reduced to arguing, contrary to the caselaw, that a different legal standard should apply. Yet the City proceeds to cite a case that undermines its own position, *see* Br. 36 (citing *City of Buffalo v. Stevenson*, 207 N.Y. 258, 262-63 (1913)), and then retreats to its premature factual contention,

based on non-dispositive extrinsic documents, that the "penalties" serve to "ensure compliance." *Id*.

Accordingly, the City's motion to dismiss should be denied, and Plaintiffs' well-pleaded allegations should proceed to discovery.

BACKGROUND

I. New York City's Legal Landscape Prior to the Enactment of Local Law 97

For more than a decade prior to the passage of Local Law 97, City and State laws sought to improve building energy efficiency and reduce carbon emissions in a voluntary and non-punitive manner. ¶¶ 29-51. For instance, Local Law 22 of 2008 created a New York City Climate Protection Act, which called for a 30% citywide reduction in greenhouse gas emissions by calendar year 2030, relative to 2005 emissions levels. *Id.* ¶¶ 31-32. These emissions reduction targets were to be achieved via pre-existing City initiatives "and any additional policies, programs and actions to reduce greenhouse gas emissions that contribute to global warming." *Id.* ¶ 33. The 2008 Climate Protection Act did not establish any compulsory programs, enforcement mechanisms, or penalties to achieve its emissions reduction targets. *Id.* ¶ 35. Nevertheless, by 2014, the City had reduced its greenhouse gas emissions by 19% since 2005 and was almost two-thirds of the way towards achieving the targeted 30% reduction in emissions by 2030. *Id.* ¶ 41.

In August 2009, the State established its own greenhouse gas emissions reduction targets, which likewise were aspirational in nature and did not contemplate any regulatory limitations on private entities. *Id.* ¶ 45.

In late 2014, the City Council passed Local Law 66 of 2014, which amended the citywide greenhouse gas emissions reduction targets to add an 80% reduction in citywide emissions by 2050, relative to 2005. *Id.* ¶ 42. Like the 2008 Climate Protection Act, Local Law 66 did not include any enforcement mechanisms or penalty systems to achieve its emissions reduction targets.

Id. ¶ 43. Instead, since 2008, the 2008 Climate Protection Act required the City to establish voluntary programs to "encourage private entities operating within the city of New York to commit to reducing their own greenhouse gas emissions." *Id.* ¶ 44 (quoting N.Y.C. Admin. Code § 24-803(d)).

In January 2017, the City expanded one of these voluntary incentive programs, known as the "Carbon Challenge," to commercial owners and tenants. *Id.* ¶ 46. As of 2018, Carbon Challenge participants had spent an estimated $1.3 billion on building upgrades, had reduced their annual greenhouse gas emissions by 580,000 metric tons of carbon dioxide equivalent, and were saving an estimated $190 million in lower energy costs. *Id.* ¶¶ 48-49. The NYC Carbon Challenge Progress Report, which evaluated the Carbon Challenge a decade after its inception, concluded that the success of the program "demonstrate[d] that motivating voluntary action on the part of private and institutional sector leaders can lead to substantial progress on policy goals" and that "the efforts of the Challenge participants [had] a measurable impact on citywide emissions." *Id.* ¶ 50.

II. The City Enacts Local Law 97.

Local Law 97 became law on May 19, 2019. *Id.* ¶ 52. That new law replaces the 30% emissions reduction target for 2030 with a new 40% target that must be met by the same 2030 deadline. *Id.* ¶ 57. In a complete reversal from the prior regime under which owners, landlords, and shareholders had been operating successfully for years, Section 5 of Local Law 97—codified in a new article 320 of title 28 of the Administrative Code ("Article 320")—now imposes *mandatory* emissions limits on nearly 60% of the total building area of New York City. *Id.* ¶¶ 59-60. Article 320 contains provisions for calculating those emissions limits, reporting emissions, and assessing "penalties" for non-compliance. *Id.* ¶ 61.

This new Article 320 applies broadly, with limited exceptions, to any new or existing "Covered Building" in New York City. *Id.* ¶¶ 62-63. It defines "Covered Building" to include "(i) a building that exceeds 25,000 gross square feet (2322.5 m^2) or (ii) two or more buildings on the same tax lot that together exceeded 50,000 gross square feet (4645 m^2), or (iii) two or more buildings held in the condominium form of ownership that are governed by the same board of managers and that together exceed 50,000 gross square feet (4645 m^2)." *Id.* ¶ 63 (quoting N.Y.C. Admin. Code § 28-320.1). Although this "Covered Building" definition includes an express provision governing multi-building condominiums, the law is silent as to the treatment of *cooperatives*—such as Plaintiffs Glen Oaks and Bay Terrace—that consist of two or more buildings governed by the same board of managers and that together exceed 50,000 gross square feet. *Id.* ¶ 64; *see also id.* ¶¶ 152, 154-55, 178, 180. Local Law 97 is also silent as to what happens when a single, multi-building cooperative occupies multiple tax lots, some of which fall within prong (ii) of the "Covered Building" definition while others do not. *Id.* ¶ 64.

The greenhouse gas emissions caps imposed by Local Law 97 take effect in 2024 and become increasingly stringent over time. *Id.* ¶ 70. These caps are generally calculated as the product of the building's gross floor area and the applicable "building emissions intensity limit," the latter of which is determined based on the building's occupancy type, without accounting for differences in a building's specific use. *Id.* While Local Law 97 prescribes the method for calculating annual building emissions limits from 2024 to 2029, the law makes clear that, for 2030 to 2034, the DOB "may establish different limits, including a different metric or method of calculation." *Id.* ¶ 72 (quoting N.Y.C. Admin. Code § 28-320.3.2). And aside from setting a floor for average emissions intensity across all "Covered Buildings," the limits for calendar years 2035-2039, 2040-2049, and 2050 and beyond are left entirely to DOB discretion. *Id.* ¶ 73 (citing N.Y.C.

Admin. Code §§ 28-320.3.4, .5). The DOB is tasked with establishing these limits by rule no later than January 1, 2023. *Id.* ¶ 74. Prior to the promulgation of these rules, building owners, landlords, and shareholders have no notice of their long-term obligations or what retrofitting efforts they can now commence to at least attempt to meet the emissions limits for 2024. *Id.*

A building's annual emissions are calculated based on the type(s) of energy the building consumes. *Id.* ¶ 76. Each energy source is assigned a "greenhouse gas coefficient," which is then multiplied by the number of one-thousand British thermal units (kBtu) of energy used to calculate the total emissions generated. *Id.* As with the emissions limits, Local Law 97 sets out the greenhouse gas coefficients for some (but not all) types of energy for calendar years 2024-2029. *Id.* ¶ 78 (citing N.Y.C. Admin. Code. § 28-320.3.1.1). For calendar years 2030-2034, it leaves the determination to the DOB. *Id.* Coefficients for 2035 and beyond are not addressed at all. *Id.*

Owners whose buildings' annual emissions exceed the applicable limit must pay substantial annual fines. *Id.* ¶ 84. Specifically, such buildings will be liable for a "civil penalty of not more than an amount equal to the difference between the building emissions limit for such year and the reported building emissions for that year, multiplied by $268." *Id.* ¶ 85. On a citywide basis, this will result in upwards of hundreds of millions of dollars' worth of penalties each year. *Id.* ¶ 208. These enormous penalties will not be put toward producing renewable energy or reducing emissions in the City; rather, they will go into the City's general fund. *Id.* ¶ 94.

