SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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GLEN OAKS VILLAGE OWNERS, INC., ROBERT FRIEDRICH, 9-11 MAIDEN, LLC, BAY TERRACE COOPERATIVE SECTION I, INC., and WARREN SCHREIBER,

Index No. 154327/2022

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.

REPLY MEMORANDUM OF LAW IN SUPPORT OF CITY DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Through misapplications of the law and statements to confuse the applicable standards, Plaintiffs continue to seek to permanently prevent the City from implementing or enforcing its program to address greenhouse gas ("GHG") emissions from existing buildings, a sector that produces approximately two-thirds of the City's GHG emissions. Even before Local Law 97 of 2019 ("LL97") has been implemented, Plaintiffs complain that it is not fair to them. But Plaintiffs' allegations are not sufficient to invalidate a critical climate law. There are no factual disputes. They fail to state any claim. Therefore the complaint must be dismissed.

Plaintiffs claim that the State's Climate Leadership and Community Protection Act ("CLCPA") preempts LL97. Not so. Rather, the CLCPA sets emissions reduction commitments for New York State and a process for coming up with a plan on how to achieve those reductions, the draft version of which anticipates aligning with LL97.

After arguing that the broad and unspecified emissions reduction targets set by the CLCPA somehow presented a detailed regulatory scheme, Plaintiffs take a contrary approach to claim that LL97, a law that presents specific limits for differing building types, includes an enforcement mechanism, and provides opportunities for adjustments based on specific factors, is unconstitutionally vague. It is not—it provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that they may act accordingly and provides guidance to avoid arbitrary and discriminatory enforcement by providing explicit standards for those who apply them. Plaintiffs admit that their frustration with LL97 is that the statute requires further implementation through regulation. But required rulemaking to implement the specifics of a law is a regular facet of all types of local, state federal legislation, and the need for future

regulation here does not support Plaintiffs' argument that LL97 is facially unconstitutionally vague.

Next, Plaintiffs claim that LL97 is retroactive and a violation of due process. As the City set forth in its opening brief, LL97 is not retroactive. But, even if it were, retroactive legislation does not violate due process in and of itself, and LL97's clear rational legislative purpose to mitigate the threats that climate change poses to New Yorkers justifies any potential retroactivity that Plaintiffs imagine might exist.

Plaintiffs move on to complain about the potential penalties they may face under LL97 as a result of their expected excess GHG emissions. But these allegations are speculative, premature, and of no moment. Plaintiffs fail to allege facts to establish a facial challenge for excessive penalties—that no set of circumstances exists under which LL97's penalties would be valid. In fact, considering interests of the public, the opportunity for committing the offense, and the need for securing adherence to the law, LL97's penalty provision is completely reasonable.

Finally, Plaintiffs take issue with LL97's penalties claiming that they are in fact a tax. They are clearly penalties—they seek to punish an unlawful act or omission. Plaintiffs attempts to confuse penalties with fees only highlights the absence of any claim available to them. There are no factual disputes between the parties and Plaintiffs fail to state a cause of action. Therefore, the complaint must be dismissed.

ARGUMENT

I. Plaintiffs Fail to State a Claim that LL97 is Preempted

Because there is no factual dispute and only a question of law regarding whether the CLCPA preempts LL97 – which it does not – Defendants' motion to dismiss Plaintiff's preemption claim should be granted. To succeed on their preemption claim, Plaintiffs must

establish that it was the Legislature's intent to preempt local laws such as LL97 either through a legislative declaration of State policy or through showing that the CLCPA is such a comprehensive detailed regulatory scheme in a particular area that it displaces other regulations. Because neither of these can be established, the Court must dismiss Plaintiffs' preemption claim as a matter of law. *See* (Memorandum of Law in Support of City Defendants' Motion to Dismiss, Dkt. 6 ("City Br.") at 6-14.

