

TESTIMONY OF MATTHEW J. CHACHÈRE
BEFORE THE
SENATE STANDING COMMITTEE ON HEALTH
AND THE
SENATE STANDING COMMITTEE ON HOUSING, CONSTRUCTION, AND
COMMUNITY DEVELOPMENT
NOVEMBER 30, 2021

Thank you for inviting me to give testimony to your committees today.

I am Matthew J. Chachère, a staff attorney at Northern Manhattan Improvement Corporation, a community-based legal services provider based in New York City. For nearly three decades, I have engaged over the issue of childhood lead poisoning prevention, primarily in my role as counsel to the New York City Coalition to End Lead Poisoning (“NYCCELP”). As part of that work, I have been part of litigation on various state and federal cases pertaining to the meaning, validity, and enforcement of various laws pertaining to lead poisoning prevention, including federal, New York state, and New York City statutes and regulations, and have contributed as well as the author of amici curiae (“friend of the court”) briefs in a number of cases pertaining to the liability of owners, government, and industry for the lead poisoning of children.

I was heavily involved in the drafting of New York City’s current laws and regulations on the subject, as well as several bills introduced over the years in the state legislature (including this current one), and in various federal regulations on lead poisoning. For the past decade and a half I have served on the New York State Lead Advisory Council, established pursuant to Public Health Law § 1370-b.¹ I have presented at dozens of trainings on lead paint poisoning laws, and

1. Sadly, I must report that the Advisory Council not met for the past two years, despite the
(continued...)

my 350 page compendium on lead paint laws² is widely used as a reference by practitioners. A paper I co-authored, published by the New York State Bar Association in 2019³ and attached and submitted as part of my testimony, covers many of the points I wish to make here today.



The miner's canary

In a case that I argued in 2003, the New York Court of Appeals declared that “the dangers of exposure to lead-based paint, especially to young children, are well documented and pose a serious public health problem.” NYCCELP v. Vallone, 100 NY 2d 337, 342 (2003). However,

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1. (...continued)
statutory mandate that it regularly meet to, among other things, develop a comprehensive plan to prevent lead poisoning and to report by December 1 each year to the Governor and the Legislature concerning the prior year's development and implementation of that plan.
 2. available at <https://www.nmic.org/nyccelp/documents/lead-training-manual.pdf>
 3. Korfmacher, Benfer, Chachère, “Lead Laws and Environmental Justice in New York,” 39(1) *The New York Environmental Lawyer* (1) 47-56 (NYSBA) Fall/Winter 2019.

the fundamental issue before us is that New York State – which has the highest number of dwellings with lead-based paint in the nation, and, not surprisingly, the highest number of lead poisoned children – largely continues to base its response to this wholly preventable epidemic by the barbaric use of vulnerable children as coal-miner’s canaries to detect the presence of this neurotoxin in their homes. New York largely has neither laws on the books nor the enforcement mechanisms to prevent lead poisoning of children, or what is called primary prevention. Instead, New York continues to rely on secondary intervention – a system that takes no action until a child has been found to have an elevated blood lead level, even though it is well understood that the damage done to young children from the ingestion of lead in their home environment is permanent. In short, rather than test buildings for lead, New York’s policy, in effect, is to test children for lead as a means to detect lead in their environment. Again, I can think of no better term to describe this other than barbaric.

For over half a century of legislation and regulation, New York has largely continued to duck this fundamental challenge. In 1970, in its first effort to limit the lead poisoning epidemic, the legislature, in enacting Title X of Article 13 of the Public Health Law (codified at PHL § 1370 et seq.), declared:

The occurrence of the disease of lead poisoning in children has become a major public health concern. Severe lead poisoning cases result in death or mental retardation. It is estimated that children in our nation with abnormally high blood levels of lead number in the hundreds of thousands. Many thousands of children in the cities of our state are actual or potential victims of lead poisoning. The disease of lead poisoning is most prevalent in areas of old and deteriorating housing where leaded paint and plaster in a peeling condition is accessible for ingestion by young children.

Lead poisoning is a disease which will require the concerted efforts of public health agencies and other agencies concerned with the availability of healthful housing for the people of our state before the disease can be brought

under control and its incidence reduced.⁴

Despite these noble sentiments, a quarter of a century later, NYSDoH data indicated that in 1994 — while only 42% of children under age 3 were screened — some 17,741 children under 3 years of age had blood lead levels of 10 µg/dL or above (what was then considered to be the “level of concern”). NYSDoH, Maternal, Child and Adolescent Health Profile, New York State 1995; New York State Lead Poisoning Prevention Advisory Council, 1998 Report for the Program Years 1995-1996. The actual number of children under six who had elevated blood levels was undoubtedly much higher, as only “31 percent of the State's 1.5 million children under 6" were tested for lead in 1994. DHCR, Consolidated Plan: Federal Fiscal Years 1996-1997 at 73.

These dire figures continue to date. According to the CDC, New York has more children with elevated blood lead levels than any other state, and a recent estimate is that as many as 108,000 children have blood lead levels of 5 µg/dL or greater.⁵

As I indicated, the current laws have never provided meaningful remedies for families with children at risk of lead poisoning. The 1970 enactment of Title X banned the application of lead paint in interiors of dwellings and child care facilities, and granted the Commissioner of Health the power (but not the mandate) to declare areas of housing with “conditions conducive to lead poisoning” as “high risk,” and the power (but, again, not the mandate) to order removal of

4. McKinney’s PHL § 1370, Historical and Statutory Notes.

5. See, Korfmacher, Benfer, Chachère, “Lead Laws and Environmental Justice in New York”. Earlier this month, the federal Centers for Disease Control (“CDC”) further lowered the “reference level” for lead poisoning to 3.5 µg/dL. CDC, Update of the Blood Lead Reference Value — United States, 2021; Morbidity and Mortality Weekly Report Oct. 29, 2021 / 70(43); 1509-1512 (available at www.cdc.gov/mmwr/volumes/70/wr/mm7043a4.htm).

dangerous lead conditions. Two years later, an Albany family with lead poisoned children used it as the basis for obtaining an injunction to force their landlord to correct lead hazards (hazards he admitted were present). Graham v. Wisenburn, 70 Misc.2d 492 (S. Ct. Albany Co. 1972) rev'd, 39 A.D.2d 334, 336 (3d Dep't 1972) The Appellate Division, however, swiftly reversed, holding that Title X gave health officials enforcement powers “but add[ed] nothing to the rights of a private party to force landlords into action.” 39 A.D.2d at 336. This still remains the case today.

The following year, an Albany group brought an Article 78 to compel the county and state health commissioners to designate certain areas as “high risk,” inspect housing for lead hazards, and administer blood lead tests pursuant to Title X. In Community Action Against Lead Poisoning v. Lyons, 72 Misc. 2d 662 (S. Ct. Albany Co. 1973), rev'd, 43 A.D.2d 201 (3d Dep't 1974), aff'd, 36 N.Y.2d 686 (1975) the same justice as in the Graham case declared the provisions of Title X were mandatory, only to be reversed once again by the Appellate Division, which found the enforcement of Title X committed to the judgment and discretion of the health departments.⁶ This, too, still remains the case today.

In 1992, recognizing that state law had not been as effective in ending the scourge of lead poisoning, the legislature enacted the Lead Poisoning Prevention Act, amending PHL Title X and declaring that:

lead is the number one environmental poison for children and lead poisoning is still one of the most prevalent and preventable childhood health problems in New York State today. Despite advances in reducing or eliminating lead from paint and gasoline, little progress has been made in limiting childhood exposure to

6. In Pelaez v. Seide, 2 N.Y.3d 186 (2004), the Court of Appeals in essence declared that local health departments and municipalities were largely immune from negligence liability in their enforcement (or lack thereof) of Title X.

leaded paint from the interior and exterior of older housing.

McKinney's PHL § 1370-a, Historical and Statutory Notes. Yet while the 1992 amendments improved the mechanisms for blood lead screening, PHL Title X still largely remains a "secondary intervention" health policy — i.e., one which waits until a child is identified as lead poisoned before requiring environmental intervention — rather than a "primary prevention" policy (mandating intervention before a child is lead poisoned).⁷ It is not — despite its title — a "Prevention Act."

As a tenant's attorney, I can tell you that if a family with young children comes to our office for assistance with lead-based paint hazards in New York City, we know how to assist them to get those hazards abated before their child was lead poisoned. But were I to be practicing in, say, Utica, or Newburg, I would have little to offer them, because there the mandated inspections and remediation occur only after their child was lead poisoned. Sshockingly, there is, in fact, no New York State law or regulation whatsoever currently on the books, at least that I am aware of, that specifically mandates that a landlord abates lead-based paint hazards before children become lead poisoned.

And you don't need to take my word for it. Lacking any such mandate or local law, the courts upstate have pretty much uniformly found this to be so in personal injury cases, holding that, absent actual or constructive notice of lead hazards, there is no "duty on landlords to test for the existence of lead in leased properties based solely upon the general knowledge' of the dangers

7. As the CDC declared some time ago, "programs must not rely solely on screening and secondary prevention but also focus on prevention lead exposure through the implementation of housing-based primary prevention." CDC, Advisory Committee on Childhood Lead Poisoning, Preventing Lead Exposure in Young Children - A Housing-Based Approach to Primary Prevention of Lead Poisoning, October 2004, at 9.

of lead-based paints in older homes.” Sanders v Patrick, 94 AD3d 1514, 1516 (4th Dept 2012), leave to appeal denied, 19 N.Y.3d 814 (2012).⁸ Thus, even the threat of liability as a means of compelling landlords to act to safely and preemptively abate lead-based paint hazards is largely absent.

Moreover, even were such laws in existence, if there are no effective mechanisms whereby tenants can invoke appropriate and meaningful enforcement for non-compliance (and without fear of a retaliatory eviction or the issuance of a vacate order), such laws become largely a dead letter. New York City’s experience can serve as a valuable lesson here.

New York City was among the first jurisdictions in the nation to take action against childhood poisoning from lead-based paint. In 1960, the New York City Board of Health outlawed the further use of lead paint in residential housing. N.Y. City Health Code § 173.13.⁹ This first mandate, however, did nothing to address the widespread hazard posed by the pre-

8. See, also, Gonzales v Nemetz, 276 AD2d 670, 671 (2d Dep’t 2000) (“A landlord’s knowledge of the existence of chipping paint, or that a dwelling requires new paint, is not the equivalent of notice of a hazardous lead paint condition. Furthermore, a general awareness of the dangers of lead-based paint in older buildings is also insufficient to establish that a defendant had actual or constructive notice of the dangerous condition.”).

By way of comparison, the Court of Appeals declared in 1995 that with respect to dwellings within New York City, which has had a primary prevention law on the books since 1982 (discussed infra), landlords are charged with both constructive knowledge of, and a duty to abate, lead hazards in dwellings where young children are known to reside. Juarez v. Wavecrest Management, 88 N.Y.2d 628 (1996). As the First Department subsequently noted,

The plain effect of [Local Law 1 of 1982] ... and the entire remedial scheme would be meaningless if a landlord could suffer a lead condition in its building until given "notice" of the condition as the result of a test performed by others. Valdez v. Sherman Estates, Inc., 224 A.D.2d 240, 241 (1st Dep’t 1996).

9. By contrast, the ban on the use of lead paint in residential dwellings statewide did not occur until 1970 (when the Legislature enacted Pub. Health L. § 1372), and on a nationwide basis not until 1978 (when the federal Consumer Product Safety Commission banned the sale of lead-contaminated paint effective February 27, 1978. 16 C.F.R. Part 1303)

existing lead-based paint in the millions of units of older existing homes – just as State law still fails to do now. Thus, in 1982, the New York City Council enacted its first primary prevention law, Local Law 1 of 1982 (former N.Y.C. Admin. Code § 27-2013(h)), which required landlords to “remove or cover” lead paint hazards before children became lead poisoned.