Local Law 97 permits the DOB to impose a penalty via an administrative proceeding before the Office of Administrative Trials and Hearings ("OATH"), a City adjudicative body, or in court. *Id.* ¶ 86 (citing N.Y.C. Admin. Code § 28-320.6.4). When assessing a penalty, the law requires OATH or the court to give "due regard" to a number of "aggravating and mitigation factors"—including an owner's good-faith compliance efforts—but offers no guidance as to how

these factors should be measured or weighed. *Id.* ¶¶ 88-89 (quoting N.Y.C. Admin. Code § 28-320.6.1).

Similarly, although Local Law 97 includes various mechanisms whereby owners may seek "adjustments" to the annual building emissions caps, these adjustments are subject to vague, ambiguous, and open-ended statutory criteria that afford DOB substantial discretion over both (1) whether to make the various categories of adjustments available *at all* and (2) whether to grant any individual adjustment applications. *Id.* ¶¶ 97-119.

Owners, landlords, and shareholders subject to Local Law 97 are thus faced with a Hobson's choice: expend vast sums retrofitting their buildings in the hopes of complying with vague and unsettled standards, or pay a penalty for emissions resulting entirely from prior decision-making that fully complied with then-existing laws and regulations. *Id.* ¶¶ 90-92.

III. New York State Steps in to Enact a Comprehensive Emissions-Reduction Law.

New York State has taken an active role in combating climate change and, specifically, regulating greenhouse gas emissions. On July 18, 2019, the State enacted CLCPA, which the Legislature's findings describe as a "comprehensive regulatory program to reduce greenhouse gas emissions" across New York State. *Id.* ¶ 120. CLCPA's enactment was no surprise, as the State had been active in the field for years. *Id.* ¶ 121. Indeed, a similar climate bill had already passed the Assembly in both 2016 and 2018, and then-Governor Cuomo proposed similar legislation in his January 2019 annual budget. *Id.* The Legislature then reformulated the Governor's proposal and passed the bill as CLCPA. *Id.*

CLCPA sets ambitious targets for reducing New York State's greenhouse gas emissions, including limiting total statewide emissions to 60% of their 1990 levels by 2030 and 15% of 1990 levels by 2050, setting a goal of "net zero" emissions in "all sectors of the economy" by 2050, requiring that 70% of the State's electrical energy come from renewable energy sources by 2030,

and requiring that the State achieve an electrical system that runs entirely on renewable energy by 2040. *Id.* ¶¶ 122-24; *see also id.* ¶¶ 125-38 (describing CLCPA's clear and detailed plan for how New York State will implement these goals over the next decade).

The legislative findings state that CLCPA "will build upon [New York State's] past development [in combatting climate change] by creating a *comprehensive* regulatory program to reduce greenhouse gas emissions." *Id.* ¶ 139; *see also id.* ¶¶ 141-44 (surveying similar statements by State officials). Consistent with its comprehensive scope, CLCPA *does not* grant municipal governments the authority to impose additional, more demanding energy usage requirements. *Id.* ¶¶ 145-46. This was not an oversight: Section 8 of CLCPA expressly authorizes certain *State* agencies to "promulgate greenhouse gas emissions regulations" in order to achieve the "statewide" emissions limits established by CLCPA, while section 7 affirmatively compels certain agency action, again, exclusively at the State level. *Id.* ¶ 147. Section 10 of CLCPA states that "[n]othing in [CLCPA] shall limit the existing authority of a *state entity* to adopt and implement greenhouse gas emissions reduction measures." *Id.* ¶ 148. Section 11, which clarifies that CLCPA does not create an exemption to other generally applicable health and environmental requirements, does *not* contain a corresponding reference to "emissions reduction measures." *Id.* ¶ 149.

IV. This Lawsuit

Plaintiffs here are two garden cooperatives in Queens, their respective board presidents (each of whom is also shareholder and resident of the co-op), and the owner of a mixed-use residential and commercial building in Manhattan. *Id.* ¶¶ 19-23. While Plaintiffs are supportive of clean energy—and have actively worked to increase the energy efficiency and reduce the energy emissions of their buildings—their stories demonstrate the significant and disproportionate harm facing owners, landlords, and shareholders throughout the City if Local Law 97 is allowed to take effect. *Id.* ¶¶ 151-88. Plaintiffs therefore brought this suit for declaratory and injunctive relief.

ARGUMENT

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading "is to be liberally construed," and "[t]he court must accept the facts alleged in the pleading as true and accord the [plaintiff] the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory." *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 104 A.D.3d 401, 403 (1st Dep't 2013). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail[.]" *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

To the extent documentary evidence is cognizable at all under CPLR 3211(a)(7), such evidence must be "in admissible form" and "demonstrate[] the absence of any significant dispute regarding [the alleged] facts." *McGivney v. Sobel, Ross, Fliegel & Suss, LLP*, 2011 WL 8771851, at *1 (Sup. Ct. N.Y. Cty. Nov. 28, 2011). Even if such evidence is considered, the motion should still be denied "unless it has been shown that a material fact" alleged by the Plaintiff "is not a fact at all," *i.e.*, unless the "essential" factual allegations in the complaint have been "negated beyond substantial question." *Guggenheimer*, 43 N.Y.2d at 275.

I. Plaintiffs Have Adequately Alleged That CLCPA Preempts Local Law 97 (Count I).

By enacting CLCPA, the State Legislature made clear that it intended to fully occupy the field of regulating greenhouse gas emissions. *See* ¶¶ 120-50, 193-202. As the City acknowledges, quoting a case in which the Court of Appeals held that the local law in question *was* preempted, field preemption "may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." Br. 7-8 (quoting *Consol. Edison*, 60 N.Y.2d at 105). Both indicia of preemption are present here. First, both CLCPA's legislative findings and the text of the law itself confirm that the State

Legislature intended it to serve as "a comprehensive regulatory program to reduce greenhouse gas emissions" across New York State, clearly evincing a desire to preempt local legislation. CLCPA § 1; *see also* ¶¶ 6, 120, 139, 145-49. Second, the City concedes that the State's forthcoming regulations under CLCPA *are* "intend[ed]" to "control GHG emissions" across the State—a concession that ends the preemption inquiry. The City's contention that it can avoid preemption simply because the State has not yet exercised its authority to promulgate the regulations is legally baseless. Br. 13. For each of those independent reasons, Plaintiffs' well-pleaded preemption claim should proceed.

A. The State Legislature Intended to Occupy the Field of Greenhouse Gas Emissions Regulation.

As a threshold matter, deliberate statements by the Legislature about the comprehensive nature of a State law constitute strong indicia of preemptive intent. *See*, *e.g.*, *Robin v. Inc. Vill. of Hempstead*, 30 N.Y.2d 347, 350 & 350 n.1 (1972) (finding field preemption where State's policy declaration stated that the State had "comprehensive responsibility" in the relevant area). The same is true of statements made by public officials at the time the State law was enacted. *See, e.g.*, *People v. Diack*, 24 N.Y.3d 674, 683 (2015) (finding field preemption where Governor said State law would "lead[] to a *coordinated and comprehensive statewide policy*" (emphasis in original); *Consol. Edison*, 60 N.Y.2d at 106 (finding preemption in part based on Governor's public statement when enacting the State law). Here, in addition to the clear statement of intent included in CLCPA's legislative findings, *see* CLCPA § 1; *see also* ¶¶ 6, 120, 139, 145, numerous politicians and public officials, including then-Governor Cuomo, hailed CLCPA, upon its enactment, as a comprehensive and aggressive piece of legislation, further underscoring the State's intent to preempt the field, *see id.* ¶¶ 141-44. Assembly Speaker Carl Heastie, for instance, praised the Legislature for enacting "comprehensive legislation to address and mitigate climate change"

and noted that "New York State is leading the way in developing green energy alternatives and sustainable policies." *Id.* ¶ 141. Similarly, CLCPA's lead sponsor in the Assembly stated that the law "involves such a comprehensive and proactive approach" to addressing climate change and lauded CLCPA as "the latest evidence" of New York State's role as an "environmental leader." *Id.* ¶ 142. The City's disagreement with the import of these express public statements, Br. 9, is, at most, a factual dispute that cannot be resolved on a motion to dismiss.