On the issue of preemptive intent, Plaintiffs have failed to allege that the Legislature intended to occupy the field of GHG emissions regulations because plainly, it does not. As fully described in the City's opening brief, CLCPA acknowledges LL97's complementary regulatory scheme and, the State entity responsible for implementing CLCPA—the Climate Action Council—has explicitly endorsed LL97 as a model for a statewide standard (City Br. at 11-12). Notably, in their opposition, Plaintiffs fail to acknowledge that two State-government entities, the Council Action Council as well as the New York State Energy Research and Development Authority ("NYSERDA"),[1] clearly acknowledge that LL97 would continue to operate alongside any future State regulation.[2]

Ignoring these inconvenient facts, Plaintiffs instead point to generic statements by State officials lauding the important objectives of the CLCPA. Nothing in these statements suggests that the politicians themselves thought the CLCPA was foreclosing additional regulation by

[1] NYSERDA is a State public benefit corporation that offers information and analysis, programs, technical expertise, and funding aimed at increase energy efficiency and reduce their reliance on fossil fuels.

[2] Plaintiffs also choose to ignore that NYSERDA's website even includes advice for buildings to adhere to LL97, *see* City's Br. at 12. A court can take judicial notice on a motion to dismiss. *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001) (a record is "a proper subject of judicial notice because it is taken from public records.").

localities. And more importantly, these handful of comments by individual politicians do not evince the intent of the entire Legislature. While a deliberate statement by the Legislature about the nature of a State law may elucidate its scope regarding preemption, *see Robin v. Inc. Village of Hempstead*, 30 N.Y.2d 347, 350 (1970), general informal comments by politicians and public officials do not constitute statements of the Legislature. *See United States v. Trans-Missouri Freight Asso.*, 166 U.S. 290, 318 (1897) ("[i]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof."); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017) ("The legislative materials . . . consist almost wholly of excerpts from committee hearings and scattered floor statements by individual lawmakers—the sort of stuff we have called among the least illuminating forms of legislative history. (internal citation omitted)).

Plaintiffs also contend (incorrectly) that the CLCPA's findings and declarations intended to occupy the entire field of GHG emotions regulation. This is wrong. The findings and declarations only describe the adverse impacts and severity of climate change; the role New York can play in reducing GHG emissions globally, including setting the State's goal for emission reductions; and acknowledging that the impacts of climate change must be minimized, particularly for vulnerable and disadvantaged communities. CLCPA § 1. Nothing in the CLCPA or the informal comments by public officials to which Plaintiffs cite comes close to establishing the legislative intent necessary to preempt local laws.[3] Plaintiffs cling to the word "comprehensive"

[3] In the cases they cite to support their assertion that informal comments by political figures can establish Legislative intent of preemption, Plaintiffs ignore the additional significant sources supporting preemption in each case. *See People v. Diack*, 24 N.Y.3d 674 (2015) (after outlining the numerous ways almost 20 years of state regulation regarding identification and monitoring of sex offenders preempted local law, noting the governor's comment upon signing the statute at issue that this chapter "recognized that the placement of these offenders in the community has been and will continue to be *a matter that is properly addressed by the State*" (emphasis in original));

used in the CLCPA's findings statement, but to no avail: "comprehensive" here means that the CLCPA touches upon all sources of GHG emissions – not that it is intended to preempt all local legislation that furthers the CLCPA's intent by regulating or otherwise addressing GHG emissions.[4]

Plaintiffs' second preemption argument also fails because the CLCPA does not present a comprehensive and detailed regulatory scheme that occupies a particular field. *NY State Club Ass'n*, 69 N.Y.2d 211, 217 (1987); *see also* City Br. at 12-14. Rather, the CLCPA establishes state-wide GHG emissions reduction targets and a climate action council to prepare a scoping plan outlining the recommendations for attaining those targets. ECL § 75-0103. The CLCPA does not demonstrate a need for statewide uniformity, *see Dougal v. County of Suffolk*, 102 A.D.2d 531, 533 (1984), but rather emphasizes the wide variety of paths that cumulatively must be explored and pursued in order to meet the GHG emissions reduction targets. The local role in implementing LL97 that Plaintiffs dismiss as "speculative morass" is well-documented in the CLCPA Draft Scoping Plan,[5] which they conveniently ignore in their brief: "Local governments have an important role to play in meeting Climate Act mandates. They control assets like street lighting systems, wastewater treatment plants, landfills, and public transit systems. They *enact codes*,

Consol. Edison Co. of N.Y. v. Town of Red Hook, 60 N.Y.2d 99 (1983) (quoting the Legislature's statement "there is a need for the state to control determinations regarding the proposed siting of major steam electric generating facilities within the state," before noting the governor's comments upon approving the bill regarding the need for unified certificating procedure).