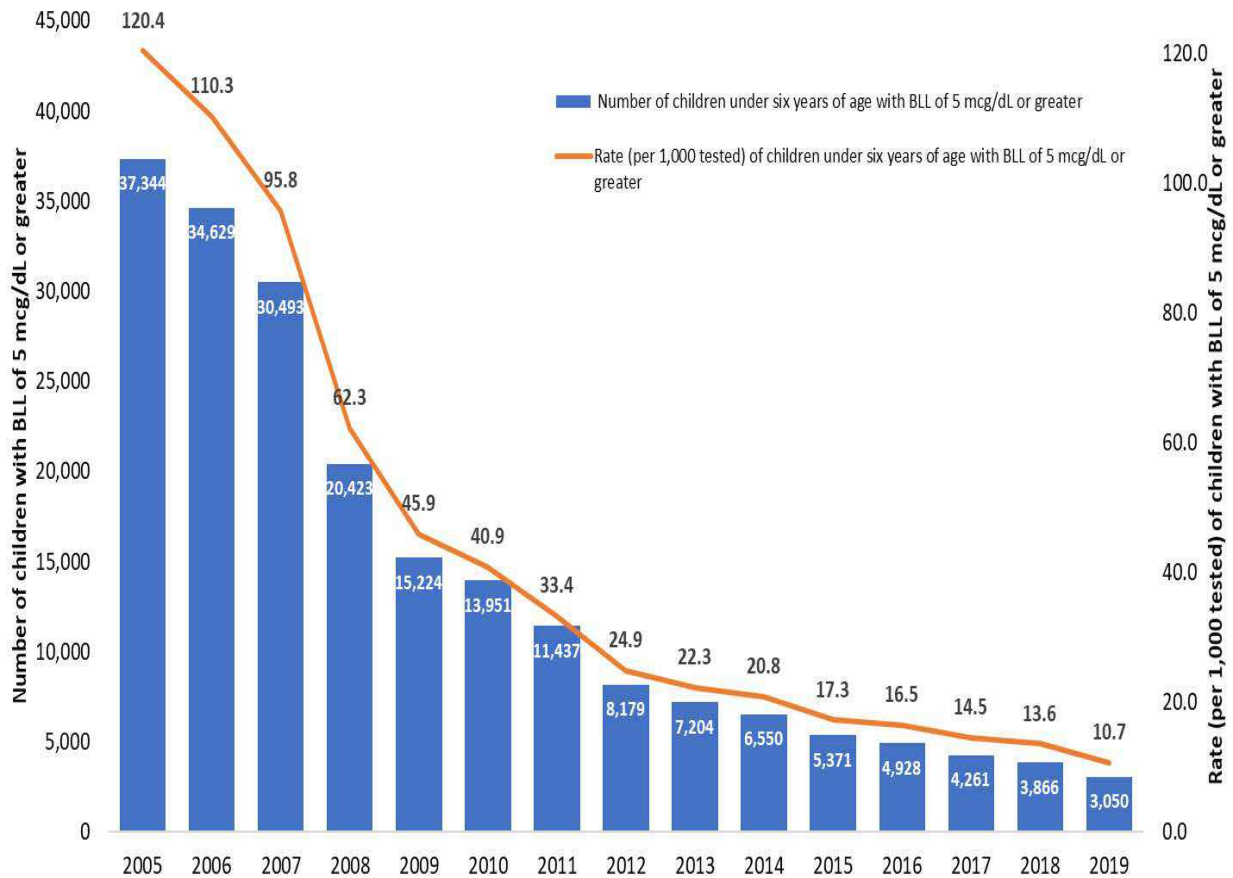
Notwithstanding these enactments, however, New York City failed in large part to carry out meaningful enforcement of this first law. Indeed, in 1995, parents of lead poisoning children and other advocates found it necessary to commence a class action lawsuit against the City, New York City Coalition to End Lead Poisoning (“NYCCELP”) v. Koch, seeking timely and adequate enforcement of Local Law 1 of 1982, resulting in numerous orders against City, all of which were upheld on appeal, and — after the City was held in contempt of court several times — the certification of a class of all children under age 7 living in older multiple dwellings. NYCCELP v. Giuliani, 245 AD2d 49 (1st Dep’t 1997). This combination of landlord non-compliance and inadequate enforcement caused the Court of Appeals to declare in 1996 that

[lead] paint continues to cover the walls of two out of three City dwellings ... Its widespread use thus renders lead poisoning a continuing threat to the health of young children in New York City, especially those in older and poverty-ridden neighborhoods.

Juarez v. Wavecrest Management, 88 N.Y.2d 628, 641 (1996).

To meet this continuing public health threat, and the identified gaps in enforcement by City agencies and compliance by negligent landlords, in 2003 the New York City Council passed a comprehensive reform of its lead laws, the New York City Childhood Lead Poisoning Prevention Act, known as Local Law 1 of 2004. Local Law 1 of 2004 provided an extensive set of mechanisms intended to make the primary prevention measures effective, including mandates that complaints of lead-based paint hazards are timely inspected, and that where landlords fail to

timely remediate lead-based paint hazards the City must step in and do so – rather than await the poisoning of a child.¹⁰ While the City Council’s goal of ending lead poisoning has not been achieved, the decline of childhood lead poisoning in New York City since Local Law 1 of 2004 has been dramatic:



NYC Children < age 6 with BLLs of $\geq 5 \mu\text{g}/\text{dL}$ or greater

(Source: NYC Department of Health and Mental Hygiene, Report to the New York City Council on Progress in Preventing Elevated Blood Lead Levels in New York City at 2.)

10. Notwithstanding these prescriptions, the NY City Council has found it necessary to amend Local Law 1 repeatedly in recent years to close some of the loopholes found in compliance and enforcement. For more on this subject, I would respectfully refer the committees to my training manual “Lead Paint Laws and Regulations in New York City,” available at www.nmic.org/nycclp/documents/lead-training-manual.pdf, at pages 59-82.

It is readily apparent, however, that outside of New York City and perhaps several other jurisdictions (Rochester, Syracuse, Buffalo), there are no realistic remedies for tenants to obtain primary prevention from lead poisoning in their homes. As more fully detailed in a research paper prepared last year by one of my then-law student interns, Victoria Morrell, which I attach and submit as part of my testimony today, the barriers that tenants face in accessing code enforcement inspections and timely and meaningful judicial remedies are overwhelming in many parts of the state. And as noted in the Senate's 2019 Final Investigative Report: Code Enforcement in New York State,¹¹ adequate enforcement and deterrents are largely absent in many municipalities.

Over the years, I and other advocates have sought to promote meaningful legislative solutions. One of the first of these was S4121/A4121, introduced in 2007 by then Senator- Bill Perkins and Assemblymember Crystal Peoples-Stokes, which was intended as a broad-reaching omnibus bill covering many pieces of the puzzle, but which never received even a committee hearing. More recently, I have worked with other advocates to promote some of the concepts that were in the original Perkins/Peoples-Stokes bill as separate bills, several of which have been (or hopefully will be) introduced in the current legislature. Below I briefly outline what I believe are some of the essential core elements of any legislative solutions:

* Effective Code enforcement, which includes:

- a mandate that residential rental properties with children under age 6 be maintained at all times in a condition that does not cause lead poisoning;

11. published jointly by the Committee on Investigations and Government Operations and the Committee on Housing, Construction & Community Development (August 5, 2019) (available at www.nysenate.gov/sites/default/files/press-release/attachment/final_investigative_report_code_enforcement_skoufis.pdf)

- a requirement that residential rental properties that are not free of lead-based paint be subject to regular inspections (either by the owner, local government, or a third party) for lead hazards, with full disclosure to occupants;
- a mechanism whereby tenants can obtain timely and adequate inspections and enforcement by localities when their homes are not in compliance with lead paint laws;
- a publically-available electronic database of lead-based paint violations, admissible in court as prima facie evidence thereof (similar to that available in New York City pursuant to Multiple Dwelling Law § 328), as well as an accessible registry of rental properties, with information concerning the ownership and management;
- provision that eviction, or a vacate order does not negate the mandate to cure lead violations;
- a private right of action for tenants to seek enforcement of statutory and regulatory mandates concerning lead-based paint hazards, as New York City tenants have under Civil Court Act § 110(c);
- a provision that lead-paint hazards are a rent-impairing violation; and
- prohibitions against retaliation for tenants where lead-based paint hazards are reported.

* Safe work practices that govern activities that disturb lead-based paint, such as a state takeover of enforcement the Repair, Renovation and Painting (RRP) enhanced with lead-dust clearance testing. (See S6554/A7117, sponsored by Sen. Bailey and Assemblymember Bronson)

- * Accreditation of lead inspectors and abatement contractors.
- * Funding to help distressed properties, particularly in high-risk areas, carefully drafted to minimize displacement.
- * Mechanisms to put teeth into federally-mandated lead paint and lead hazard disclosure by, among other things, mandating a one-time full XRF inspection before property sales, and a statewide registration of properties with lead-based paint. Its long past time to end the “don’t ask, don’t tell” regime in property transactions. (See S2142/A6608, sponsored by Sen. Kavanagh and Assemblymember Rivera)
- * A ban on the lead exclusion clause in insurance policies for residential rental properties. (See S3079/A7488, sponsored by Sen. Ryan and Assemblymember Rivera).
- * Greater transparency and timely updating of data on lead poisoning by the Health Department to enable better targetting of resources and meaningful analysis of the effectiveness of programs.

Most recently, New Jersey enacted many of these elements into its state law. New York, with its dubious distinction of the worst statistics on lead poisoning, must do the same, rather than condemn yet another generation of children to the damage done from this entirely preventable disease. We need to stop focussing our approach on counting the bodies of victims, and refocus on preventing the creation of victims in the first place.

I look forward to working with your committee to make that happen.

Lead Laws and Environmental Justice in New York

By Katrina Smith Korfmacher, Emily A. Benfer, and Matthew J. Chachère

Introduction

Federal law began to phase out the use of lead in gasoline in the early 1970s and banned the use of lead in paint in the late 1970s. Since that time, population-wide levels of lead poisoning have declined dramatically. Nonetheless, lead poisoning remains a key environmental health risk, particularly for children living in older housing in disrepair. Widespread publicity about the lead contamination of Flint, Michigan’s water supply in 2014 raised public awareness that lead remains in our environment. Today, lead sources that include pre-1978 paint, lead-contaminated dust and soil, leaded pipes and solder, and imported consumer goods continue to threaten the health and well-being of the population, especially children.

According to the Centers for Disease Control and Prevention (CDC), New York has more children identified with elevated blood lead levels (EBLL) than any other state. Up to 108,000 young children in the state may have a blood lead level (BLL) of 5 micrograms per deciliter ($\mu\text{g}/\text{dL}$) or higher.¹ New York has the nation’s greatest number of housing units (over 4 million units), the highest percentage of pre-1960 (55.08%) and pre-1950 (41.0%) housing, and the oldest housing inventory among the 50 states (see Table 1). This older housing stock places residents at greater risk of exposure to lead hazards. Lead is widely recognized as an issue of environmental justice because low-income children living in older housing have the highest risk of lead poisoning.

	State	Percentage of Housing Stock Built 1978 or Before	Percentage of Housing Stock Built 1959 or Before	Percentage of Housing Stock Built Before 1950
1	New York	77.8%	55.1%	41.0%
2	Rhode Island	72.5%	47.2%	38.3%
3	Massachusetts	70.5%	49.2%	39.5%
4	Connecticut	70.2%	42.9%	29.5%
5	Pennsylvania	68.9%	46.5%	34.4%

Table 1

Table 1: Age of Housing Stock in the United States (Top 5 States)²

Research has shown that even low levels of lead can cause lifelong health, behavior, and learning problems that contribute to staggering social costs, including over \$6.4 billion for the 2019 birth cohort of children in New York.³ The CDC has repeatedly lowered the blood lead “level of concern” as understanding of the health impacts of lower levels of lead has emerged. In recognition of the current scientific consensus that no level of lead

poisoning is safe, the CDC set a “reference value” for lead poisoning of $5 \mu\text{g}/\text{dL}$ in 2012 that will be updated every four years to reflect the 97.5th percentile of the population BLL in children ages 1–5.⁴

In 2019, New York adopted the CDC reference value when it enacted legislation that lowered the statewide definition of “elevated lead levels” from $10 \mu\text{g}/\text{dL}$ to $5 \mu\text{g}/\text{dL}$.⁵ The state joins seven other states that require environmental investigations, nurse case management, and other interventions at this lower threshold (see Table 2).⁶

States that <i>require</i> lead hazard inspections	States that <i>require nurse case management and lead hazard inspections</i>
California (2018) Maine (2015; excludes owner-occupied single-family residences) New Hampshire (adopted 2018, effective 2021) New York (2019) North Carolina (2017)	Illinois (2019) Maryland (2019) New Jersey (2017)

Table 2

Table 2: State Action When a Child’s BLL Is Equal to or Above $5 \mu\text{g}/\text{dL}$ ⁷

The lower threshold means that many more children will now be considered to have an EBLL (see Figure 1) and will receive interventions earlier in the timeline of exposure, with concomitant costs for the expanded public health response.