Underscoring these clear statements that CLCPA was intended to serve as "comprehensive" legislation are the law's express references to regulating emissions on a "statewide" basis. ¶¶ 145, 147; *see* CLCPA §§ 1(6), 6(3), 7(2); *id.* § 2 (repeatedly referencing regulation of "statewide" emissions in newly codified article 75 of the ECL). Accordingly, the law mandates agency action *exclusively* at the State level. *See* ¶¶ 145-50. For example, Section 8 of CLCPA expressly requires various *State* agencies to "promulgate greenhouse gas emissions regulations" to achieve the "statewide" emissions limits established by CLCPA, and Section 7 requires "[a]ll *state* agencies" to "assess and implement strategies to reduce their greenhouse gas." *Id.* ¶ 147 (quoting CLCPA §§ 7, 8); *see also* ¶ 199. Moreover, Section 10 of CLCPA makes plain that the Legislature considered the preemption question and elected *not* to authorize municipalities to implement and/or enforce their own greenhouse emissions-related laws: "Nothing in this act shall limit the existing authority of a *state entity* to adopt and implement greenhouse gas emissions reductions measures." CLCPA § 10 (emphasis added); *see* ¶¶ 148, 199. Tellingly, there is no parallel provision authorizing or preserving the authority of local entities to regulate in the area.[3]

[3] CLCPA's legislative findings further confirm that localities do not have a role in regulating greenhouse gas emissions in New York. By contrast, the findings specifically contemplate a complementary role for local governments in regulating climate-related *labor* standards, noting the "strong state interest in setting a floor statewide *for labor standards*, but allowing and encouraging individual agencies and local governments to raise standards." CLCPA § 1(11) (emphasis added); *see* ¶ 146. But there is no comparable authorization with respect to local regulation in the separate area of greenhouse gas emissions. *See* ¶¶ 147-50.

Read in context, CLCPA's silence as to local regulation and enforcement was plainly deliberate, as the Complaint explains. *See* ¶ 149. Indeed, Section 11 of CLCPA clarifies that CLCPA does not relieve compliance with *other* generally applicable local health and environmental requirements. *See id.* But, in stark contrast to Section 10, Section 11 does *not* contain any reference to local "emissions reductions measures." Had the State intended to include "greenhouse gas emissions reduction measures" among the local health and environmental requirements left undisturbed by Section 11, Section 10 illustrates that it would have done so.[4]

Conversely, all of the City's so-called evidence *against* preemptive intent is either agnostic to or *favors* preemption. First, the City's reliance on legislative findings concerning the adverse effects of climate change including at the "local" level, Br. 8, has no bearing on the issue of preemption. The City's implication—that all issues with any "local" impact must be addressed by local municipalities—would read the doctrine of field preemption out of existence, as virtually *every* State (and federal) law addresses issues whose effects are "felt" at the local level. The relevant caselaw—including cases the City cites—confirms that State laws can preempt local legislation on issues of "local" significance. *See*, *e.g.*, *Diack*, 24 N.Y.3d at 679-80 (finding preemption in the field of sex offender identification and monitoring); *Robin*, 30 N.Y.2d at 350 & 350 n.1 (abortion); *People v. De Jesus*, 54 N.Y.2d 465, 469 (1981) (alcohol); *Dougal v. Cty. of Suffolk*, 102 A.D.2d 531, 533 (2d Dep't 1984) (drug paraphernalia), *aff'd*, 65 N.Y.2d 668 (1985). As both the Legislature and the courts have recognized, a "local" problem may require a uniform statewide (or nationwide) solution. That is certainly the case with climate change, which the State

[4] The City attempts to spin Section 11 in its favor but, in doing so, ignores what Plaintiffs actually allege. Specifically, instead of addressing the interplay between Sections 10 and 11, the City purports to address whether—in the abstract—a savings clause "need[s] to specifically mention 'emissions reductions measures.'" Br. 10. That is beside the point here, where context makes clear that the absence of such a specific mention was deliberate.

Legislature expressly found is "adversely affecting" the entirety of "New York." CLCPA § 1(1); *see also* ¶¶ 150, 198-99. The severity of the problem weighs in favor of—not against—preemption, as disparate local regulations on greenhouse gas emissions would cause widespread uncertainty and undermine the Legislature's intent for CLCPA to serve as a "a comprehensive regulatory program to reduce greenhouse gas emissions" statewide, *see* ¶¶ 6, 120, 139, 145.

Second, the City's interpretation of the Legislature's encouragement that "other jurisdictions" implement laws similar to the CLCPA as a reference to "local governments," *see* Br. 8-9 (citing CLCPA § 1(2)(a)) is belied by the very paragraph cited, which clarifies: "Specifically, *industrialized countries* must reduce their greenhouse gas emissions," CLCPA § 1(2)(a) (emphasis added). *See also id.* § 1(2)(b) (referencing "one hundred ninety-five *countries*" that "adopted an agreement addressing greenhouse gas emissions mitigation" (emphasis added)); §1(3) (stating that CLCPA will have an "impact on *global* greenhouse gas emissions" because it will encourage "other jurisdictions" to implement similar laws (emphasis added)). This is a far cry from a "clear statement[] demonstrating the State Legislature's intent not to preempt local legislation." Br. 9.

Third, the instances where CLCPA *does* "mention[]" local laws, *see* Br. 9, only underscore the Legislature's intent to narrowly circumscribe their role. The City cites a provision setting forth requirements to which State regulators must adhere in approving "greenhouse gas emission offset project[s]," *see* ECL § 75-0109(4)(i), which are defined to include afforestation, reforestation, wetlands restoration, greening infrastructure, and anaerobic digesters, *see id.* § 75-0101(10).[5] This provision precludes approval of an "offset project" where the project at issue is already "required

[5] Tellingly, this provision falls under a section entitled "Promulgation of regulations to achieve *statewide* greenhouse gas emissions reductions." ECL § 75 0109(4)(i) (emphasis added).

pursuant to any local, state or federal law, regulation, or administrative or judicial order." *Id.* § 75-0109(4)(i)(i). But this provision stands only for the proposition that the State shall not approve of a project that allows for a deduction in the calculation of carbon emissions where the project was already required by law (so, *e.g.*, if a business was already required to plant trees pursuant to local law or court order, the business cannot use those same acts to receive an emissions deduction from the State under the CLCPA). This provision does *not* stand for the proposition that localities can *set building emissions limits different from the State's*—and penalize noncompliance therewith. CLCPA's specific deference to federal, state, or local laws affecting "offset project[s]" only highlights the limited role of local regulation in the face of New York's comprehensive scheme—and the specific *absence* of any local law authority in the area of emissions restrictions. *See id.* § 75-0109(4)(c).

Finding no support for its position within CLCPA itself, the City looks to non-preemption clauses in *other* State laws—the New York State Energy Law and the State's Uniform Fire Prevention and Building Code Act—that it claims authorize municipalities to regulate building emissions limits. *See* Br. 10-11; *see also id.* at 13. But other statutes are not at issue in this case, and Plaintiffs have not alleged that those separate statutes are the source of the field preemption here. Indeed, the City gets the argument backwards, erroneously suggesting that the non-preemption provisions in those two unrelated laws are instead local *enabling* statutes that affirmatively authorized Local Law 97, and then making the observation that CLCPA has not impliedly *repealed* those preexisting provisions of State law. *See id.* But the question here is whether the language of CLCPA itself *preempts* Local Law 97, not whether it repealed some unrelated provision of State law.