[4] Plaintiffs' insistence that the New York Legislature intended to preempt all local GHG regulation is divorced from logic. The CLCPA as it stands has established no new regulations, but has established emissions caps. If Plaintiffs' reading was correct it would mean *no local entities* can regulate to work towards those emissions caps, and must sit idly by, emitting GHGs, until the State has passed regulations – regulations which are not required by the text of the CLCPA.

[5] The Draft Scoping Plan is available at https://climate.ny.gov/Our-Climate-Act/Draft-ScopingPlan.

develop projects, adopt policies, and regulate land use." Draft Scoping Plan at Chapter 20 (Local Government) (emphasis added).

Finally, Plaintiffs point to Section 11 of the CLCPA, which explicitly states that the CLCPA does not relieve "compliance with applicable federal, state, or local laws or regulations . . . and other requirements for protecting public health or the environment," for support for their contention that the Legislature understood how to retain certain local laws as not preempted, but they bizarrely suggest that this language does not rescue LL97 from preemption. *See* Opp. at 15. In doing so, Plaintiffs misunderstand the context of LL97—a local law that the CLCPA does not alleviate compliance with as well as one that is aimed at protecting public health and the environment. As LL97 is designed to reduce GHG emissions to the environment and mitigate the threats that climate change poses to New Yorkers, LL97 is squarely preserved by the CLCPA. Accordingly, the Court should dismiss Plaintiffs' preemption claim as a matter of law.

II. Plaintiffs Fail to State a Claim That LL97 Is Unconstitutionally Vague

Plaintiffs next deride LL97 as unconstitutionally vague, yet their broadside that the entire law is incomprehensible is belied by their Complaint. *See* Opp. at 29 (outlining the potential fees one of the Plaintiffs face for the 2030-2034 compliance period). As outlined in the City's opening brief, each term Plaintiffs challenge as vague in LL97 provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that they may act accordingly and provides guidance to avoid arbitrary and discriminatory enforcement by providing explicitly standards for those who apply them. City Br. at 20-23.

Plaintiffs claim that what constitutes a "covered building" is vague, despite being quite clearly defined by LL97 with reference to tax lots and square footages. Opp. at 8. Plaintiffs willfully obscure that cooperative buildings are owned by a registered corporation, just as many

private rental buildings are owned. That these corporations' stockholders reside on the property is of no consequence for the application of the law. Conversely, a condominium is comprised of multiple separate property owners that jointly share responsibility for common elements, which may extend across multiple tax lots. In any case, the failure of the definition to account for every configuration of buildings does not make it vague, in marked contrast to the case cited by Plaintiffs, *People v. Spadaro*, 104 Misc. 2d 997 (Dist. Ct. Suffolk Cty. 1980) which involved a town code that regulated "air-parks" without ever defining the term and which the *Spadaro* court recognized was not a word with "accepted meaning long recognized in law and life." *Id.* at 999. Instead, LL97's definition of "covered buildings" provides adequate notice, particularly one that an individual Plaintiff such as Glen Oaks or Bay Terrace has the "ability to clarify . . . by its own inquiry" to DOB, weighing against unconstitutional vagueness. *Hoffman Estates*, 455 U.S. 489, 498-99 (1982).

Moreover, Plaintiffs' complaints about the "lack of regulation" are belied by the facts – DOB recently publicly noticed draft regulations[6] to implement LL97, including the establishment of GHG coefficients for the 2030-2034 compliance cycle, the GHG coefficients through 2050 and refined calculations for setting emissions limits for buildings. The GHG coefficients for 2030 and beyond are still eight years out, at the least, and provide ample notice for compliance.[7] Thus, LL97 is being implemented in a timely manner, and Plaintiffs will have a sufficiently knowable situation and ample time to adjust their future behavior. *See Hoffman*

[6] *Available at* https://rules.cityofnewyork.us/wp-content/uploads/2022/10/Proposed-Rule-Procedures-for-Reporting-on-and-Complying-with-Annual-Greenhouse-Gas-Emissions-for-Certain-Buildings-1.pdf.