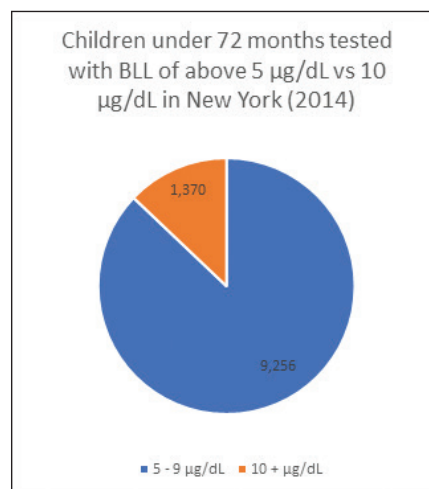


Figure 1

Figure 1: Blood Lead Levels in New York Children⁸

Nonetheless, under New York’s current regulatory regime, except in some localities such as New York City or Rochester, a child must still be lead poisoned and potentially suffer permanent brain damage before any

interventions occur that could identify the source of lead exposure. Despite release of a 2018 federal lead action plan, national efforts to actively promote primary prevention of lead exposure appear to have stalled. State and local programs are therefore key to preventing lead poisoning and its deleterious consequences. Addressing lead's contribution to the health disparities faced by children living in environmental justice communities is a particular concern. In this article, we present a brief overview of lead poisoning in New York, current policy approaches in the state, and future opportunities for effective prevention.

Why Are We (Still) Talking About Lead?

Lead was first recognized as toxic during the Roman Empire. In 1786, Benjamin Franklin warned about the dangerous consequences of a lack of action in response to lead hazards.⁹ In the 20th century, the medical community identified the particular risks of lead-based paint to children. Health professionals' concerns were effectively undermined by the lead industries (paint, gasoline, etc.) in a tobacco industry-like saga spanning decades.¹⁰ As a result, lead permeated the urban environment through the continued use of lead in paint, fixtures, water pipes, and gasoline. Despite the federal policies phasing out lead from paint and gasoline in the 1970s, the legacy of lead continues to pose a threat to children through contaminated house dust, old paint, soil, and water. The main sources of lead exposure vary from one place to another, but lead-based paint hazards are the most significant sources of exposure for most children.¹¹

According to the CDC, the American Academy of Pediatrics, and longstanding environmental health research, there is no safe level of lead in the body. Lead exposure has multiple negative and permanent effects on children's health.¹² The primary concern is lead's effects on the developing brain—it can reduce IQ, cause learning problems, and lead to impulsive behaviors.¹³ In addition, lead exposure in childhood can contribute to lifelong health effects including hypertension, osteoporosis,¹⁴ and cardiovascular disease,¹⁵ among other morbidities.¹⁶ Research suggests that lead may interact with other environmental exposures, including stress, potentially exacerbating its impacts on children living in low-income neighborhoods.¹⁷ Because lead affects how the brain and body develop, its damage cannot be readily reversed. Lead poisoning is therefore often referred to as a disease that can be prevented, but not cured.

The growing evidence documenting the lifelong effects of low-level lead exposure and the concentration of exposures in environmental justice communities has sustained the public health field's concerns about lead, despite dramatic reductions in population-wide blood lead levels. Public awareness of lead hazards in urban environments was rekindled by the Flint drinking water crisis.¹⁸ Subsequent media coverage, including Reuters reports in 2017 on surprisingly high rates of lead poisoning across the country, heightened public interest.¹⁹ Recent reports on the prevalence of lead hazards in both private²⁰ and public²¹ rental housing in New York City have

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The authors wish to thank Nga Bui, MSW and MPH candidate, and Virginia Morgan, MPH, for conducting the research and calculations that contributed to the tables and cost-benefit analysis in this article as former Health Justice Advocacy Clinic students at Columbia Law School and the Mailman School of Public Health.

increased recognition that lead remains a housing hazard in older buildings in the state.

These mounting concerns spurred renewed efforts to update federal lead policies, regulations, and programs. The Green & Healthy Housing Initiative released a “Strategic Plan to End Childhood Lead Poisoning: A Blueprint for Action” in 2016, laying out recommendations for federal agencies and legislation, as well as priorities for state and local governments and philanthropy.²² In February 2017, the National Center for Healthy Housing and the National Safe and Healthy Housing Coalition endorsed 50 specific recommendations for federal action as part of their “Find It, Fix It, Fund It” Lead Elimination Action Drive campaign.²³ Later that year, the Health Impact Project completed a comprehensive analysis of potential policies to reduce childhood lead poisoning, concluding that eliminating all lead exposure for children born in 2018 could avoid up to \$84 billion in future costs.²⁴ The 10 “key policies” recommended by this report included enforcing the use of lead-safe work practices during renovations, reducing lead in water, and removing lead hazards from low-income housing. Taken together, these documents provide a sound basis for policy changes needed at the federal level. However, the Federal Action Plan to Reduce Childhood Lead Exposure released in December 2018 did not set explicit goals to implement these recommendations.²⁵ This dearth of proactive policy change at the national level has increased lead advocates’ focus on what states and localities can do to address lead poisoning.

A Snapshot of Lead in New York

Due to the limitations of federal lead poisoning prevention laws, states are left to develop lead poisoning prevention policy, creating wide variances in approach. New York has long been a leader in lead policy. In 1970, New York enacted Article 13, Title X of the Public Health Law banning the sale of lead paint nearly a decade in advance of federal law.²⁶ In addition, Title X gave the health commissioner (or delegated local health department) authority—albeit not the mandate²⁷—to require owners to repair “conditions conducive to lead poisoning,” most commonly in the homes of children identified with EBLLs. The reach of this “secondary prevention” approach was expanded dramatically by amendments to Title X in 1992 that required “universal screening” including blood lead testing of all 1- and 2-year-old children.²⁸ Associated New York State Department of Health (DOH) regulations require health care providers to educate families of children with elevated blood lead levels, and to conduct an “environmental investigation” for children with higher EBLLs.²⁹ At the time, this was one of the most ambitious state lead poisoning programs in the country.

Ultimately, however, the elimination of lead poisoning requires “primary prevention”—identifying and addressing hazards before children are exposed and become lead poisoned. Nationwide, 19 cities and states, including Rochester and New York City, require some form of

Private Market Pre-Rental Lead Hazard Inspection Requirements*			
Dust Wipe & Visual Assessment	Risk Assessment	Visual Assessment Only	Lead Paint Inspection
Cleveland, OH† Lancaster, PA Maryland Philadelphia, PA Rhode Island Rochester, NY Toledo, OH	Cleveland, OH Detroit, MI Washington, D.C.	Burlington, VT Grand Rapids, MI New York, NY San Diego, CA Vermont‡	Massachusetts Newark, NJ New Jersey§ Paterson, NJ
<p>* This table is current as of November 2019.</p> <p>† Cleveland requires the owner obtain either a dust wipe plus visual assessment or a risk assessment.</p> <p>‡ Vermont requires compliance with “essential maintenance practices” that removes deteriorated visible lead-based paint prior to rental of the property. Burlington adopted local legislation requiring compliance with the essential maintenance practices and additional requirements in rental units.</p> <p>§ New Jersey requires the commissioner to conduct lead paint inspections every five years. Newark and Paterson adopted local legislation requiring a lead paint inspection and additional requirements in rental units.</p>			

Table 3

pre-rental lead hazard inspection prior to occupancy (see Table 3).³⁰ New York State lead poisoning prevention advocates have long promoted strengthening the State’s primary prevention efforts. A comprehensive bill was introduced in 2007 that would have established a statewide primary prevention system, among other provisions.³¹ A less comprehensive bill passed both houses in 2008,³² but was vetoed by then-Governor Paterson, citing fiscal concerns.³³

In 2007, DOH piloted a “primary prevention” program that provided \$3 million to local health departments in eight counties with high rates of lead poisoning.³⁴ Local programs were given discretion in designing programs to provide education and inspections of homes where children had not yet been poisoned. Based on the accomplishments of the pilots, this program was expanded to 15 counties where over 80% of the children identified with elevated blood lead levels lived.

In June 2009, Governor Paterson established an inter-agency Task Force on the Prevention of Childhood Lead Poisoning, which released a draft report on lead poisoning in New York State.³⁵ The Task Force recommended integrating lead into weatherization, human services, child care inspections, and housing grant programs, enhancing education and training, and adding lead into the State’s Property Maintenance Code. Overall, the Task Force emphasized that DOH, alone, did not have the resources to prevent lead poisoning, and that many other State agencies needed to do more to prevent lead poisoning. Few of the Task Force recommendations have been fully implemented.

After the Flint water crisis, many lead-related bills were introduced in the New York State Senate and Assembly. Several passed, including a law requiring testing and reporting of lead in school drinking water (enacted in 2016),³⁶ and the Child Safe Products Act, which pro-

hibits the sale of goods intended for children that include toxic chemicals, including lead (passed by both houses in 2019).³⁷

Notably absent from this wave of new policies, however, was a comprehensive effort to address the primary risk: lead hazards in pre-1978 housing.³⁸ The fact that New York State's EBLL rates remain so high suggests that a renewed effort to address lead risks in housing is urgently needed. The critical question is how to equitably and effectively *prevent* lead poisoning and reduce the societal, community, and individual costs that fall disproportionately on low-income children and children of color.

Reframing Lead as an Issue of Environmental Justice

An accurate characterization of the drivers of lead poisoning is a prerequisite to developing appropriate solutions, garnering political support for these solutions, and implementing them effectively. Framing lead as an issue of environmental justice is a key part of understanding and addressing this problem.

Although lead poisoning rates continue to decline throughout New York, statewide data clearly show lead poisoning to be an issue of environmental justice. In 2005, DOH reported that 54% of the children identified with BLLs over 10 µg/dL lived in just 68 of the over 1600 zip codes in the state.³⁹ Most of these "high risk zip codes" encompassed communities of color in older urban areas. For example, analysis of census data in Rochester showed that Black and Latino children were far more likely than White children to live in one of its five "high risk zip codes." The distribution of lead poisoning along racial and socioeconomic lines strongly affirms that lead is an issue of environmental justice in New York.

Lead has a disproportionate impact on lower-income children and children of color for many reasons. Children with low socioeconomic status:

- 1) Are the most likely to live in high lead-risk housing: pre-1978 housing in poor condition.
- 2) Have caregivers who are the least likely to have access to the knowledge needed to protect their children (e.g., the sources of lead exposure, its importance, and ways to avoid hazards).
- 3) Reside in low-income households that, even when aware of the danger, may lack the capacity to reduce lead hazards (e.g., renters cannot fix deteriorated windows and may face retaliatory eviction for complaints, low-income owners may not be able to afford remediation, parents with multiple jobs may not have time for frequent lead-safe cleaning).
- 4) May live in neighborhoods with significant non-housing sources of lead, including current or past

industrial sources, soil contaminated by lead in gasoline, airport emissions, etc.

- 5) Are less likely to have resources to secure early educational intervention and other interventions that may mitigate long-term effects of lead poisoning.
- 6) May be exposed to stressful environments and other exposures that interact with lead to cause greater harm.

Recent immigrants and refugees face particular risk. Not only are they vulnerable for the reasons listed above, but also they may have been exposed to lead in their home countries, use traditional products containing lead, fear that raising concerns with landlords or government actors will put their families at legal risk, or be unable to understand public health messages about lead prevention that are in English.

This characterization of lead as a problem of environmental justice has several implications for developing solutions. First, it may guide targeting of policies to reach those at greatest risk first. Second, it is essential that solutions be feasible to implement in low-income housing, particularly private rentals. Third, raising awareness of the inequitable impacts on children who already face many barriers to success may increase motivation for action. At the same time, highlighting that lead poisoning can happen anywhere—and that the financial costs of lead poisoning (special education, medical costs, juvenile justice, etc.) are borne by the entire society—may be important for mustering the political support needed to devote resources to this problem.