The City's last-ditch "textual" argument is that, because the "CLCPA encourages the Climate Action Council to learn from policies made at local levels," Br. 11, 13, there can be no intent to preempt local legislation. Not so. For one thing, the City erroneously assumes—based on nothing but its say-so—that the choice is binary, *i.e.*, that the State can *either* learn from local experience *or* preempt local laws. But both can obviously be true, *i.e.*, the State may choose to enter and fully occupy a field, while still drawing on prior local experience to inform its policy choices. Moreover, CLCPA does not instruct that the Climate Action Council must learn from New York City or any locality within the State. Rather, CLCPA authorizes the Climate Action Council to broadly examine efforts at "the federal, state, and local levels" across the country, ECL § 75-0103(15), and to consider information from "other states, regions, localities, and nations," *id.* § 75-0103(14)(a).

B. CLCPA Is a Comprehensive and Detailed Regulatory Scheme.

Plaintiffs have adequately alleged legislative intent to occupy the field of regulating greenhouse gas emissions for the additional reason that CLCPA is a "comprehensive and detailed regulatory scheme." *Consol. Edison*, 60 N.Y.2d at 105. "When the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field." *Diack*, 24 N.Y.3d at 677. As the City concedes, CLCPA is intended to "lead to regulations that *control* GHG emissions" on a "statewide" basis. Br. 13 (emphasis added).

As the Complaint alleges, CLCPA lays out a clear and all-encompassing plan by which New York State will implement its greenhouse gas emissions goals over the next several decades, leaving no room for localities to legislate in this area. ¶¶ 122-38. The State-level enforcement authorized by CLCPA further evinces the Legislature's desire to preempt local law in this area (*see id.* ¶¶ 145-50), as confirmed by yet another case finding field preemption that the City cites

repeatedly. *See Ba Mar v. Cty. of Rockland*, 164 A.D.2d 605, 613 (2d Dep't 1991) (finding that a provision of State law providing for, *inter alia*, enforcement by "a State official with State-wide jurisdiction" "evince[d] a clear intent by the State to provide State-wide uniformity").

The City's lackluster attempt to refute Plaintiffs' well-pleaded allegations concludes with a rehash of earlier arguments and a hodgepodge of *ipse dixit* that contradicts the City's concession that CLCPA will lead to "statewide" regulations that "control" emissions limits. Specifically, the City baldly proclaims (without citation) that CLCPA's goals "require local laws"; that CLCPA "could not achieve" those goals if it preempted local legislation, that the State Legislature "understood this"; and that statewide uniformity is neither "necessary" nor "possible" in "areas of law traditionally reserved for municipalities" (which also assumes—again without support—that greenhouse gas emissions regulation is one such "area"). Br. 13-14. The City's speculative morass does nothing to undermine Plaintiffs' well-pleaded allegations regarding the comprehensive and detailed regulatory scheme enacted by CLCPA, which leaves no space for localities to regulate in the field. Plaintiffs' preemption claim should proceed.[6]

II. Plaintiffs Have Adequately Alleged That Local Law 97 Is Void for Vagueness (Count IV).

The right to due process entitles a person to "be informed as to what [a law] commands or forbids." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Legislation is subject to facial attack "[w]hen vagueness permeates the text of such a law." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999); *see also VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186-87 (2d Cir. 2010) ("void-for-vagueness doctrine" is "one of the most fundamental protections of the Due Process Clause") (citing

[6] Despite acknowledging that Plaintiffs have not asserted a conflict preemption claim, Br. 15, the City devotes an entire subsection of its brief to that non-issue and concedes that a conflict may indeed arise with forthcoming regulations, underscoring the need for one consistent regulatory scheme.

Thibodeau, 486 F.3d at 65). "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A statute is thus unconstitutionally vague "'if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits'" or "if its vagueness makes the law unacceptably vulnerable to arbitrary enforcement." *Hilliard*, 2022 WL 2803356, at *1 (quoting *Demott*, 906 F.3d at 237); *see also People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371, 378-79 (1982); *People v. Bright*, 71 N.Y.2d 376, 382 (1988). Local Law 97 fails on both counts, as it is replete with ambiguous statutory language and silence on key provisions that render it impossible for owners, landlords, and shareholders to determine whether or how to comply, while simultaneously opening the door for arbitrary enforcement. *See* ¶¶ 230-44.

The City's brief attacks a strawman, repeatedly arguing that the various Administrative Code sections created by Local Law 97 are not vague in the abstract. *See* Br. 15, 18-22. But the devil is in the details—and Plaintiffs' Complaint expressly alleges that Local Law 97 is unconstitutionally vague because of ambiguities inherent in various key provisions *within* those sections. *See* ¶¶ 13-14, 64, 71-74, 77-78, 87-90, 97-102, 154-55, 180, 230-44. It is no answer for the City to argue that the adjustment provisions, for example, are not vague simply because Plaintiffs were capable of reciting the statutory text in their Complaint. *See* Br. 21. Nor are Plaintiffs challenging the conceptual notion of a "maximum penalty." *Id.* at 19-20. The question is whether that text provides owners, landlords, and shareholders with "'adequate notice'" of their

compliance obligations. *Hilliard*, 2022 WL 2803356 at *1.[7] As alleged in the Complaint and discussed below, the answer to that question is "no."

Local Law 97 is vague even in its definition of "Covered Building." *See* ¶¶ 64, 154-55, 180, 238. Specifically, the law is completely silent as to the treatment of multi-building cooperatives—such as Plaintiffs Glen Oaks and Bay Terrace—that are spread across multiple tax lots. *Id.* The City ignores these allegations completely, and the vagueness claim should proceed for that reason alone. *See, e.g.*, *People v. Spadaro*, 104 Misc. 2d 997, 999 (Dist. Ct. Suffolk Cty. 1980) (finding statute requiring a permit for an "air-park" unconstitutionally vague because the definition was unclear as to what entities fell within the definition of an "air-park").

But even for those buildings that are clearly "covered," Local Law 97 fails to provide sufficient guidance to enable owners, landlords, and shareholders to comply. First, DOB is granted broad discretion to tighten the specified emissions limits for 2030-2034, while the limits for calendar years 2035 and beyond are left *entirely* to DOB discretion. ¶¶ 71-73 (citing N.Y.C. Admin. Code §§ 28-320.3.2, 28-320.3.4, 28-320.3.5). The City's response fundamentally misunderstands Plaintiffs' claim, which is not that DOB lacks general rulemaking authority (*see* Br. 18-19), but rather that—in the specific context of Local Law 97—this silence on key provisions

[7] The City's contention that Plaintiffs must also "me[e]t the heavy and well-established burden for overturning a statute protecting public health" (Br. 15-17) is flawed in three ways. *First*, the City cites inapposite cases describing standards associated with rationality review rather than the separate issue of vagueness. *See Marcus Assocs., Inc. v. Town of Huntington*, 45 N.Y.2d 501, 506-07 (1978) (post-trial decision in zoning case that listed "public health" among the types of government interests that might satisfy rational basis review); *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11-12 (1976) (rejecting rationality challenges to law restricting vehicular traffic (after trial), and incidentally referencing "health" when quoting statutory text); *Nicholson v. Inc. Vill. of Garden City*, 112 A.D.3d 893, 894 (2d Dep't 2013) (upholding zoning law at summary judgment and referencing "health" only when reciting the applicable legal standard); *N.Y.C. Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 532-40 (S.D.N.Y.) (converting motion to dismiss into motion for summary judgment and holding that ban on pet ferrets was rationally related to public health), *aff'd*, 71 F.3d 405 (2d Cir. 1995). *Second*, as the procedural posture of the City's cases makes plain, any discussion of Plaintiffs' ultimate "burden" is premature on a motion to dismiss. *Third*, and in any event, Local Law 97 is not a public health statute. Rather, it amends, in relevant part, chapter 3 ("Maintenance of Buildings") of title 28 ("New York City Construction Codes") of the Administrative Code.

means that "building owners, landlords, and shareholders have no guidance with respect to their long-term obligations, even though they would need to commence retrofitting efforts *now* in order to at least try to meet the requirements for 2024." ¶ 74 (emphasis added).[8] That is, it is the lack of regulation itself—and the corresponding uncertainty of what actions will be sufficient to bring a building into compliance for years to come—that renders these provisions unconstitutionally vague, because it turns owners' long-term retrofitting efforts into moving targets.[9]

As to the vagueness of the individual words and phrases that render Local Law 97's penalty and adjustment provisions unconstitutionally vague, the City concedes that the inquiry is statute-specific but then proceeds to argue by repeated reference to how words are "commonly understood" or how they have been interpreted in other cases. Br. 20-21, 23. Those efforts fail.