[7] The proposed regulations made some changes for certain buildings in the 2024-2029 period that made emissions limits more stringent, but those buildings will not have to use the new calculation until 2026.

Estates, 455 U.S. at 498-99 (finding that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is prescribed").

Plaintiffs also fail to meet the heavy and well-established burden for overturning a statute on a facial vagueness challenge, which requires them to demonstrate that the law, "in every conceivable application[,] . . . suffers wholesale unconstitutional impairment." *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003); *see also Hoffman Estates*, 455 U.S. at 498-99 (holding that economic regulation is subject to a "less strict vagueness test" and expressing greater tolerance of laws with civil rather than criminal penalties because the consequences of imprecision are less severe). Crucially, Plaintiffs admit that their frustration with LL97 is that the statute requires further implementation through regulation. *See* Opp. at 22 ("it is the lack of regulation itself . . . that render these provisions unconstitutionally vague…"). But the mere fact that LL97 authorizes DOB to promulgate further regulations setting emissions limits for future compliance cycles beginning in 2030 and establishing procedures for adjustments to limits, among other things, does not support Plaintiffs' argument that LL97 is facially unconstitutional. Plaintiffs apparently do not deny LL97 authorizes DOB to further implement the law (Opp. at 21), yet they ask this Court to declare the entire law void before the City has a chance to implement it. This is contrary to how many laws throughout the country, not just LL97, are implemented through regulation, and case law cited favorably by Plaintiffs acknowledge that adequacy of notice – here being implemented through delegated agency rulemaking – militates against a law's vagueness. *See Hoffman Estates*, 455 U.S. at 498-99.

Finally, Plaintiffs take out of context the City's Chief Climate Officer and others' statements regarding implementation of LL97's allowance for mitigation of penalties if building

owners demonstrate "good faith efforts" at compliance as elaborated on in Ad. Code § 28-320.6. *See* Opp. at 23. The Chief Climate Officer's cited testimony demonstrates the City's desire and willingness to help, where the law allows, the regulated community comply with their GHG emissions limits and mitigate penalties when they have attempted compliance, rather than inveighing against LL97 as Plaintiff argues. *Id.*; Plaintiff's Ex. A at 63:5-65:5, 67:10-68:21. This statement of support and cooperation does not render LL97 vague. In fact, taking Plaintiffs' argument to its logical conclusion, any new law which allowed an agency to work with stakeholders trying to come into compliance, rather than simply dole out penalties, must be struck down as unconstitutionally vague.

Accordingly, as Plaintiffs have failed to allege a facial vagueness claim that LL97 is devoid of meaning in every conceivable application, the Court must dismiss this cause of action.

III. Plaintiffs Fail to State a Claim that LL97 Is Unconstitutionally Retroactive

Plaintiffs' retroactivity cause of action should be dismissed for failure to state a claim. Plaintiffs fail to establish that LL97 is retroactive, for the reasons more fully set forth in Defendants' opening brief at 24-28. Plaintiffs' brief continues to misapply retroactivity analysis – LL97 does not create penalties for emissions generated before the law was passed, and thus operates only prospectively. Plaintiffs have *no new liability* attached to former transactions – they are not liable for any action prior to the first enforcement period. *C.f. Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020) (a law allowing punitive damages for rent overcharges in the past was retroactive); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (applying a new provision for compensatory damages to litigation that was already pending was retroactive); *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136 (2017) (amendment imposing unfunded costs upon insurers for policies finalized before the amendment's

effective date was retroactive). A prospective regulation of an existing building is not retroactive merely because the building already exists.

Importantly, even if the Court were to find that LL97 is retroactive, which it is not, Plaintiffs still cannot show that the alleged retroactivity renders it unconstitutional. Retroactive legislation does not violate due process in and of itself, particularly in civil legislation. *American Economy Ins. Co*., 30 N.Y.3d at 149. "The test of due process for retroactive legislation is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 158 (internal citations omitted) , *quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Even if LL97 were retroactive, that retroactivity is clearly justified by a rational legislative purpose, and Plaintiffs cannot show otherwise.