Promoting Primary Prevention at the State Level

The framework for primary prevention policy is embodied in the phrase: "find the hazards, fix the hazards, fund the fix."⁴⁰ Implementing this mandate requires multiple strategies by many actors and institutions. A wide range of approaches is needed to identify and address lead in paint, dust, water, consumer products, soil, and other sources. Because of the dominance of housing-based hazards in New York, we focus here on several strategies that address pre-1978 housing.

Find the Hazards

Lead hazards are invisible. Harmful levels of lead in house dust or soil may exist absent peeling paint or other visible signs of deterioration. Detailed inspections are needed to find lead hazards, ranging from visual inspections (with the assumption that deteriorated paint and bare soil contain lead), to dust wipe tests (which capture a "point in time" assessment of lead dust hazards), to risk assessments (that collect paint, dust, dirt, and water samples), to lead paint inspections using an XRF (X-ray fluorescence) gun. These inspection protocols have varied levels of accuracy, cost, and technical expertise requirements.

“Finding hazards” also means identifying high-risk housing and neighborhoods for inspection or intervention. Pre-1978 rental housing is generally the riskiest housing, and research suggests that public housing tends to be less risky than privately owned housing, both because of the associated federal lead regulations and also perhaps due to a lower prevalence of lead-based paint for various historical reasons.⁴¹ Some states, such as New Jersey and Massachusetts, target pre-1978 housing where a pregnant woman or child under 6 lives.⁴² As noted above, several states have implemented proactive lead-hazard rental inspections, requiring periodic lead inspection by the owner, private technician, or public agency staff before a tenant occupies the unit (see Table 3).⁴³ Existing inspection requirements apply primarily to rental housing.⁴⁴ For owner-occupied housing, one potential strategy is to require inspection at the time of sale.

“The main goal of funding lead hazard control under a comprehensive prevention system is to promote equity by incentivizing rapid, effective repair of the highest-risk housing while avoiding disruption of housing markets and the availability of low-income housing.”

Regardless of the method chosen to identify and inspect target housing, it is important to share this information publicly so that the private market can encourage proactive repair and maintenance to address hazards. Federal disclosure laws require sharing information about known lead hazards with future renters or buyers, although limited enforcement of this law has encouraged several localities to enact policies to enhance disclosure.⁴⁵ In addition to sharing lead hazard information with individuals, decision-makers need aggregate information over space and time. For example, geographic analysis of the distribution of children with elevated blood lead levels provides a way to check on where the system has failed to proactively find lead hazards and prevent lead poisoning.

Fix the Hazards (Safely)

Once lead hazards are identified, the second step is to ensure that they are effectively repaired. This requires establishing standards for remediation, ensuring that the work is done safely, and engaging in strong enforcement. The U.S. Department of Housing and Urban Development (HUD) and the U.S. Environmental Protection Agency (EPA) have established clear standards for abate-

ment (full removal or permanent encapsulation of all lead components) and interim controls (removal of lead from friction surfaces and stabilization elsewhere). Although full abatement is more expensive, it does not require repeated inspection as the use of interim controls or other methods does.

It is critical that lead hazards be controlled or abated in a safe manner to avoid generating severe new lead hazards by dispersing lead dust when disturbing paint around a home. In 2010, EPA implemented the Renovation, Remodeling and Painting (RRP) Rule, which sets forth lead-safe work practices, training curricula, and worker certification standards for renovation work in pre-1978 housing. Even landlords doing work in units they own are required to be trained and certified, but given the EPA’s limited resources, enforcement of this law can be challenging.

Enforcing standards for remediation and work practices requires timely monitoring of activities in the field, often inside privately owned homes. This requires field staff capacity, a strong quality assurance program, and education to ensure that clients, owners, and residents are equipped to report hazards. Dust wipe inspections after work is completed are the only reliable way to detect unsafe work practices, and periodic inspections can detect if hazard controls have failed over time. Because EPA has limited capacity to enforce the RRP Rule due to distance and resources, many states (albeit not New York) have adopted the RRP Rule and engage in localized enforcement and oversight.⁴⁶ In addition, states that have adopted the RRP Rule can set standards for stricter clearance testing and improve training requirements and work practices.

Funding the Fix

Permanently removing lead hazards can be extremely expensive, sometimes exceeding the total value of the house. Interim controls are less costly, but can still be significant expenses, particularly when window replacement is necessary. Many owner-occupants and landlords lack the capital to make the needed investments. Therefore, any comprehensive state lead prevention system must consider how to pay for this work.

In New York, several municipalities have received millions of dollars in Lead Hazard Control grants from HUD. However, these grants can only assist a limited number of properties each year. States can augment these programs, which generally provide grants to owner-occupants and loans to investor-owners (landlords). In addition, lead safety can be integrated into other kinds of housing assistance programs such as energy efficiency programs. Several states have implemented new fees to support lead hazard remediation in private housing, although in most places these funds have supported the state’s implementation and enforcement efforts. California, for example, levies an annual fee on manufacturers

and entities involved with the production or sale of lead and lead-based products including paint and petroleum.⁴⁷ In Maine, a fee is placed on the price of paint at retailers throughout the state, ranging from \$0.35 to \$1.60.⁴⁸ Massachusetts imposes surcharges of \$25 to \$100 on the annual fees of certain professional licenses, including for real estate brokers, property and casualty insurance agents, mortgage brokers and lenders, small loan agencies, and individuals who perform lead inspections.⁴⁹ Los Angeles recently enacted a housing ordinance that imposes a \$43.32 annual fee on owners of rental properties with two or more units to cover the cost of the City's systematic code inspection program.⁵⁰ In 2018, Connecticut enacted a law imposing a \$12 surcharge on homeowners' insurance to fund their Healthy Homes program.⁵¹ This approach significantly increases funding for lead poisoning prevention in a state.

The main goal of funding lead hazard control under a comprehensive prevention system is to promote equity by incentivizing rapid, effective repair of the highest-risk housing while avoiding disruption of housing markets and the availability of low-income housing. Any comprehensive statewide lead prevention system should include resources to track unintended impacts on housing so that programs can be adapted and affordable housing expanded, as necessary.

There are many other approaches and combinations of strategies to finding, fixing, and funding primary prevention of lead poisoning. Fortunately, other states offer an expanding range of models and experiences from which New York can learn. A comprehensive statewide primary prevention system that provides for effective approaches to finding hazards, fixing them, and funding remediation is needed to address New York's persistent lead problem.⁵² However, the variations in the nature of lead risks within the state suggest that local efforts are also needed to address the unique challenges of New York's diverse communities.

The Potential for Local Action

In addition to improving the statewide framework for lead poisoning prevention, action at the local level is essential.⁵³ The diversity of housing stock, tenure, and resources in the state make primary prevention even more complex. There are vast differences in housing characteristics between New York City and the rest of the state, and between urban areas, older rural villages, and newer housing in suburban areas. These economic, demographic, and housing stock differences among New York's many communities require different approaches.

For example, collaboration among health care providers, legal advocates, and communities resulted in the adoption of New York City's housing-based lead poisoning prevention law (Local Law 1 of 1982), one of the first in the country. The original law⁵⁴ required permanent abatement of all lead-based paint in child-occupied

dwelling buildings with three or more rental units. While New York City's current lead law, Local Law 1 of 2004,⁵⁵ no longer requires full abatement, it does require the permanent abatement of lead-based paint on friction surfaces (and the remediation of all deteriorated lead-based paint) prior to rental of any residential property, and requires owner inspections at least annually in child-occupied dwelling units in buildings with three or more units.⁵⁶ Given the prevalence of large apartment buildings in New York City, Local Law 1's focus on multi-unit dwellings was a logical way to prioritize resources, but it may not be appropriate for upstate cities with significant numbers of single-family private rental homes. For example, when Rochester added lead to its existing proactive rental inspection program in 2006, it included all pre-1978 rental units.⁵⁷ After several years of data showed much higher rates of hazards in one- and two-unit homes, the law was amended to exempt dwellings with more than five units from dust wipe testing.⁵⁸ Rural areas with high numbers of low-income owner-occupants require still different approaches. For that reason, it is important to preserve flexibility in how localities promote lead-safe housing.

In addition to proactive inspection of rental housing, local governments can contribute through:

- *Funding*: Local governments may know of specific funding needs or approaches suited to their community.
- *Enforcement*: Local laws can "mirror" state or federal laws, such as the federal disclosure law or the RRP Rule. Adding local enforcement capacity is particularly valuable to lead prevention efforts that require "eyes in the field" to detect non-compliance in a timely fashion.
- *Community coalitions*: Successful lead poisoning prevention requires strong partnerships between diverse local and state agencies, community-based groups and populations most affected by lead poisoning. Local government support of and participation in coalitions can enhance the effectiveness of program design and evaluation.
- *Education*: Because lead hazard control requires changes in the behavior of local code officials, social services programs, landlords, parents, and many others, education about the dangers of lead, relevant laws, and resources to address lead hazards is key to well-functioning systems.

State funding, technical resources, and policies can either enable or discourage such local innovations. For example, in 2018, a bill was introduced to affirmatively allow Buffalo to pass a local lead law.⁵⁹ Simply affirming localities' right to innovate might encourage other municipalities to do so. Alternatively, the State could adopt an "opt-in" program for local lead policies, such as those in

place for neighbor notification of pesticide application.⁶⁰ At a minimum, it is essential to preserve municipalities' ability to pass local lead ordinances that are appropriate to local conditions, rather than preempting local authority.⁶¹

Lack of local building inspection and code enforcement capacity is a significant barrier in many areas that will require state support to overcome. An initial step is to help local governments, community groups, and businesses to understand the nature of lead poisoning in their unique neighborhoods. For example, Rochester's successful lead initiative was initiated in part by a "Needs Assessment" commissioned by the local health department in 2002. State programs to inform and support local initiatives hold promise for addressing lead problems efficiently, equitably, and effectively.

Looking to the Future

Lead remains a critical environmental hazard in New York State, particularly for low-income children of color living in older housing. Now that New York has officially recognized the CDC's recommendation to take public health action for children with blood lead levels of 5 µg/dL or above, the state has the opportunity to once again become a leader in lead poisoning prevention policy. Lowering the definition of "elevated blood lead level" to 5 µg/dL is likely to (1) raise public awareness as the number of children under active management rises drastically; (2) increase concerns about the cost of management—both by public health agencies and home owners (including owner-occupants and investor-owners); and (3) protect children from additional exposure to the neurotoxin.

A comprehensive approach is needed to address all sources of children's lead exposure before a child is exposed and develops permanent brain damage, to target the most high-risk situations, and to prevent lead poisoning effectively, while continuing to bolster the DOH's secondary prevention efforts to help children who have already been exposed. As this brief overview shows, community, private, and public actors in New York can support action at the local, state, and national levels to address these challenges. These efforts could be initiated by:

- 1) Systematically analyzing recent national efforts to advance lead poisoning prevention to identify approaches that can be initiated at the state level—or that federal elected officials should be encouraged to pursue.
- 2) Evaluating the growing body of experience in other states with innovative primary prevention efforts with respect to geographic, housing, demographic, and economic conditions in New York to identify locally appropriate strategies.

- 3) Forming an interagency group charged with implementing steps State agencies other than DOH can take to more effectively prevent lead exposures.
- 4) Exploring ways to promote local prevention policies that are appropriate to local resources and conditions, including but not limited to proactive inspection of rental housing (e.g., opt-in policies, financial support, or technical resources).
- 5) Supporting local and statewide multi-stakeholder collaborations to inform and evaluate these efforts to ensure that they meet the needs of New York's diverse communities, help those at highest risk, and are implemented effectively.

The federal policies that were so effective at reducing national rates of childhood lead poisoning since the 1970s were informed by policy innovations initiated in New York. Despite progress, New York's most vulnerable children remain at risk. Addressing lead as an issue of environmental justice requires a comprehensive approach, multi-sectoral involvement, and community-government partnerships at all levels of policy action.