As Plaintiffs allege, Local Law 97's penalty provisions are unconstitutionally vague because they require adjudicators to give "due regard" to various "aggravating or mitigating factors," including an owner's good-faith compliance efforts, but offer no instruction as to how these factors should or will be measured or weighed. ¶¶ 88-89 (quoting N.Y.C. Admin. Code § 28-320.6.1). The law thus "lack[s] [ ] clear standards for how [it] will ultimately be enforced," opening the door for arbitrary enforcement. *In re Independent Ins. Agents & Brokers of N.Y. Inc. v. N.Y. State Dep't of Fin. Servs.*, 195 A.D.3d 83, 88 (3d Dep't 2021); *see also In re Turner v. Municipal Code Violations Bureau of City of Rochester*, 122 A.D.3d 1376, 1378 (4th Dep't 2014) (holding a municipal ordinance unconstitutionally vague because it "gives ordinary people

[8] The City's ripeness argument (Br. 19 n.8) is meritless, given that facial challenges ripen "the moment the challenged regulation or ordinance is passed." *In re Real Estate Bd. of N.Y., Inc. v. City of New York*, 165 A.D.3d 1, 9 (1st Dep't 2018).

virtually no guidance on how to conduct themselves in order to comply with it" and "does not provide clear standards for enforcement").

Moreover, while the City contends that "good faith" is a "commonly understood" term (Br. 20), there is plainly no commonly understood meaning of "good faith" in the *specific statutory context* of Local Law 97. This was made plain at an April 2022 legislative oversight hearing on Local Law 97's implementation, at which the meaning of "good-faith compliance" became a point of debate. ¶ 89; *see* Ex. A at 63:5-65:5, 67:10-68:21 (commissioner of City Department of Environmental Protection testifying, in response to questioning from councilmembers, that the current mayoral administration is "still exploring exactly what the law allows and what we think we [*sic*] would be a correct and workable interpretation" of good faith efforts); *id.* at 105:13-106:4 (former councilmember who was Local Law 97's lead sponsor testifying about what "[g]ood faith to me means"); *id.* at 155:21-25 (member of Local Law 97 Advisory Board testifying that "the key question here . . . is what is good faith effort in the context"); *id.* 186:21-187:5 (representative of climate advocacy group noting that, "along with many Council Members throughout today's hearing, we are deeply concerned with the good faith effort standard," which "is unclear on what these efforts would include"). It defies reason for the City to argue—in a legal brief—that this phrase is sufficiently well-defined when the government actors responsible for enacting and implementing Local Law 97 are publicly quarreling about that very issue.[10]

This same unconstitutional subjectivity extends to Local Law 97's adjustment provisions, which—aside from allowing DOB to decide whether to make any adjustments available *at all*—

[10] The City's reference to "examples" of "good faith efforts" within Local Law 97 (Br. 20) is unavailing. Although the statute generally notes that "good faith efforts" include "investments in energy efficiency and greenhouse gas emissions reductions" prior to Local Law 97's effective date (N.Y.C. Admin. Code § 28-320.6.1), that list—which on its face is non-exhaustive—is impermissibly vague, as it says nothing about the nature, timing, or scope of the contemplated "investments" and "reductions," let alone how they might be weighed.

require owners to demonstrate that they complied with the law "to the maximum extent practicable," repeats the ambiguous use of "good faith efforts," and adds additional open-ended criteria such as whether certain improvements were "reasonably possible," whether greenhouse gas offsets were available at a "reasonable cost," whether owners could "reasonably" participate in various incentive programs, and whether financing costs would allow owners to earn a "reasonable financial return." ¶¶ 97-102 (quoting N.Y.C. Admin. Code § 28-320.7).

These subjective, open-ended criteria make it impossible for owners, landlords, and shareholders to know whether and how they might qualify for an adjustment in order to bring their buildings into compliance and avoid massive penalties. For example, a cost may be reasonable to one entity while being unduly burdensome to another. *See, e.g.*, *Bakery Salvage Corp. v. City of Buffalo*, 175 A.D.2d 608, 610 (4th Dep't 1991) (finding noxious odor statute unconstitutionally vague because it "contain[ed] no objective standards by which one can determine the quantum of emissions of odor which constitute a 'minimum concentration'" or to assess "whether a person is of 'average odor sensitivity'"); *People v. Bell*, 15 Misc. 2d 562, 564 (Cty. Ct. Schenectady Cty. 1959) (statute prohibiting opening the door of a motor vehicle if it was not "reasonably safe" was void-for-vagueness due to individual variances in what one may believe to be "safe").

Here again, the City refers generally to how these terms are used in *other* contexts, without making any attempt to propose how they might apply here. Indeed, the most the City can offer is that the use of the word "reasonable" demonstrates that the requirements "are not without limit." Br. 23. But neither the City's brief nor Local Law 97 itself sheds any light on what those limits are—which is precisely what renders the adjustment provision unconstitutionally vague and subject to arbitrary enforcement. *See In re Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235,

256 (2010) ("Due process requires that a statute be sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms."

This level of statutory ambiguity is unconstitutional. *See, e.g.*, *VIP of Berlin*, 593 F.3d at 186-87. At a minimum, there is a factual dispute on this question that cannot be resolved on the pleadings.

III. Plaintiffs Have Adequately Alleged That Local Law 97 Is Unconstitutionally Retroactive (Count III).

Plaintiffs have adequately alleged that Local Law 97 is unconstitutionally retroactive. *See* ¶¶ 217-29. Deciding when a statute operates retroactively "is not always a simple or mechanical task." *Landgraf*, 511 U.S. at 269. In making that determination, the court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280; *In re Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 365 (2020) (noting that the Court of Appeals has "adopted" the *Landgraf* framework).

As alleged in the Complaint (and discussed above), Local Law 97 marks a drastic departure from the prior regime of voluntary compliance under which owners, landlords, and shareholders operated lawfully for years, threatening them with massive annual penalties for purported "excess" emissions that result directly from their prior, lawful decision-making. *See* ¶¶ 29-119, 222-23. There is no limit to the length of this retroactivity period, as the law applies to all "Covered Buildings," regardless of how long ago they were built or retrofitted. ¶ 224. Thus, Local Law 97 plainly "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. The City's arguments to the contrary disregard Plaintiffs' well-pleaded allegations, misapprehend the law, and are inappropriate on a motion to dismiss.