Plaintiffs only vaguely allege that "there is no rational legislative purpose specifically justifying the retroactive treatment" of LL97. However, in their discussion of this point, they completely ignore the rational basis that the City has put forth for the Law: to mitigate the devastating impacts of climate change that are already wreaking havoc on the City. As discussed in the City's opening brief at 28-29 n.15, approximately two-thirds of New York City's GHG emissions come from buildings. To meet the City's target for carbon neutrality by 2050 – a target selected to align with the Paris Climate Agreement – building emissions must be lowered. Exempting already existing buildings from LL97's requirements would fatally undermine its goal by negating much of the anticipated reduction in total building emissions, and incentive owners to maintain high-emitting, inefficient buildings far longer than normal to avoid compliance with restrictions on new buildings. The retroactivity and the length of the retroactivity – encompassing all "covered buildings" – is crucial to the purpose of the legislation. *Regina Metro.*, 35 N.Y.3d at 368 (noting that Courts have found "statutory retroactivity – even if more substantial" to be

constitutional if "[the retroactivity] is integral to the fundamental aim of the legislation").[8] In their Opposition, Plaintiffs entirely ignore this argument – as it is fatal to their claim of retroactivity.[9]

IV. Plaintiffs Fail to State a Claim that LL97's Penalties Are Severe or Overly Oppressive on Their Face

Plaintiffs fail to state a claim that the LL97 penalties are severe and overly oppressive on their face. In fact, seemingly in order to avoid the premature nature of an as-applied challenge, Plaintiffs instead bring a claim against LL97s penalty provision as a facial challenge. However, the potential penalties and speculative amounts of which Plaintiffs bemoan in the complaint are of no moment. *See* Compl. ¶¶ 160, 162, 174-77, 182, 208.

In a facial challenge, the claimant must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[8] DOB enforces many laws that operate to protect the health and safety of New Yorkers, including abating lead paint, retrofitting lighting and sub-metering to improve energy and water efficiency (Local Law 88 of 2009), and requiring residential buildings to provide drinking water to common areas (Local Law 110 of 2013). Plaintiffs' standard of what constitutes "retroactivity" and its prohibitions would gut municipalities of their police power to protect health and safety by forbidding them from requiring changes to existing buildings. Though lead paint was thought to be safe and useful when first used, we know now the danger it poses, and the same is true for GHG emissions. Preventing the harm to New York City residents from both of these threats is indeed a "persuasive reason for the potentially harsh impacts of retroactivity." *Regina Metro.*, 35 N.Y.3d at 368*, quoting Holly S. Clarendon Trust v. State Tax Commn.*, 43 N.Y.2d 933, 935 (1978) (internal quotation marks omitted).

[9] Plaintiffs also note that "whether there was forewarning of the change in law as relevant to reliance interests" is a factor in analyzing whether a retroactive statute violates Due Process. Yet they tellingly fail to mention that LL97, which became law in 2019, does not create any legal consequences until 2024 nor do they mention that the emissions limits will decrease over a period of decades. Thus Plaintiffs will have had at least 5 years notice that they will be required to reduce their emissions under LL97. Moreover, the very programs and laws Plaintiffs cite to demonstrate the unfairness of LL97 – the Climate Protection Act, Executive Order No. 24, the Carbon Challenge, and Local Law 33 – all show that this is an area of evolving regulation and should have put the Plaintiffs on notice of future buildings emissions limitations. While the Carbon Challenge participants reduced GHG emissions by 580,000 metric tons, New York City emits 50 million metric tons of climate pollution each year – about 70% of which is from buildings. City Ex. A at 61.

Plaintiffs' Complaint simply does not allege facts to meet this standard and this claim must be dismissed.

Only when a penalty is "so excessive and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" will it be considered unconstitutional. *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).[10] To assess the severity of a statutory penalty, due regard should be given to the interests of the public, the opportunity for committing the offense, and the need for securing adherence to the law. *Id.* at 67. As thoroughly described in City's opening brief, considering these elements, LL97's penalty provision is necessary, proportionate to the offense, and reasonable. *See* City's Br. at 29-33.

Plaintiffs would have the Court erase as "besides the point," *see* Opp. at 32, fn 15, the important public interest that LL97 seeks to achieve—namely responding to the climate crisis, which poses existential risks to New Yorkers' health and safety. *See generally* NYC Panel on Climate Change. [11] In fact, it must be given due regard in assessing the severity of the penalty.