Endnotes

1. In 2011, the most recent year for complete CDC data, 12,009 of the 334,930 tested children younger than 72 months in New York City had BLL above 5 µg/dL (3.58%). In New York State (excluding New York City), 13,786 of the 222,805 tested children younger than 72 months had BLL above 5 µg/dL (6.61%). *Number of Children Tested and Confirmed BLL's ≥10 µg/dL by State, Year, and BLL Group, Children < 72 Months Old*, CDC, https://www.cdc.gov/nceh/lead/data/Website_StateConfirmedByYear_1997_2014_01112016.htm (last visited July 9, 2019). However, not all children are tested for lead, or tested to the extent required by State law. Assuming that these rates of EBLL apply to all children under 72 months in New York City (639,380) and New York State (1,386,618), respectively, yields an estimate of 108,721 EBLL children statewide (not including children over 72 months of age). This estimate provides an upper bound for the number of children with BLL over 5 µg/dL, since testing rates are typically higher among higher-risk children. In addition, available data shows that EBLL rates have continued to decline since 2011.
2. This table is based on data from the U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates: Physical Housing Characteristics for Occupied Housing Units (Excludes the District of Columbia).
3. According to Altarum's VALUE of Lead Prevention Calculator, New York's estimated burden is \$6.4 billion based on 28,820 children born in 2019 having BLL of 2 µg/dL or greater. *See New York, VALUE of Lead Prevention*, <http://valueofleadprevention.org/calculations.php?state=New%20York> (last visited July 9, 2019).
4. CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations in "Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention" (June 7, 2012), https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf.
5. *See* N.Y. Pub. Health Law § 1370(5) (enacted in 2019 N.Y. Laws 57, Part P).
6. Currently, California, Maine (excluding owner-occupied properties), New Hampshire (effective 2021), and North Carolina require lead hazard inspections, and Illinois, Maryland, and New Jersey require lead hazard inspections and nurse case management when a child's blood lead level reaches 5 µg/dL. Emily A. Benfer et

- al., *Health Justice Strategies to Eradicate Lead Poisoning: An Urgent Call to Action to Safeguard Future Generations*, 19 Yale J. Health Pol’y L. & Ethics __ (forthcoming 2019) [hereinafter Benfer et al., *Urgent Call*]; see also Columbia Law School Health Justice Advocacy Clinic, *Eliminating Lead Poisoning in New York: A National Survey of Strategies to Protect Children* (2019) (on file with authors). Many additional states match the CDC reference value in their definition of elevated blood lead level but do not require specific intervention at that level.
7. Benfer et al., *Urgent Call*, *supra* note 6; see also Columbia Law School Health Justice Advocacy Clinic, *supra* note 6.
 8. This figure combines separate data for New York City and New York State outside New York City. New York State data was only available for children under age 3; this figure was doubled to approximate incidence among children under age 6. Note that since fewer children ages 3–6 are identified with EBLL, this provides an upper estimate. For New York State: *Lead Data & Statistics: Child Blood Lead Testing and Blood Lead Levels by Zip Code*, N.Y. State Dept. of Health, <https://www.health.ny.gov/statistics/environmental/lead/> (accessed July 3, 2019) (Childhood_Blood_Lead_Testing_and_Elevated_Incidence_by_Zip_Code, Beginning_2003). For New York City: *Children Under 6 Yrs with Elevated Blood Lead Levels (BLL)*, NYC Open Data, <https://data.cityofnewyork.us/Health/Children-Under-6-yrs-with-Elevated-Blood-Lead-Level/ttry-kwh5> (accessed Apr. 15, 2019).
 9. Letter from Benjamin Franklin to Benjamin Vaughan (July 31, 1786), text available at <https://perma.cc/QUX4-D4PN>.
 10. See David Rosner & Gerald Markowitz, *Lead Wars: The Politics of Science and the Fate of America’s Children* (2013); Christian Warren, *Brush with Death: A Social History of Lead Poisoning* (2000); Jamie Lincoln Kitman, *The Secret History of Lead*, *Nation* (Mar. 2, 2000), <https://www.thenation.com/article/secret-history-lead/>.
 11. Council on Env’tl. Health, *Prevention of Childhood Lead Toxicity*, *Pediatrics* (July 2016), <https://pediatrics.aappublications.org/content/pediatrics/138/1/e20161493.full.pdf>.
 12. Adults may also suffer from lead poisoning, although symptoms tend to be less severe than for children with similar blood lead levels and are often reversible. Elevated blood lead levels in adults may be residual from early life exposure or from current (often occupational) exposures. We focus here on childhood lead exposure because of its prevalence and significant lifelong health effects.
 13. David C. Bellinger, *Childhood Lead Exposure and Adult Outcomes*, 317 *JAMA* 1219 (Mar. 28, 2017); Council on Env’tl. Health, *supra* note 11; Anne Evens et al., *The Impact of Low-Level Lead Toxicity on School Performance Among Children in the Chicago Public Schools: A Population-Based Retrospective Cohort Study*, *Env’tl. Health* (Apr. 7, 2015); Bruce P. Lanphear et al., *Low-Level Environmental Lead Exposure and Children’s Intellectual Function: An International Pooled Analysis*, 113 *Env’tl. Health Persp.* 895 (July 2005).
 14. James R. Campbell et al., *The Association Between Environmental Lead Exposure and Bone Density in Children*, 112 *Env’tl. Health Persp.* 1200 (Aug. 2004).
 15. Bruce P. Lanphear et al., *Low-Level Exposure and Mortality in US Adults: A Population-Based Cohort Study*, *Lancet Pub. Health* (Mar. 2018).
 16. Kent Bennett et al., *Lead Poisoning: What’s New About an Old Problem?*, *Contemp. Pediatrics* (Apr. 2015).
 17. Deborah A. Cory Slechta et al., *Lifetime Consequences of Combined Maternal Lead and Stress*, 102 *Basic & Clin. pharm. & toxic.* 218 (2008); Margaret T. Hicken et al., *How Cumulative Risks Warrant a Shift in Our Approach to Racial Health Disparities: The Case of Lead, Stress, and Hypertension*, 30 *Health Aff.* 1895 (2011); Devon C. Payne-Sturges et al., *Engaging Communities in Research on Cumulative Risk and Social Stress-Environment Interactions: Lessons Learned from EPA’s STAR Program*, 8 *Env’tl. Just.* 203 (2015).
 18. Indeed, the last time a lead article in this publication focused on lead policy was 1993, the year New York’s then cutting edge secondary prevention program was implemented. Suzette Brooks, *Lead-Based Paint: Liability Looms for Landlords*, 4 *Env’tl. L. N.Y.* 138 (Sept. 1993).
 19. M.B. Pell et al., *Lead’s Hidden Toll: Hundreds More Lead Hotspots Are Identified as Trump Prepares to Gut Programs*, *Reuters* (Apr. 21, 2017), <https://www.reuters.com/investigates/special-report/usa-lead-states/>.
 20. Joshua Schneyer & M.B. Pell, *Lead Poisoning Lurks In Scores of New York Neighborhoods*, *Reuters* (Nov. 14, 2017), <https://www.reuters.com/investigates/special-report/usa-lead-newyork/>.
 21. Emily A. Benfer, Op-Ed., *New York’s Public Housing Is the Size of a City. It’s Failing Children.*, *Wash. Post.* (Feb. 11, 2019) [hereinafter Benfer Op-Ed], https://www.washingtonpost.com/opinions/new-yorks-public-housing-system-is-the-size-of-a-city-its-failing-children/2019/02/11/458f63c2-2bb7-11e9-984d-9b8fba003e81_story.html.
 22. Green & Healthy Homes Initiative, *Blueprint for Action: Strategic Plan to End Childhood Lead Poisoning* (Oct. 2016), <https://www.greenandhealthyhomes.org/wp-content/uploads/strategic-plan-1.pdf>.
 23. Nat’l Ctr. for Healthy Housing & Nat’l Safe & Healthy Housing Coal., *Find It, Fix It, Fund It: A Lead Elimination Action Drive—Policy Recommendations to Congress and the New Administration* (2017), <https://nchh.org/resource-library/FFF-Action-Drive-Transition-Documents-Admin-Version.pdf>.
 24. The majority of these benefits come from avoiding damage to children’s brains and associated reductions in their lifelong earning potential, as well as in expenditures for medical care, special education, premature mortality, and incarceration. See Health Impact Project et al., *10 Policies to Prevent and Respond to Childhood Lead Exposure: An Assessment of the Risks Communities Face and Key Federal, State, and Local Solutions* (Aug. 2017), https://www.pewtrusts.org/-/media/assets/2017/08/hip_childhood_lead_poisoning_report.pdf.
 25. Emily A. Benfer et al., *Duty to Protect: Enhancing the Federal Framework to Prevent Childhood Lead Poisoning and Exposure to Environmental Harm*, 18 *Yale J. Health Pol’y L. & Ethics* __ (2019), available at <https://ssrn.com/abstract=3408133>; see also *Federal Action Plan to Reduce Childhood Lead Exposure*, U.S. Env’tl. Prot. Agency, <https://www.epa.gov/lead/federal-action-plan-reduce-childhood-lead-exposure> (last updated Apr. 2, 2019).
 26. See 1970 N.Y. Laws 338, § 4 (codified as amended at N.Y. Pub. Health Law § 1372); see also Matthew J. Chachère, N. Manhattan Improvement Corp. Legal Servs., *Lead Paint Laws and Regulations in New York City* 44 (May 10, 2018), <https://www.nmic.org/nycclp/documents/lead-training-manual.pdf>.
 27. See *Cnty. Action Against Lead Poisoning v. Lyons*, 43 A.D.2d 201 (3d Dept. 1974), *aff’d*, 36 N.Y.2d 686 (1975) (holding that health commissioner’s action is entirely discretionary).
 28. 1992 N.Y. Laws 485 (codified as amended at N.Y. Pub. Health Law §§ 1370-a(2), 1370-c, 1370-d, 1370-e); see also Chachère, *supra* note 26, at 45.
 29. Implementing regulations are at 10 N.Y.C.R.R. Part 67. Until 2019, an environmental investigation of a child’s home was not required below a EBLL of 15 µg/dL, although several counties voluntarily inspected at lower levels. Regulations proposed by DOH on May 1, 2019 to implement lowering the definition of EBLL included environmental investigation at 5 µg/dL. See N.Y. Reg. vol. XLI, issue 18, at 15 (May 1, 2019).
 30. Benfer et al., *Urgent Call*, *supra* note 6.
 31. 2007 Bill Text NY A.B. 7533A (Peoples); 2007 Bill Text NY S.B. 4121A (Perkins).
 32. *Childhood Lead Poisoning Primary Prevention and Safe Housing Act*, 2008 Bill Text NY A.B. 6399 (Gantt); 2008 Bill Text NY S.B. 6350 (Robach).