In a series of redundant arguments, the City incorrectly argues that Local Law 97 is not retroactive because it "does not impose liability for past emissions," is "exclusively concerned with future conduct," and "does not impair rights that Plaintiffs possessed in the past." Br. 25-28.[11] The City hangs its hat on the mistaken notion that Local Law 97 merely "cap[s] *future* [greenhouse] emissions," rather than "attach[ing]" "new duties" to "completed transactions or contracts." *Id.* at 26-27. The opposite is true: as alleged in the Complaint, Local Law 97 attaches new legal consequences to events—namely design, construction, and renovation decisions—completed before its enactment. A building's "future emissions" are inextricable from "one's choice of boiler or heat source in years past," *id.* at 25—a choice made in reliance on and compliance with prior law. *See*, *e.g.*, ¶ 76 (explaining that a building's annual emissions are calculated based on the types of energy consumed).

Local Law 97 would thus impose substantial monetary penalties resulting directly from this prior decision-making—unless owners take steps to *unwind* that prior, lawful conduct. *See*, *e.g.*, ¶¶ 10, 222.[12] Those retrofits would cost an estimated $16.6 billion to $24.3 billion citywide by 2029, and many owners simply cannot bear those costs. *See*, *e.g.*, ¶¶ 11, 91, 163, 185. And, even setting cost aside, many owners will inevitably be fined *anyway*. *See*, *e.g.*, ¶¶ 12, 92, 95, 162, 174-77, 183-84. There can be no doubt that Local Law 97 "attach[es] an important new legal burden" on prior lawful conduct. *Landgraf*, 511 U.S. at 282-83. The City's contrary arguments under each of the three (independent) *Landgraf* retroactivity criteria fall flat.

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[11] The City concedes that the retroactivity analysis is disjunctive, such that the law will be deemed retroactive if it is wrong on any one of these three related arguments. *See* Br. 25 (quoting *Regina*, 35 N.Y.3d at 365). Here, the City is wrong on all three.

[12] The City's observation that Local Law 97 does not mandate any "particular" retrofit (Br. 26 n.13) is irrelevant, as the law's retroactive nature does not turn on *which* lawful prior decision is penalized in a given building.

First, it is the City, not Plaintiffs, who "misunderstand the formal analysis of retroactivity" in arguing that Local Law 97 does not impose liability for prior lawful conduct. Br. 26. This case is nothing like *Forti v. New York State Ethics Commission*, 75 N.Y.2d 596, 609-10 (1990), in which the "revolving door" provisions in a state ethics law simply limited former government officials' ability to engage in new *affirmative* activities in the future, even if they had left the government prior to the law's enactment. Nor does this case remotely resemble *In re Acevedo v. New York State Department of Motor Vehicles*, 29 N.Y.3d 202, 220, 228-29 (2017), in which DMV regulations allowed the Commissioner to "consider" applicants' pre-enactment history of drunk driving in denying current (and future) relicensing applications. Here, by contrast, owners' prior decision-making will not simply be "considered" by the law's penalty scheme; rather, Local Law 97 imposes penalties unless owners *unwind* that lawful pre-enactment conduct itself.

Second, Local Law 97 is not "exclusively concerned with future conduct." Br. 25-28. The City's observation that Local Law 97 does not impose new taxes on the underlying *purchase* of the buildings in question is completely beside the point, as the underlying purchase is not the relevant "transaction" on which Local Law 97's new liability is imposed. *Id.* 27. Indeed, the City implicitly acknowledges as much with its carefully hedged argument that "[n]o past transactions are *formally* implicated by LL97." *Id.* (emphasis added). As discussed, Local Law 97 *does* implicate past transactions, even if the statute is "formally" presented as applying prospectively. *See Landgraf*, 511 U.S. at 268-69 (explaining that courts take a "functional" approach when assessing retroactivity, so as to capture "all statutes, which, though operating only from their passage, affect vested rights and past transactions.".

Third, to argue that Local Law 97 "does not impair rights that Plaintiffs possessed in the past," the City sets up a strawman argument by suggesting Plaintiffs expect all "building

regulations" to "perpetually . . . remain the same," and then attacks that strawman by cobbling together various inapposite strands of caselaw. Br. 27-28. But while the City is correct that a law is not retroactive simply because it "upsets expectations based in prior law," it *is* retroactive if "the new provision attaches new legal consequences to events completed before its enactment," and "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in making that determination. *Landgraf*, 511 U.S. at 269-70. That is precisely what Plaintiffs have alleged here. *See*, *e.g.*, ¶¶ 222-25. Building owners, landlords, and shareholders plainly have a vested property interest in the buildings they own, and Local Law 97 upsets their reasonable reliance interests by penalizing them for failing to predict the future when they designed, constructed, and renovated those properties years ago. *Id.*; *see also id.* ¶ 219. And although the City cites two century-old cases for the apparent proposition that *no* law "requiring changes to existing buildings" can ever retroactively impair vested property rights (Br. 28), both of those cases involved laws that simply required one-off improvements to discrete building features to bring them into compliance with applicable health and safety codes. *See, e.g.*, *City of New York v. Foster*, 148 A.D. 258, 261-62 (1st Dep't 1911) (statute required building owners to fireproof dumbwaiter shafts "if [they] wishe[d] to maintain these dumbwaiter shafts in the future"), *aff'd*, 205 N.Y. 593 (1912); *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 331 (1904) (statute requiring installation of water closets in tenement buildings was "a proper exercise of the police power"). Those cases—both of which pre-date both *Landgraf* and *Regina*—are dissimilar in kind from the building-wide emissions limits and associated annual penalties at issue here.

Thus, under any of the three independent retroactivity criteria set forth in *Landgraf*, Plaintiffs have more than sufficiently alleged that Local Law 97 is retroactive.[13]

IV. Plaintiffs Have Adequately Alleged That Local Law 97's "Penalties" Are Unconstitutionally Excessive (Count II).

As the City acknowledges, a penalty will be held to violate due process when it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67; *see Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962-63 (8th Cir. 2019) (finding that $500 in statutory damages for each violation infringed due process under *Williams*). That is precisely the case here. *See* ¶¶ 203-16.

Under Local Law 97, an owner whose building exceeds its annual emissions limit will be liable for a "civil penalty of not more than an amount equal to the difference between the building emissions limit for such year and the reported building emissions for such year multiplied by $268." ¶ 85 (quoting N.Y.C. Admin Code § 28-320.6). That is, the law not only imposes a penalty for every single metric ton of carbon dioxide equivalent above the prescribed limit, but also reimposes the penalty *every year*. Plaintiff Glen Oaks, for example, faces a staggering $1.1 million penalty *per year* for the 2030-2034 compliance period, with even larger fines in the years that follow. *Id.* ¶¶ 160, 208. Retrofits costing tens of millions of dollars, even if they can be completed in time, would still leave Glen Oaks with annual penalties in excess of $800,000 per year. *See id.* ¶¶ 162, 208. Plaintiff Bay Terrace similarly finds itself exploring cost-prohibitive retrofits that will not eliminate the disproportionately excessive fines in any event, while Plaintiff Maiden expects to be penalized even though much of the building's energy usage is outside its control as

[13] In a footnote, the City argues that, even if the Court holds that Local Law 97 is retroactive, the retroactivity is "eminently rational" because it is "central to the statute['s] purpose." Br. 29 n.15. Plaintiffs have already alleged why this is not the case—including, *inter alia*, because the law threatens to punish even the most ambitious efforts to bring buildings into compliance, and because of the complete disconnect between the "penalties" and the goals the law purports to advance. *See*, *e.g.*, ¶¶ 94-96, 162, 225-26.

a landlord. *Id.* ¶¶ 174-77, 182. And this pattern is replicated throughout the City, with upwards of hundreds of millions of dollars in penalties expected citywide every year—all because owners, landlords, and shareholders could not have anticipated Local Law 97 at the time their buildings were constructed or renovated. *Id.* ¶¶ 7, 208.