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[10] Plaintiffs cite to *Golan v. FreeEats.com, Inc.*, an Eighth Circuit decision, contemplating the reduction of an as-applied penalty assessment of $1.6 billion. *See* Opp. at 29; *see also* 930 F.3d 950, 962-63 (8th Cir. 2019). In that case, it was *not* the $500 statutory penalty for each violation that the court found infringed on due process, as Plaintiffs suggest, but rather the cumulative assessment for the 3,242,493 violations of the law. *Id.* at 957, 962-62. In contrast, the Seventh Circuit, in *United States v. Dish Network L.L.C.,* has explained that "it is not possible to evaluate [the assessed penalty] separately from the penalty per violation," which was $10,000 per violation and the court found was "a normal number for an intentional wrong." 954 F.3d 970, 979 (7th Cir. 2020). The approach of evaluating the statutory amount (rather than the assessed amount) is in line with *Williams*, which analyzed the penalty for a single statutory violation and held that it comported with due process. *See Williams*, 251 U.S. at 66 ("The ultimate question is whether a penalty . . . for the offense in question can be said to bring the provision proscribing it into conflict whit [sic] the due process of law cause of the Fourteenth Amendment."). In conflating the potential future penalty amount that might be assessed to them with the current issue before this court, Plaintiffs confuse their facial challenge with an as-applied one, which is simply premature at this point.

[11] *Available at* https://www.nyas.org/annals/special-issue-advancing-tools-and-methods-for-flexible-adaptation-pathways-and-science-policy-integration-new-york-city-panel-on-climate-

Williams, 251 U.S. at 67. The urgency of action to drastically reduce GHG emissions to mitigate the devasting impacts of climate change is essential. Reducing emissions from the City's buildings, a sector that produces approximately two-thirds of the City's GHG emissions, is a significant action the City can take. This important public interest supports the City's need to secure adherence to the law.

Plaintiffs concede that penalties are designed to secure adherence, *see* Opp. at 31, but suggest that *Williams'* stated need for compliance should only apply to seeking adherence to rate setting statutes like the one at issue in *Williams*. *See Williams*, 251 U.S. at 67 (expressing the factors to be considered to include "the need for securing uniform adherence to established passage rates"). But this narrow reading ignores the important role penalties play in securing compliance with laws in many other contexts. *See Hudson v. United States*, 522 U.S. 93 (1997); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167 (2000) (penalties help to deter future violations, prevent recurrence of violations, and provide a form of redress). Similar to the interest in *Williams* of securing adherence to a regulatory structure, the City has an interest in consistent compliance with the emissions limits set forth in LL97 and reducing GHG emissions accordingly. LL97 sets forth a uniform penalty amount for each metric ton of carbon dioxide equivalent emitted over a building's limit. Ad. Code § 28-320.6.

Plaintiffs suggest that "tenant density" and "hours of operation" should alter the uniform regulatory scheme the City has established. *See* Opp. at 30. However, LL97 already incorporates consideration of buildings' differing intensity of energy use by setting limits based on occupancy groups and by requiring the City to establish a methodology for calculating

change-2019-report-vol-1439/. Courts can take judicial notice of documents on motions to dismiss.

emissions limits based on Energy Star Portfolio Manager property types to more accurately reflect the amount of GHG emissions generated by different property types. Ad. Code § 28-320.3. LL97's purpose is to reduce GHG emissions from buildings by setting emissions limits. It seeks adherence with those regulatory limits through the ability to assess penalties at a maximum amount that is clearly articulated in the statute—"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"—and discretion to reduce the penalties based on outlined factors. Ad. Code § 28-320.6. Through the application of the law, any potential due process concerns are addressed. Still, Plaintiffs attempt to challenge LL97 before it has been applied.