33. Veto Memo No. 176 (Oct. 15, 2008).
34. Nat'l Ctr. for Healthy Housing, New York State's Primary Prevention of Childhood Lead Poisoning Pilot Program: Year One Implementation Final Report (Feb. 27, 2009), https://nchh.org/resource-library/nysdoh-clpppp_year-01-implementation-report_2007-2008.pdf. The five counties within New York City were treated as a single county. See N.Y. State Task Force on the Prevention of Childhood Lead Poisoning, Preliminary Report 13 (2009), https://www.health.ny.gov/environmental/lead/exposure/childhood/task_force/docs/2009_preliminary_report.pdf.
35. N.Y. State Task Force on the Prevention of Childhood Lead Poisoning, *supra* note 34. The interagency Task Force's final report was never publicly released.
36. 2016 N.Y. Laws 296 (codified at N.Y. Pub Health Law § 1110 and N.Y. Educ. Law §§ 1950, 3602).
37. 2019 N.Y. Bill Text A.B. 6296 (Englebright); 2019 N.Y. Bill Text S.B. 501 (Kaminsky); see also Denis Slattery, *NY Dems Barring Toxic Toys as They Pass Sweeping Set of Bills Meant to Protect the Environment and Public Health*, N.Y. Daily News (Apr. 30, 2019), <https://www.nydailynews.com/news/politics/ny-dems-environment-kaminsky-toxic-toys-lead-cadmium-mercury-20190430-core6trpf5bulitzocavp6c7ea-story.html>; Press Release, Clean & Healthy N.Y., New York State Policymakers Pass Bipartisan Bill to Protect Children from Toxic Chemicals (Apr. 30, 2019), <https://www.cleanhealthyny.org/child-safe-products-act-passes>.
38. The 2019 Executive Budget included a provision requiring inspection of all pre-1978 rental units in the state, but this was not included in the State's adopted budget. See FY 2019 New York State Executive Budget: Health and Mental Hygiene Article VII Legislation, Part R, at 115 (2019), <https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19artVII/HMH-ArticleVII.pdf>.
39. The report indicated that outside of New York City, just 22 zip codes accounted for nearly 40% of all EBLL cases. DOH, Eliminating Childhood Lead Poisoning in New York State: 2004-2005 Surveillance Report, at 68 tbl.3 (not dated), https://www.health.ny.gov/environmental/lead/exposure/childhood/surveillance_report/2004-2005/docs/full_report.pdf.
40. The Rochester Coalition to Prevention Lead Poisoning used this framework to explain its comprehensive approach to lead in the early 2000s; it was later taken up as the tagline for the 2016 national campaign to update lead policy and programs.
41. Katherine A. Ahrens et al., Housing Assistance and Blood Lead Levels: Children in the United States, 2005–2012, 106 Am. J. Pub. Health 2049 (2016); David E. Jacobs et al., The Prevalence of Lead-Based Paint Hazards in U.S. Housing, 110 *Env'tl. Health Persp.* A599 (Oct. 2002); see also *New York City v. Lead Indus. Ass'n*, N.Y.L.J. Aug. 10, 1995, at 23, col. 1 (S. Ct. N.Y. Co.) (New York City public housing “never purchased lead paint”). Despite these findings, there has been recent evidence of persistent lead hazards in multiple cities' public housing. See, e.g., Benfer Op-Ed, *supra* note 21; Molly Parker, HUD Is Failing to Protect Children from Lead Paint Poisoning, Audits Find, ProPublica (June 22, 2018, 5 AM EDT), <https://www.propublica.org/article/hud-is-failing-to-protect-children-from-lead-paint-poisoning-audits-find>; Benjamin Weiser & J. David Goodman, New York City Housing Authority, Accused of Endangering Residents, Agrees to Oversight, N.Y. Times (June 11, 2018), <https://www.nytimes.com/2018/06/11/nyregion/new-york-city-housing-authority-lead-paint.html>.
42. New Jersey requires pre-rental inspection for pregnant women or children under 6 in a pre-1978 unit (N.J. Admin. Code § 5:10-6.6(c)); see also *The Massachusetts Lead Law*, Mass.gov, <http://www.mass.gov/eohhs/gov/departments/dph/programs/environmental-health/exposure-topics/lead/lead/> (last visited July 10, 2019). See generally Mary Jean Brown, *Costs and Benefits of Enforcing Housing Policies to Prevent Childhood Lead Poisoning*, 22 *Med. Decision Making* 482 (2002); Ruanda McFerren et al., Robert M. La Follette School of Public Affairs, Univ. of Wisc.-Madison, *Improving Local Lead Hazard Disclosure: A Case Study Analysis* (Spring 2018), <https://www.lafollette.wisc.edu/images/publications/workshops/2018-Lead-Disclosure-FINAL2.pdf>.
43. Benfer et al., Urgent Call, *supra* note 6.
44. ChangeLab Solutions, *A Guide to Proactive Rental Inspection Programs* (2014), http://www.changelabsolutions.org/sites/default/files/Proactive-Rental-Inspection-Programs_Guide_FINAL_20140204.pdf.
45. See McFerren et al., *supra* note 42.
46. See Columbia Law School Health Justice Advocacy Clinic, *supra* note 6.
47. See Health Impact Project et al., *supra* note 24.
48. *Maine, PaintCare*, <https://www.paintcare.org/paintcare-states/maine/#/everyone> (last visited July 10, 2019).
49. Health Impact Project et al., *supra* note 24.
50. L.A. Admin. Code § 161.352.
51. 2018 Conn. Legis. Serv. P.A. 18-160 (H.B. 5209); 2018 Conn. Legis. Serv. P.A. 18-52 (S.B. 357).
52. See, e.g., Childhood Lead Poisoning Prevention and Safe Housing Act of 2019, 2019 Bill Text NY A.B. 3432 (Bichotte); 2019 Bill Text NY S.B. 5107 (Parker) (introduced but did not advance in 2019 session).
53. Katrina Smith Korfmacher, Policy Brief, Local Housing Policy Approaches to Preventing Childhood Lead Poisoning (Sept. 2014), <http://phlr.org/product/local-housing-policy-approaches-preventing-childhood-lead-poisoning>; Katrina S. Korfmacher & Michael L. Hanley, *Are Local Laws the Key to Ending Childhood Lead Poisoning?*, 38 J. Health Pol. Pol'y & L. 757 (Aug. 2013).
54. Previously codified at N.Y.C. Admin. Code § 27-2013(h).
55. Codified at N.Y.C. Admin. Code Title 27, Article 14, and in various sections of Title 17.
56. This local lead law was amended or replaced several times, with the most comprehensive revision being Local Law 1 of 2004, codified in the New York City Administrative Code, beginning at Section 27-2056.1. See also Chachère, *supra* note 26, at 55. In 2019, a batch of ten laws (Local Laws 64 through 73 of 2019) made a number of additional changes, among them a tightening of the definitions of lead paint to 0.5 mg/cm², lead dust to 10 µg/ft² on floors (5 µg/ft² after June 1, 2021), 40 µg/ft² on window sills, and 100 µg/ft² on window wells, as well as enhanced data reporting by City agencies.
In part in response to widespread reports of inadequacies in the City's enforcement of the lead laws (see, e.g., Nolan Hicks, *NYC Has Never Sued Under Law Requiring Landlords to Test for Lead Paint: Report*, N.Y. Post (Sept. 25, 2018, 2:42 PM), <https://nypost.com/2018/09/25/nyc-has-never-sued-a-landlord-who-failed-to-inspect-for-lead-paint-report/>), the Mayor announced a new program, “LeadFreeNYC,” on January 28, 2019. See Press Release, Office of the Mayor, Mayor de Blasio Announces LeadFreeNYC, a Comprehensive Plan to End Childhood Lead Exposure (Jan. 28, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/061-19/mayor-de-blasio-leadfreenyc-comprehensive-plan-end-childhood-lead-exposure#/0>; LeadFreeNYC, www1.nyc.gov/content/leadfree/pages/ (last visited July 10, 2019). However, advocates continued to have concerns about effective enforcement. See, e.g., Sarina Trangle, *What Has Mayor's Lead Enforcement Accomplished? Absolutely Nothing' Advocate Says*, *am New York* (May 8, 2019, 7:13 PM), www.amny.com/real-estate/nyc-apartment-lead-1.30825435.
57. Katrina Smith Korfmacher, *Collaborating for Primary Prevention: Rochester's New Lead Law*, 14 J. Pub. Health Mgmt. & Prac. 400 (July-Aug. 2008); Katrina Smith Korfmacher et al., *Rochester's Lead Law: Evaluation of a Local Environmental Health Policy Innovation*, 120 *Env'tl. Health Persp.* 309 (Feb. 2012).

58. Katrina Smith Korfmacher, *Boundary Networks and Rochester's "Smart" Lead Law: The Use of Multidisciplinary Information in a Collaborative Policy Process*, 20 *New Solutions* 317 (Nov. 2010); see also *Lead Paint—Essential Links and Documents*, <https://www.cityofrochester.gov/lead/> (last visited July 10, 2019).
59. 2018 N.Y. Bill Text A.B. 9784 (Ryan); see also 2019 N.Y. Bill Text A.B. 6094 (Ryan).
60. See *Neighbor Notification*, N.Y. State Dept. of Envtl. Conserv., <https://www.dec.ny.gov/chemical/8529.html> (last visited July 10, 2019).
61. Several states have recently limited municipalities' ability to regulate housing and land use, reflecting the larger national trend toward preempting local policy initiatives. ChangeLab Solutions et al., *Preemption and Public Health Advocacy: A Frequent Concern with Far-Reaching Consequences*, (Sept. 2013), http://www.changelabsolutions.org/sites/default/files/Preemption_PublicHealthAdvocacy_FS_FINAL_20130911.pdf.

QUESTION PRESENTED:

- I. Whether New York State’s code enforcement scheme for housing provides for adequate remedies for tenants who have lead-based paint and other hazards in their homes.

BACKGROUND

The State of New York has done far too little to protect tenants from toxic substances in housing such as lead-based paint and other hazards. On a state-wide level, lead remains a major environmental health problem.¹ According to the federal Centers for Disease Control (“CDC”), in New York State the prevalence of children under six years old who were tested and confirmed for blood lead levels (“BLLs”) greater than or equal to 5 micrograms per deciliter (“µg/dL”) – the current regulatory definition for an elevated blood lead level (“EBLL”) – is 6.19% of children throughout the state, including 2.21% of children in New York City.² New York has some of the highest percentages of children with EBLLs in the United States.³ No amount of lead in the body is safe; lead exposure has numerous negative effects on a person’s developing brain and can be particularly hazardous for young children. It can reduce IQ, cause hyperactivity, inattention, learning issues, attention deficit disorder, delayed growth and irritability.⁴

Public health efforts to prevent lead poisoning can be generally classified as primary and secondary measures. Primary prevention is the term used to describe the process of identifying

¹ Emily A. Benfer, *The Cost of Childhood Lead Poisoning in New York*, Columbia University Mailman School of Public Health [2019], available at web.law.columbia.edu/sites/default/files/microsites/clinics/health-advocacy/new_york_cba_11.pdf (herein “Benfer, *Cost of Childhood Lead Poisoning*”)

² *Id.*

³ Emily A. Benfer, Matthew J. Chachère, Katrina Smith Korfmacher, *Lead Laws and Environmental Justice in New York* [2019] (herein “Benfer *et al.*, *Lead Laws*”)

⁴ www.aacap.org/aacap/families_and_youth/facts_for_families/fff-guide/Lead-Exposure-In-Children-Affects-Brain-And-Behavior-045.aspx [last accessed Oct. 14, 2020]

and removing lead hazards from a child’s environment before that child is poisoned.⁵ Primary prevention activities include programming and outreach aimed at removing lead hazards before children are exposed; primary prevention may also design and enforce a regulatory infrastructure order to create lead-safe⁶ and lead-free housing. These may include strategies meant to create lead-safe housing, collaborating with local housing agencies to create lead-safe plans, developing community-wide environmental interventions and educational campaigns, as well as highlighting risk disparities amongst populations and using data and expertise in order to motivate action.⁷ Blood lead testing and environmental follow-up are considered secondary prevention measures. Secondary prevention measures do not reach the ultimate goal of preventing lead poisoning before a child is harmed; and since lead-poisoning causes lifelong irreparable damage, secondary prevention is simply ineffective.⁸

In New York, neither primary nor secondary prevention programs provide individual tenants with the resources to invoke protections of laws to prevent lead poisoning within their own homes. Indeed, the presence of peeling lead-based paint within a rental dwelling occupied by children is not even a violation of any State law or regulation (unless a local health department has specifically ordered its removal). Lead hazard controls generally occur only *after* a child has been poisoned and EBLs have been recorded with the New York State Department

⁵ Adrienne S. Ettinger, Monica L. Leonard, Jacquelyn Mason, *CDC’s Lead Poisoning Prevention Program: A Long-standing Responsibility and Commitment to Protect Children from Lead Exposure* [Jan. 5, 2019], available at www.ncbi.nlm.nih.gov/pmc/articles/PMC6320665/ (herein “Ettinger et al., *CDC’s Lead Poisoning Prevention Program*)

⁶ For the purposes of this memo, “lead-safe” means housing where, while not necessarily free of lead-based paint, steps have been taken to contain lead-hazards in order to mitigate the potential for lead-poisoning.