The City's response is framed around a fundamental misunderstanding of *Williams*, which involved a state statute that imposed fixed rates for intrastate railroad transportation and subjected railroad companies to civil penalties of $50-$300 each time they charged a passenger more than the government-prescribed rate. *See Williams*, 251 U.S. at 63-64. Although the Supreme Court acknowledged that the penalty "of course seem[ed] large" if contrasted with the overcharge any one railroad passenger might face, it held that the penalty was not "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable" if "considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates." *Id.* at 67. That is, the penalty was reasonable because a rate-setting statute works only if railroad companies apply the designated rate uniformly, and because the penalty for each identified offense must account for the likelihood that there are "numberless" *unidentified* overcharges that must be deterred.

As alleged in the Complaint, Local Law 97 is wholly unlike the rate-setting statute in *Williams*. Contrary to the need for uniformity in the context of statutory rate-setting, here Local Law 97's one-size-fits-all approach to regulating raw emissions totals—without regard for factors such as tenant density and hours of operation—will result in penalties being imposed on *more* energy-efficient buildings, while less efficient buildings are left off the hook. *See* ¶¶ 8-9, 70, 79-80, 173, 177, 208-09. As the CEO of the Urban Green Council put it, the impossibility of compliance for those high-efficiency buildings creates a "lose-lose situation" in which owners are

"left with paying a fine," which is a "waste." *See id.* ¶ 95; *see also, e.g.*, *id*. ¶¶ 93, 211 (observing that owners who change the use or occupancy of their buildings may be subject to penalties even if they were previously in full compliance with the law and their emissions levels do not change).

The City misstates *Williams* on this issue, omitting its context-specific discussion of uniformity and instead suggesting that the case invoked a general "need for securing adherence to the law." Br. 30; *cf. Williams*, 251 U.S. at 67 ("the need for securing *uniform* adherence *to established passenger rates*" (emphasis added)). This generalization has no limiting principle, as *any* penalty is, by definition, designed at least in part to "secur[e] adherence," as the City admits. *See* Br. 33 (citing *Hudson v. United States*, 522 U.S. 93, 102 (1997) ("all civil penalties have some deterrent effect"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185 (2000) (quoting *Hudson* for the same proposition)).[14]

The fundamental disconnect between owners' conduct and the raw emissions totals on which penalties are imposed is not a matter of policy "preference." Br. 32. Rather, it illustrates a deterrence scheme massively disproportionate to the "violations" it is purportedly meant to target. The City's repeated reference to caselaw discussing the general deference afforded to government on rational basis review, *see Oriental Blvd. Co. v. Heller*, 27 N.Y.2d 212, 218-19 (1970) (rejecting argument that regulations on fuel and refuse burners were substantively irrational, before addressing penalties separately); *Kaufman v. O'Hagan*, 64 A.D.2d 46, 59 (1st Dep't) (rejecting *Lochner*-style due process challenge to fire-safety regulations, with no mention of fines or penalties), *aff'd*, 46 N.Y.2d 808 (1978), is non-responsive to the applicable legal test, *see Williams*,

[14] *Williams* specifically relied on Arkansas precedent establishing that "'[i]t is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties.'" 251 U.S. at 67. There is no comparable finding here. To the contrary, as alleged, the City had been immensely *successful* in reducing emissions levels under its prior regime of voluntary compliance. *See* ¶¶ 43-50.

251 U.S. at 66-67 (taking the states' "discretion" to impose penalties as a given, but then explaining that its test for excessive fines is designed to delineate the circumstances in which penalties "transcend" the *limits* on that discretion).[15]

Moreover, the City *concedes* that Local Law 97 is distinguishable from the rate-setting scheme in *Williams*, where outsized penalties were necessary to account for "numberless opportunities for [the] committing [of] the offense" that might go uncaught. Br. 31; *see Williams*, 251 U.S. at 67. And the City errs in assuming—contrary to Plaintiffs' well-pleaded allegations—that each year's emissions levels reflect a discrete "violation." Br. 30-31. Instead, Local Law 97 repeatedly penalizes owners, landlords, and shareholders for the same single offense—the inability to retrofit their buildings to the City's satisfaction within Local Law 97's impracticably short timeframe (and, as discussed *supra* section II, without adequate notice of what they are actually expected to do). *See, e.g.*, ¶¶ 10-12, 90, 212. That is, the emissions levels on which the penalties are based result from owners' lawful *prior* decisions—and the penalties accumulate each year unless and until owners are able to *unwind* that prior conduct.[16] Far from saving the law, this feature further compounds the excessive and unreasonable nature of the penalties imposed. *See* ¶ 210.

The cases cited by the City—both of which were resolved on the merits rather than on the pleadings—illustrate the contrast. In *Heller*, the Court of Appeals reviewed a summary judgment decision concerning a statute that regulated fuel and refuse burners and imposed fines "for each

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[15] The City's discussion of the need to address climate change more generally (Br. 30) is likewise beside the point, as it begs the relevant legal question (and ignores the corresponding allegations) regarding whether the *specific penalties* here are "wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67.

[16] The City suggests that there is a separate "violation" each year because owners might be able to gradually reduce the penalty with incremental retrofitting. Br. 31. But this just confirms that the City is assuming a *preexisting* violation, with any new "action a building takes" merely impacting the *size* of the resultant penalty. *Id.*

day of improper operation of an incinerator." 27 N.Y.2d at 218; *see also United States v. Dish Network L.L.C.*, 954 F.3d 970, 979-80 (7th Cir. 2020) (upholding damages award following a five-week trial during which defendant was found to have committed over 65 million telemarking violations). Although the *Heller* Court upheld these cumulative penalties, it acknowledged that the result would have been different on a "showing of impossibility of compliance" because "if the requirements of the statute were impossible to satisfy, cumulative penalties would be confiscatory, as any penalty would be invalid because irrational." 27 N.Y.2d at 220. That is precisely what Plaintiffs have alleged here.

The City's reference to purported "flexibility and discretion in the penalty assessment" (Br. 31, 33) is equally unavailing, as this so-called "flexibility" is tied to provisions that are themselves hopelessly vague. *See supra* section II. Regardless, a penalty provision may offend due process on its face even if "[i]t may be the case that no penalty so excessive and so disproportionate to the offense will be imposed," as "plaintiffs and others similarly situated should have the ability to measure the risk of violation under the penalty provisions." *Tops Mkts. v. Cty. of Erie*, 156 Misc. 2d 49, 62 (Sup. Ct. Erie Cty. 1992).

Relatedly, although the City purports to challenge Plaintiffs' excessive fines claim as premature (Br. 33-34), it is black-letter law that facial challenges to a statute ripen at the time of its enactment. *See Real Estate Bd. of N.Y.*, 165 A.D.3d at 9. Indeed, a contrary rule would essentially read facial challenges out of existence altogether, as a plaintiff *always* has the theoretical option of waiting to challenge a given statute on an as-applied basis instead.[17] Plaintiffs' facial excessive fines claim should proceed.

[17] The City completely misses the mark with its citation to *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975), which addressed the wholly distinct question whether to stay the accrual of cumulative penalties during the pendency of a challenge to agency action, so as to preserve a meaningful right to judicial

V. Plaintiffs Have Adequately Alleged That Local Law 97's "Penalties" Are Actually Unauthorized Taxes (Count V).

Local governments possess no inherent taxing authority and thus may impose taxes only when authorized to do so by the State. *See* N.Y. Const. Art. IX, Section 2(c)(ii)(8); N.Y. Municipal Home Rule Law ("MHRL") § 10(1)(ii)(a)(8). Although styled as "civil penalties," the assessments imposed by Local Law 97 are, in fact, unauthorized municipal taxes that violate this well-settled constitutional principle. *See* ¶¶ 245-58; *see also N.Y. Tel.*, 200 A.D.2d at 317-18. An improper tax will be found if the assessment is not "reasonably necessary to the accomplishment of the regulatory program," *In re Walton v. N.Y. State Dep't of Correctional Services*, 13 N.Y.3d 475, 485 (2009), or where the funds are used for the "purpose of defraying the costs of government services generally," *N.Y. Telephone*, 200 A.D.2d at 318; *see also Ass'n for Accessible Medicines v. James*, 974 F.3d 216, 222-23 (2d Cir. 2020) ("The principal identifying characteristic of a tax . . . is whether the imposition serves general revenue-raising purposes, which in turn depends on the disposition of the funds raised.").