Finally, Plaintiffs propose a strained reading of *Williams*' factor related to the numberless opportunities for committing the offense by adding the notion that the penalty amount seeks to address "unidentified" violations of the law, despite this term appearing nowhere in the decision. This reading rests on the unsupported hypothesis that the Legislature assumed that railroad companies will "get away with" violating the law so often, that the assessment of a significant penalty for the times they are caught is reasonable. However, recent decisions considering the assessment of statutory penalties makes clear that this narrowing of *William's* application is unjustified. For example, *United States v. Dish Network L.L.C.* the court was not concerned with unidentified violations, but rather the assessing statutory penalties for each violation. 954 F.3d at 980 ("Someone whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct."). Similarly in *Wakefield v. Visalus, Inc.*, the court noted that the damages assessed reflect the number of separate violations of the statute. 2020 U.S. Dist. LEXIS 146959 (D. Or. 2020), *11. "The large [] number comes from simple arithmetic: the total

damage award equals the number of violations multiplied by the minimum statutory penalty for each violation." *Id.*

Plaintiffs' insistence that yearly penalties are for "the same single offense," Opp. at 32, is willfully obtuse – every year that the Covered Buildings' emissions exceed their limit is additional GHG in the atmosphere, and thus additional harm. Plaintiffs request a law that penalizes them one time for the right to continually perpetrate the same environmental harm in perpetuity. The City's rational choice to avoid such a penalty scheme does not rise to a constitutional violation, and the Court should dismiss Plaintiffs' claim.

V. Plaintiffs Fail to State a Cause of Action that LL97 Imposes a Tax

Plaintiffs continue to attempt to confuse this issue by using an erroneous legal test—determining whether a fee is a tax (not whether a penalty is a tax), even though feeds are of no issue in their complaint. The standard Plaintiffs draw out from completely inapposite cases is not applicable to determining whether a penalty is a penalty or a tax. Furthermore, Plaintiffs' attempts to conflate fees and penalties are confused, unavailing and inaccurate.[12]

Plaintiffs cite three cases to craft a standard they seek to apply here, but each of those cases is inapposite as they each seek to distinguish fees from taxes, and therefore have no bearing on any analysis regarding penalties. In *In re Walton v. N.Y. State Dep't of Correctional Services*, the court explained that those engaged in regulatory activity can assess *fees* when it is "reasonably necessary to the accomplishment of the regulatory program." 13 N.Y.3d 475, 485 (2009) (citing *Suffolk County Bldrs. Assn. v County of Suffolk,* 46 NY2d 613, 619 (1979)). There

[12] Furthermore, penalties are properly directed to the general fund. NYC Charter §109 directs that "all revenues of the city … from whatsoever source except taxes on real estate … be paid into a fund to be termed the 'general fund.'" LL97 has no designation of where the revenues will go, thus they are properly directed towards the General Fund. NYC Charter § 109 (revenues "not required by law to be paid into any other fund" go to the "general fund").

is no mention of penalties in *Walton*. Similarly, in *N.Y. Tel. Co. v. City of Amsterdam* the court analyzed when a fee is actually a tax noting that taxes have "the purpose of defraying the costs of government services generally."[13] 200 A.D.2d 315, 318 (3d Dep't 1994). Again, there is no mention of penalties. Finally, *Ass'n for Accessible Medicines v. James* applied a three-factor test to distinguish taxes from fees; not penalties. 974 F.3d 216, 222 (2d Cir. 2020).[14] None of these cases present any relevant standard to evaluating the nature of a penalty.

Plaintiffs seemingly cite to these cases that only address the distinction between fees and taxes as part of their effort to conflate fees with penalties. But fees and penalties are not the same.[15] Contrary to Plaintiffs' assertion that the Municipal Home Rule Law ("MHRL") treats penalties and fees together, *see* Opp. at 35, the MHRL's authorization to impose both fees and penalties does not mean that the terms are interchangeable. *See* MHRL § 10(1)(ii)(a)(9-a). In fact, the inclusion of both fees and penalties separately in the MHRL exemplifies their distinct nature; were they the same thing the use of both terms would be redundant. However, "a statute should be construed to avoid rendering any of its provisions superfluous." *Kimmel v. State of N.Y.*, 29 N.Y.3d 386, 393 (2017). The cases Plaintiffs cite do nothing to suggest that fees and penalties are treated together and, in fact, only support the proposition that fees and penalties are distinctly authorized by the MHRL. *See In re 201 C-Town LLC v. City of Ithaca*, 206 A.D.3d 1398 (3d

[13] Nor does *Suffolk County Bldrs.* mention penalties. 46 N.Y.2d 613.