⁷ Julia J. Gerberding, Henry Falk, Jim Rabb, Mary Jean Brown, *Preventing Lead Exposure in Young Children: A Housing Based Approach to Primary Prevention of Lead Poisoning* at 24 [2004], available at <https://www.cdc.gov/nceh/lead/publications/primarypreventiondocument.pdf>

⁸ www.cdc.gov/nceh/lead/prevention/default.htm (last accessed Oct. 14, 2020)

of Health (“NYSDoH”); at that point the health commissioner may refer an individual child with a blood lead level of 5 µg/dL or greater for “environmental management.”⁹ Environmental management is defined in the state regulations as environmental investigation and exposure assessment, sampling for lead, environmental testing and reporting, notice and demand of discontinuance of conditions conducive to lead poisoning, environmental intervention and abatement and enforcement.¹⁰ NYSDoH then analyzes BLL data per a particular neighborhood and, if a pattern emerges, may also authorize counties to declare a neighborhood “high-risk.”¹¹ When an area has been designated “high-risk” the county health commissioner may give written notice and demand for the removal of a paint condition conducive to lead-poisoning – but even this is not mandatory.¹²

This system pales in comparison to that of New York City’s primary prevention model, which provides for robust lead remediation mechanisms that presume the existence of lead-based paint (“LBP”) and compels removal of lead-based paint hazards *before* a child experiences dangerous and irreversible lead poisoning.¹³ Not only do New York City residents have far more protection from the insidiousness of lead, but the City’s housing code enforcement scheme provides tenants with a centralized way to file complaints and report Housing Maintenance Code (“HMC”) violations. It also provides a mechanism for tenants and the NYC housing code enforcement agency – the Department of Housing Preservation and Development (“HPD”) – to resolve issues in a centralized Housing Court.¹⁴ The State’s code enforcement scheme, as

⁹ 10 NYCRR § 67-2.3

¹⁰ 10 NYCRR § 67-1.1(f)

¹¹ *Id.*

¹² 10 NYCRR § 1373(1)

¹³ New York City Childhood Lead Poisoning Prevention Act, codified at NYC Admin. Code §§ 27-2056.1 *et seq.* (herein LL1/2004)

¹⁴ NYC Civil Court Act § 110

compared to the City's, has contributed to widespread disparities in safe housing that has had an adverse effect on the state of New York's overall public health.¹⁵

DISCUSSION

I. NEW YORK STATE HAS SOME OF THE COUNTRY'S HIGHEST RATES OF CHILDHOOD LEAD POISONING DUE TO A COMBINATION OF OLD HOUSING STOCK AND AN INEFFECTIVE LEAD HAZARDS REGULATORY SCHEME.

The use of lead paint in homes has been banned by Federal law since 1978.¹⁶ Although New York State banned the sale of lead paint in early 1970,¹⁷ older housing stock and homes left in disrepair have contributed to ongoing lead hazards throughout the state.¹⁸

Nearly 78% of available housing in New York was built in or before 1978.¹⁹ and nearly 5,370,020 occupied housing units possibly contain lead-based paint as well as other environmental hazards.²⁰ Due to this, the CDC estimates that approximately 80,215 children in the State of New York under the age of six are likely to have an EBLL.²¹ Additionally, about 46.2% of housing stock is renter occupied.²² Renters typically must rely on landlords to repair damages and maintain their property so that it is suitable for tenancy and/or the terms of their lease under the implied warranty of habitability.²³ Thus, the duty to mitigate lead-paint hazards ought to lie with the landlord.

¹⁵ Valeria B. Haley, Thomas O. Talbot, *Geographic Analysis of Blood Lead Levels in New York State Children 1994-1997*, 112 *Environmental Health Perspectives* 15 [2004], available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1247624/#

¹⁶ 16 C.F.R. Part 1303

¹⁷ PHL § 1372

¹⁸ *Id.* Benfer *et al.*, *Lead Laws*

¹⁹ U.S. Environmental Protection Agency, www.epa.gov/sites/production/files/2016-12/documents/2017tscagrant-stag.pdf [last accessed Oct. 26 2020]

²⁰ *Id.*

²¹ Benfer, *Cost of Childhood Lead Poisoning*

²² www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2019-07/housing-affordability-2019.pdf

²³ NY Real Property Law ("RPL") § 235-b

Lead-paint hazards are most common in low-income neighborhoods with a high concentration of older housing stock.²⁴ Due to ongoing racial and economic segregation, people of color tend to make up the majority of the population within these neighborhoods.²⁵ For example, in Buffalo, over half of the residents who live in an area of concentrated poverty (where poverty rates are 20% or higher) live in an area comprised mostly of people of color.²⁶ Addressing New York’s lead-paint problem is a matter of crucial environmental and health justice.

A. Lead laws and lead-poisoning prevention programs in New York State exist within an ineffective patchwork of local programs and state and federal laws.

At present, New York has a variety of programs, laws, regulations and tactics pertaining to address childhood lead poisoning.²⁷ The effectiveness of each of these varies.

Childhood lead poisoning prevention is primarily governed under Title X, Article 13 of the New York State Public Health Law (“PHL”), and its implementing regulations at 10 NYCRR Part 67. Because the effects of childhood lead-poisoning are irreversible, primary prevention—intervention before a child is sickened—is necessary.²⁸ Yet, PHL Title X is largely a secondary prevention policy.²⁹

²⁴ Sam Magavern, *Policies to Reduce Lead Exposure: Lessons from Buffalo and Rochester*, 15 Int. J. Environ. Res. Public Health, 2197 [Oct. 9, 2018] (herein “*Magavern, Lessons from Buffalo and Rochester*”)

²⁵ *Id.*

²⁶ *The Racial Equity Dividend: Buffalo’s Great Opportunity* (June, 2018), available at <http://racialequitybuffalo.org/files/documents/report/theequitydividendfinaljune2018.pdf>

²⁷ Magavern, *Lessons from Buffalo and Rochester*

²⁸ *Preventing Lead Exposure in Young Children: A Housing Based Approach to Primary Prevention of Lead Poisoning*, Recommendation from the Advisory Committee On Childhood Lead Poisoning Prevention [Oct. 2004] available at <https://www.cdc.gov/nceh/lead/publications/primarypreventiondocument.pdf>

²⁹ *Low Level Lead Exposure Harms Children: A Renewed Call for Primary Intervention*, Report of the Advisory Committee on Childhood Lead Poisoning Prevention of the Centers for Disease Control and Prevention [Jan. 4, 2012], available at https://www.cdc.gov/nceh/lead/acclpp/final_document_030712.pdf

PHL Title X requires childhood lead poisoning screening for all children at ages one and two.³⁰ If elevated levels of lead are found, a child's medical provider must report lead exposure levels to the health officer of the community health district as well as inputting that data into a statewide registry.³¹ However, many children are still not being tested, nor are they being tested to the extent required by law. This mechanism presumes that all families with young children have the means to readily attend well-child visits, but ongoing data suggests that this is not the case, particularly in low-income communities.³² For example, in Monroe County only about 50% of children have been tested twice by the age of three, as required by law.³³

The state health commissioner is mandated by the PHL to promulgate regulations that establish criteria for identification of areas and conditions involving high risk of lead poisoning, specify methods of detection of lead in dwellings, provide for the administration of prescribed tests for lead poisoning and the recording and reporting of the results thereof, and provide for professional and public education, as may be necessary for the protection of the public health against the hazards of lead poisoning.³⁴

These implementing regulations provide for the issuance of a Notice and Demand ("N&D") that requires property owners to correct lead-based hazards.³⁵ However, even the issuance of a written N&D for discontinuance is not mandatory. The regulations state:

Whenever the commissioner or his designated representative determines that a condition conducive to lead poisoning exists in a dwelling a written notice and demand for discontinuance of such *may* be issued in accordance with Section 1373(2) of the Public Health Law.(emphasis added)³⁶

³⁰ 10 NYCRR § 67-1.2 (3)

³¹ 10 NYCRR § 67-1.2 (5)

³² Magavern, *Lessons from Buffalo and Rochester*

³³ *Id.*

³⁴ PHL § 206 (n)

³⁵ 10 NYCRR § 67-2.6

³⁶ *Id.*

Thus, while issuance of an N&D is not mandatory, compliance with the directives contained within a written N&D *is* mandatory.³⁷ Property owners who receive a written N&D for discontinuance have the responsibility of complying with all federal, state and local laws that govern the safety of work with hazardous lead-based materials.³⁸ Moreover, the “owner of the dwelling must provide, upon request, to the Commissioner or his designated representative, such documentation as shall show that the owner has fully complied with these laws.”³⁹ However, as will be discussed in more detail further on, New York courts have held tenants can compel neither their landlords nor health departments to inspect for lead hazards.⁴⁰

If a pattern of elevated blood lead levels exist in a specific community or area, NYSDoH *may* designate that area a “community of concern.” This may permit the implementation of programs such as the Childhood Lead Poisoning Primary Prevention Program (“CLPPPP”).⁴¹ Under the CLPPPP, NYSDoH uses surveillance health data to target communities in the state with a high burden of childhood lead poisoning.⁴² Local health departments in these communities may be provided grants in order to implement approved lead-prevention programs. Fourteen counties and the City of New York have received CLPPPP grants.⁴³

Counties that have received CLPPPP funding are supposed to design their programs to reflect local needs and infrastructure while using CLPPPP as a framework in which to operate.⁴⁴

³⁷ See: 10 NYCRR § 67-2.6 (b); Upon receipt of a notice and demand for discontinuance of conditions conducive to lead poisoning, the owner of a dwelling is required to abate such conditions.

³⁸ 10 NYCRR § 67-2.6 (c)

³⁹ *Id.*

⁴⁰ See: *Community Action Against Lead Poisoning v. Lyons*, 43 AD3d 201 [3d Dept 1974]

⁴¹ *New York’s Childhood Lead Poisoning Primary Prevention Program*, National Center for Healthy Housing, available at https://nchh.org/resource-library/case-study_sustainable-financing-mechanisms_ny-clpppp.pdf [last accessed Nov. 2, 2020]; 10 NYCRR § 1370-a (3)

⁴² Ettinger et al., *CDC’s Lead Poisoning Prevention Program*

⁴³ *New York State’s Childhood Lead Poisoning Primary Prevention Program: Year 8 Grantee Impact Summaries*, National Center for Healthy Housing [April 1 2014-March 31 2015], available at nchh.org/resource-library/NYSDOH_Yr8_Appendix_Final.pdf

⁴⁴ *Id.*

For example, Erie County has used CLPPPP to provide case management for children with elevated BLLs that includes, but is not limited to: notification to parents/guardians and property owners of elevated test results, educational home visits and environmental referrals as appropriate based on BLLs, and information on proper medical evaluation and follow-up in accordance with the recommendations of the NYSDoH and the Erie County Health Department.⁴⁵ Erie County has also launched related programs such as the Lead Hazard Reduction Demonstration (“LHRD”) program which utilizes U.S. Department of Housing and Urban Development (“HUD”) funding and contracted labor and supplies to remediate lead hazards at eligible properties.⁴⁶ Qualifying properties receive free lead-based paint inspections and risk management in addition to new windows, doors, siding, trim, exterior and interior painting, porch repair and home safety measures. The program is available via an application administered by program staff.⁴⁷

Over the years, Congress has enacted various statutes pertaining to lead contamination; these include two major packages enacted in 1971 and 1992. The first package of lead laws, known as the Lead-based Poisoning Prevention Act of 1971 (“LPPA”), codified at 42 U.S.C. §§ 4821-4846, and amended at various times thereafter,⁴⁸ was passed in order to reduce the levels of lead in paint in federally financed and subsidized housing and to fund screening and research programs. The LPPA is the enabling statute mandating HUD to adopt implementing regulations

⁴⁵ Erie County NY, Department of Health, Childhood Lead Poisoning Prevention Program, www2.erie.gov/health/index.php?q=childhood-lead-poisoning-prevention-program-clppp [last accessed Nov. 2, 2020]

⁴⁶ Erie County NY, Department of Health, Lead Hazard Reduction Demonstration Program, <https://www2.erie.gov/health/index.php?q=lead-hazard-reduction-demonstration-program-lhrd> [last accessed Nov. 2, 2020]

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. Chapter 63 §§ 4821 et seq.

related to subsidized housing and lead-based hazards.⁴⁹ In 1976, amendments to the LPPA gave the Consumer Product Safety Commission the mandate to ban the sale of lead paint.⁵⁰

In an effort to bolster the federal government’s response to lead-poisoning, Congress enacted Title X of the Housing and Community Development Act of 1992.⁵¹ Among the components of federal Title X was the Residential Lead-Based Paint Hazard Reduction Act (“RLBPHRA”) of 1992, codified at 42 U.S.C. §§ 4851 – 4856. The RLBPHRA, among other things, directed the federal Environmental Protection Agency (“EPA”) to issue regulations pertaining to lead paint and lead hazard disclosure in real estate transactions, including the requirement that contracts for sale or lease of any interest in pre-1978 housing must contain a warning statement and a statement signed by the purchaser that evidenced compliance with the disclosure requirements.⁵² Additionally, federal Title X amended the Toxic Substances Control Act (“TSCA”) to add a number of new mandates pertaining to lead-based paint, found at 15 U.S.C. §§ 2681 *et seq.*. Among these was a mandate that EPA issue regulations requiring training and accreditation of individuals engaged in "lead-based paint activities" (and requiring that all risk assessment, inspection and abatement activities performed in “target housing” – i.e., pre-1978 – be performed by trained, certified contractors);⁵³ regulations defining dangerous levels of lead;⁵⁴ and public education.⁵⁵