Here, as alleged, the "penalties" at issue are not reasonably necessary to the accomplishment of Local Law 97's regulatory purpose, as the government can plainly reduce emissions without imposing taxes on building owners, landlords, and shareholders. *See* ¶ 252. Indeed, it did so successfully for years prior to Local Law 97's abrupt turnabout. *Id.* ¶¶ 44-51. Moreover, the funds collected under Local Law 97 are not earmarked for reducing emissions or any other effort that would further the law's purported environmental goals, but instead are directed to the City's general coffers—a clear sign of a revenue-generating measure. *See id.* ¶¶ 94,

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review. The City's citation to *Williams* on this issue addresses that same inapposite doctrine. *See* 251 U.S. at 64-65 (explaining that there must be meaningful opportunity for judicial review of the rate-setting determinations before penalties can be imposed for exceeding the rate cap). And the statutory provision governing *assessment* of penalties has nothing to do with "the *validity* of penalties assessed." Br. 34 (emphasis added).

253-58; *see, e.g.*, *N.Y. Tel.*, 200 A.D.2d at 318 (finding assessment to be unauthorized tax in part because defendant "ha[d] not controverted the assertion that the moneys garnered under the ordinance will be deposited into defendant's general fund"). Although the City's balance sheet may benefit from the collection of this revenue, there is no corresponding benefit either to the environment or to the owners, landlords, and shareholders saddled with these annual assessments. *See* ¶¶ 95, 251. Thus, Local Law 97's self-styled "penalties" clearly constitute unauthorized taxes.

Indeed, the City never disputes—and thus impliedly concedes—that Plaintiffs' allegations suffice to state a claim under the aforementioned legal standard. Instead, the City simply asks the Court (in a footnote) to ignore those well-pleaded allegations, arguing that the standard Plaintiffs invoke is relevant only when distinguishing "between a fee and a tax—not between a penalty and a tax." Br. 35 n.16.[18] That is incorrect.

As a threshold matter, the plain text of the MHRL treats penalties and fees together. Specifically, the same section 10 that reserves the taxing power to the State contains an additional subsection granting localities the limited authority to impose "charges, rates or *fees, penalties* and rates of interest" on "local property." MHRL § 10(1)(ii)(a)(9-a) (emphasis added). New York courts likewise often group fees and penalties together, juxtaposing them with unauthorized taxes. For example, in *In re 201 C-Town LLC v. City of Ithaca*, the court held that a street permit fee schedule did not constitute an unauthorized tax because the locality could "'regulate the use of the streets'" through "the imposition of *fees and penalties* upon those who impair that use." 206 A.D.3d 1398, 1402 (3d Dep't 2022) (emphasis added). Other courts simply refer collectively to fees and penalties as "funds." *See, e.g.*, *N.Y. Ins. Ass'n, Inc. v. State*, 145 A.D.3d 80, 91 (3d Dep't

[18] The City also spends a full page of its brief arguing that it has the power to impose penalties (Br. 35-36), but that undisputed background principle begs the relevant question, which is whether the assessments at issue here *are* penalties.

2016) (stating that "courts must examine the purpose and use of the *funds*" when determining whether those funds are unauthorized taxes (emphasis added)); *Cella v. Suffolk Cty.*, 70 Misc. 3d 1204(A), at *3 (Sup. Ct. Suffolk Cty. Dec. 31, 2020) (same).[19]

None of the cases cited by the City is to the contrary. Indeed, in purporting to describe "[t]he distinction between the police power and the tax power" (Br. 36), the City cites a case that addressed the distinction between taxes and fees, belying its own contention that such caselaw is irrelevant. *See City of Buffalo v. Stevenson*, 207 N.Y. 258, 262-63 (1913) (finding that a fee was not a tax where, *inter alia*, "[t]he moneys are reserved in a particular fund, set apart for the repairs of streets and not intended for the expense of conducting the municipal government"); *see also People ex rel. Lemon v. Elmore*, 230 A.D. 543, 545 (2d Dep't 1930) (holding that nuisance assessment for prostitution was a penalty where "the ultimate application of the proceeds stamps it as a penalty and not as a tax in any sense of the word"), *aff'd*, 256 N.Y. 489 (1931). And although the City purports to offer various additional guideposts for distinguishing taxes from penalties (Br. 36-37), it relies entirely on out-of-context quotations drawn from wholly inapposite cases. *See Friends of the Earth*, 528 U.S. at 185-86 (discussing deterrent effect of civil penalties for purposes of assessing private parties' Article III standing to seek such relief under the federal Clean Water Act); *Hudson*, 522 U.S. at 102 (assessing whether penalty was civil or criminal for double jeopardy purposes); *State v. Wallkill*, 170 A.D.2d 8, 10-11 (3d Dep't 1991) (assessing whether statutory penalty provision was mandatory or permissive).

[19] Although the court in *In re 201 C-Town* held that the assessment was not a tax, the court emphasized that the regulated entities in that case (unlike here) received a direct benefit from the charge imposed by the City. *See* 206 A.D.3d at 1402-03. Similarly, in *New York Insurance Association*, the defendant proffered affidavits establishing as an *evidentiary* matter at summary judgment that—contrary to Plaintiffs' well-pleaded allegations here—the funds collected under the challenged law were closely related to the "accomplishment of the regulatory purposes." 145 A.D.3d at 92.

At bottom, the City's entire argument reduces to a contention that Local Law 97's "penalties" serve to "drive compliance" rather than "generate revenue"—a premature factual argument rooted in hearsay statements and fiscal impact *projections* that are extrinsic to the Complaint, and therefore not cognizable on this motion to dismiss, and are non-dispositive in any event. Nor can the City's argument be squared with Plaintiffs' well-pleaded allegations. For instance, as the Complaint explains (quoting the Urban Green Council CEO), even "super energy-efficient" buildings will be unable to comply with the strict emissions limits and thus are "kind of left with paying a fine"—but "[a] fine is a failure, a waste." ¶ 95; *see also, e.g.*, ¶¶ 162-63 (alleging that Plaintiff Glen Oaks could spend $24 million on a wholesale boiler replacement project—at a cost of over $9,000 per household—and yet still have to pay over $800,000 *per year* in "penalties" beginning in 2031). Similarly, buildings that undergo a change in use or occupancy face the prospect of immediate penalties despite *no change* in their emissions levels. *See* ¶¶ 93, 257.[20] If the City wishes to establish that the law *in fact* drives compliance rather than generating revenue, it must do so on the merits, not on a motion to dismiss.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the City's motion to dismiss.

[20] The City responds to this use-and-occupancy issue with pure *ipse dixit*, contending (without a single citation) that this feature of the law "would be not [*sic*] transform the penalty to a use or occupancy tax" and "is wholly rational." Br. 37 n.17.

Dated: New York, New York
September 30, 2022

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-b

I, Leigh M. Nathanson, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Opposition to Defendants' Motion to Dismiss complies with the word count limit set forth in the parties' letter agreement dated September 16, 2022 (Dkt. 18) because it contains 12,490 words, excluding the parts of the memorandum exempted by Rule 202.8-b. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: New York, New York
September 30, 2022

/s/ Leigh M. Nathanson

Leigh M. Nathanson