[14] *James* only mentions "penalties" in a totally separate section of the statute not under review and which was eliminated through subsequent amendments, related to penalties that could be assessed for violations of a prohibition on passing-through the contested assessment to customers. 974 F.3d at 220.

[15] Fees are generally an amount imposed by a regulatory body to cover the expenses of administering a program. *See Walton,* 13 N.Y.3d at 485 ("Typically, fees are paid to obtain access to a government service or benefit . . . .").

Dep't 2022) (referencing municipalities proper exercise of power to regulate the use of its streets, including the imposition of fees *and* penalties); *N.Y. Ins. Ass'n, Inc. v. State*, 145 A.D.3d 80 (3d Dep't 2016) (using the word "funds" to describe an assessment (i.e., tax or fee) for the purpose of distinguish between the two);[16] *Cella v. Suffolk Cty.*, 70 Misc. 3d 1204(A) (Sup. Ct. Suffolk Cty. 2020) (referencing "penalties" only in a recitation of the authority under the MHRL which provides the authority to assess both fees *and* penalties).

Plaintiffs' insistence on conflating fees with the penalties described in LL97 highlights their fundamental misunderstanding of the law. LL97 does not set a fee that, if paid, authorizes their building to emit GHGs, but rather sets a limit on emissions and assesses a penalty for exceedance of that limit.[17] In distinguishing between penalties and taxes the U.S. Supreme Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *U.S. v. Reorganized CF&I Fabricators of Utah, Inc*., 518 US 213, 224 (1996). Here, LL97 establishes GHG emission limits and seeks compliance with those limits through the assessment of a penalty for their exceedance set in a manner consistent with the costs associated with compliance. *See* City Ex. A. As Plaintiffs admit, penalties are designed to secure adherence with the law. *See* Opp. at 31. Without the adequate liability penalties established in

[16] The use of "funds" provides no support for Plaintiffs' argument. Every case the court cites for this proposition discusses fees and none discuss penalties. *See American Ins. Asso. v. Lewis*, 50 N.Y.2d 617, 622 (1980) (distinguishing between taxes and fees with no mention of penalties); *Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor*, 40 N.Y.2d 158, 163 (1976) (describing the test for the reasonableness of fees with no discussion of penalties); *Phillips v. Town of Clifton Park Water Auth.*, 286 A.D.2d 834, 836 (3d Dep't 2001) (distinguishing between taxes and fees with no mention of penalties); *Coconato v. Esopus*, 152 A.D.2d 39, 44 (3d Dep't 1989) (same); *Torsoe Bros. Constr. Corp. v. Bd. of Trustees*, 49 A.D.2d 461, 465 (2d Dep't 1975) (same).

[17] Elucidating Plaintiffs' misperception or desire for LL97 to authorize them to emit (rather than penalize their exceedance of limits), Plaintiffs take issue with the penalty being assessed each year. *See* Opp. at 29. A single payment that would permit buildings to emit unlimited GHGs into the future would make LL97 meaningless and is a preposterous reading of the law.

LL97, the City would have limited ability to compel compliance with GHG emissions reductions from buildings necessary to address climate change and meet the City's legally established GHG reduction targets. Regardless of Plaintiffs' repetitive allegation that prior voluntary City programs have been successful in reducing emissions, GHG emissions from buildings remain a significant contributor to climate change, a crisis that the City must grapple with. Through LL97's structure of emission limits and penalties for exceedances of those limits, the law seeks to achieve its purpose to mitigate the threats that climate change poses through GHG emissions reductions.

Dated: New York, NY
October 28, 2022

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CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8(B)

In accordance with Rule 17 of the Uniform Civil Rules for the Supreme Court and County Court, 22 NYCRR § 202.8-b, the undersigned certifies that the word count in this Memorandum of Law (not including the caption, signature block, table of authorities, table of contents, and this certification), as established using the word count on the word-processing system used to prepare it, is 5,986 words.

As further articulated in City Defendants' letter to the Court, dated October 28 2022, Defendants respectfully request the court accept this Reply Memorandum of Law which exceeds the limit set in § 202.8-b.

Date: October 28, 2022
New York, New York

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