⁴⁹ See: 24 C.F.R. 35, 570, 887, 905, 965, & 968

⁵⁰ 16 C.F.R. Part 1303

⁵¹ Pub. L. No. 102-550, Title X, § 1002 *et seq.*, 106 Stat. 3897 *et seq.* (Oct. 28, 1992), codified primarily at 42 U.S.C. § 4851 (amendment to LPPA); 42 U.S.C. §§ 4851 *et seq.* (the RLBPHRA); and 15 U.S.C. §§ 2681 *et seq.* (provisions added to the TSCA)

⁵² 42 U.S.C. § 4852d

⁵³ 15 USC § 2562

⁵⁴ 15 USC § 2563

⁵⁵ 15 USC § 2565

The various laws and amendments over the years make up a complex history of federal lead-hazards oversight, however, for brevity, this paper will only discuss the EPA’s lead-based paint Renovation, Repair and Painting regulations (“RRP”)⁵⁶ as issued under the authority of TSCA,⁵⁷ since New York’s high number of housing units with probable lead-based paint hazards creates a situation where children are becoming exposed to lead hazards due to unsafe work practices.⁵⁸ Indeed, one study estimated that each year approximately 9,327 New York children are lead-poisoned due to renovations and repair.⁵⁹

The EPA promulgated the RRP regulations in 2008,⁶⁰ and they became fully effective in 2010.⁶¹ RRP established requirements for contractors or other individuals performing renovations on homes, apartments and child-occupied facilities such as schools and daycare centers built before 1978. These requirements include pre-renovation education as well as training and certification of contractors.⁶² Any activity or renovation that disturbs paint, such as remodeling or repair work, plumbing, electrical work, painting, carpentry and window treatment, is covered by the RRP rule.⁶³

⁵⁶ 40 C.F.R. Part 745 Subpart E

⁵⁷ 15 USC § 2562(c)

⁵⁸ Alice Kreher, *Lead Safe Renovation, Repair and Painting Activities in New York State: Analysis of the Proposal for State Management of the RRP Rule* [Feb. 2020], available at https://ppgbuffalo.org/files/documents/lead_rrp_activities_in_nys.pdf

⁵⁹ E.M. Franko, J.M. Palome, M.J. Brown, ScD Kennedy, L.V. Moore, *Children with Elevated Blood Lead Levels Related to Home Renovation, Repair and Painting Activities—New York State 2006-2007*, *Morbidity and Mortality Weekly Report*, 58(3), 55-58 [Jan. 30, 2009], available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5803a3.htm>

⁶⁰ Lead Renovation, Repair and Painting Program Rules, United States Environmental Protection Agency <https://www.epa.gov/lead/lead-renovation-repair-and-painting-program-rules#rrp> [last accessed Oct. 26, 2020]

⁶¹ *Id.*

⁶² Renovation, Repair and Painting Program: Contractors, United States Environmental Protection Agency <https://www.epa.gov/lead/renovation-repair-and-painting-program-contractors-0#1> [last accessed Oct. 26, 2020]

⁶³ *Id.*

Lead-safe work practices such as RRP are a necessary lead-poisoning prevention tool, as research has shown that a key source of lead-poisoning comes from renovation projects on older homes exacerbating lead dust levels.⁶⁴ RRP enforcement is managed by the EPA’s regional office in Newark, New Jersey, where just 3.5 inspectors oversee RRP enforcement in New Jersey, Puerto Rico and the Virgin Islands as well as the state of New York.⁶⁵ In 2019, the EPA’s Office of Inspector General found that the federal EPA was not effectively implementing the RRP rule.⁶⁶ Among other things, the report revealed that the federal EPA lacks sufficient internal controls to assess the program including the program’s goals, objectives and progress.⁶⁷ Furthermore, EPA regional offices do not possess up-to-date knowledge of the size or compliance issues of their regulated universes and some staff members feel that they cannot adequately implement RRP due to declining resources and a growing inspections backlog.⁶⁸ The report also found that overburdened RRP regional staff may also work on other EPA programs.⁶⁹ Due to these issues, the EPA has struggled with RRP outreach, maintenance and penalization throughout the state, and many (perhaps even most) property owners as well as building contractors are unaware of the program’s rules and may disregard its requirements entirely.⁷⁰

As a result, RRP enforcement is sparse and it contributes to the patchy nature of lead-safe work efforts throughout New York State. Under TSCA, the EPA has the authority to delegate to

⁶⁴ Alice Kreher, *Lead Safe Renovation, Repair and Painting Activities in New York State: Analysis of the Proposal for State Management of the RRP Rule* [Feb. 2020], available at https://ppgbuffalo.org/files/documents/lead_rrp_activities_in_nys.pdf (herein “Kreher, *Analysis of the Proposal for State Management of the RRP Rule*”)

⁶⁵ *Id.* at 10

⁶⁶ U.S. Environmental Protection Agency, Office of the Inspector General, *Ensuring the Safety of Chemicals: EPA Not Effectively Implementing the Lead-Based Paint Renovation, Repair and Painting Rule* [Sept. 9, 2019], available at https://www.epa.gov/sites/production/files/2019-09/documents/_epaig_20190909-19-p-0302.pdf

⁶⁷ *Id.*

⁶⁸ *Id.* at 5, 10

⁶⁹ *Id.* at 10

⁷⁰ Kreher, *Analysis of the Proposal for State Management of the RRP Rule* at 2

any state the administration of the their own RRP program if it meets certain standards, and the agency can also provide funding for such state programs.⁷¹ While such a delegation would enable the state of New York to take over the administration of RRP, New York has never sought such authorization, and the RRP program remains under the purview of the federal EPA. The federal EPA encourages states to seek RRP authorization, and state authorization is thought to create a better relationship between the regulating body and the regulated community leading to more compliance overall.⁷² In New York, state authorization has the potential to protect about 139, 370 children under the age of six from lead hazards exposure.⁷³

B. The New York State Childhood Lead Poisoning Primary Prevention Program fails to provide effective remedies for tenants with children at risk of lead poisoning.

When EBLL data is accurately reported a community may be declared high-risk.⁷⁴ The county health department may then inspect for LBP and issue orders for repairs in communities where it is most needed, but this requires the availability of municipal funds to train and hire inspectors.⁷⁵ Rental registration laws like those enacted by the City of Buffalo may help municipalities identify problematic properties and absentee landlords, but this requires landlords to comply and readily self-report.⁷⁶

While CLPPPP was created as a way to identify, monitor and respond to community elevated blood lead levels, it does not create any legal recourse for tenants living in dwellings

⁷¹ 15 U.S.C. § 2684

⁷² Kreher, *Analysis of the Proposal for State Management of the RRP Rule at 2*

⁷³ *Id.* at 10

⁷⁴ 10 NYCRR § 67-1.6 (e)

⁷⁵ Michelle Breidenbach, *Syracuse children are poisoned by lead paint even when taxpayers pay the rent*, Syracuse Post Standard, [Dec. 17, 2018], available at <https://www.syracuse.com/news/2018/12/syracuse-children-are-poisoned-by-lead-paint-even-when-taxpayers-pay-the-rent.html> (Reporting that Onondaga County does not have inspectors and the City of Syracuse cannot afford to hire any.)

⁷⁶ Rental Registration, the City of Buffalo, <https://www.buffalony.gov/723/Rental-Registration> [last accessed Oct. 26, 2020]

likely to contain lead-based hazards. Furthermore, the PHL itself does not bar the existence of lead-paint hazards in rental housing, nor does it – in and of itself – require the removal of hazards from contaminated homes. In 1972, the Appellate Division held that tenants had no private right of action under PHL Title X to seek an order directing a landlord to remove lead hazards from a premises. Instead, the court held that only health department officials had such enforcement powers.⁷⁷ Moreover, two years later the same court held that tenants cannot compel health departments to inspect housing for lead hazards or otherwise enforce PHL Title X against landlords of buildings with lead-based paint hazards.⁷⁸ Thus, tenants have no power whatsoever to obtain relief under PHL Title X to compel remediation of lead hazards.

When taken as a whole, the provisions of PHL Title X and its implementing regulations do not provide any meaningful primary prevention remedy for any one particular tenant, especially those with young children in a rental dwelling that contains lead hazards. This perpetuates the state’s high rates of childhood lead poisoning, as it does little to forestall hazards and prevent children from getting sick.

II. THE NEW YORK STATE UNIFORM FIRE PREVENTION AND BUILDING CODE FAILS TO PROVIDE EFFECTIVE CODE ENFORCEMENT OR TENANT REMEDIES FOR THE REMOVAL OF LEAD-BASED HAZARDS AND OTHER HAZARDOUS CONDITIONS.

The New York State Uniform Fire Prevention and Building Code (“Uniform Code”) does not provide any meaningful mechanism to protect tenants from hazardous conditions like lead-based paint. Code enforcement agencies are not mandated to properly inspect properties, and landlords are not always held responsible for violations of the code – and, crucially, lead-based paint hazards are not even a violation of the Uniform Code.

⁷⁷ *Graham v. Wisenburn*, 39 AD2d 334 [3d Dept 1972]

⁷⁸ *Community Action Against Lead Poisoning v. Lyons*, 43 AD2d 201 [2d Dept 1974]

A. The Uniform Code was supposed to strengthen local housing standards.

In 1981, New York enacted legislation directing the development and implementation of an integrated building and fire code, and in 1984 the New York State Uniform Fire Prevention and Building Code came into effect.⁷⁹ The Uniform Code prescribes minimum standards for both fire prevention and building construction. Today, the Uniform Code is maintained by the State Fire Prevention and Building Code Council. The Council is comprised of seventeen members including State officials, local government officials and members of the private sector (appointed by the governor, pursuant to statute; N.Y. Exec. Law § 374. The Uniform Code is applicable to all municipalities outside New York City, including cities, towns and villages. Individual municipalities are primarily responsible for the Uniform Code's enforcement. While local laws may contain violations for chipped or peeling paint, there is no specific violation for peeling paint conditions under the Uniform Code. Moreover, lead-based paint hazards are not mentioned in the Uniform Code at all.

Under N.Y. Exec. Law § 374 the Department of State has the responsibility of ensuring local governments are sufficiently administering and enforcing the Uniform Code. Exec. Law §§ 376-a, 380, and 381. The Secretary of State is required to implement minimum standards governing the enforcement of the Uniform Code.⁸⁰ The Secretary is also responsible for establishing a training program for code enforcement officers; the Secretary sets the standards

⁷⁹ See *Background: Administration and Enforcement of the Uniform Fire Prevention and Building Code and the State Energy Conservation Construction Code, Technical Series, New York State Department of State, Division of Local Government Services I* (2015) available at https://www.dos.ny.gov/LG/publications/Administration_and_Enforcement_of_the_Uniform_Code.pdf

⁸⁰ N.Y. Exec. Law § 381. See also *Administration and Enforcement of the Uniform Fire Prevention and Building Code and the State Energy Conservation Construction Code, Technical Series, New York State Department of State, Division of Local Government Services I* (2015) available at https://www.dos.ny.gov/LG/publications/Administration_and_Enforcement_of_the_Uniform_Code.pdf

for qualification that each officer must meet.⁸¹ However, under Exec. Law § 381 a local government is permitted to relinquish its responsibilities by enacting a law in which the local government “opts out” of code enforcement activities. Should this occur, the responsibility for enforcement passes to the county in which the local government sits.⁸² If a county declines to enforce the code it may adopt a local law to that effect and responsibility and code enforcement passes to the Department of State.⁸³

Local governments have the authority to enact laws or ordinances and commence and prosecute actions that impose civil or criminal sanctions for violations of the Uniform Code. For example, local governments may seek criminal sanctions for violations of the Uniform Code via the issuance of an order to remedy. A party who fails to comply with the order is liable to a fine not exceeding \$1,000 per day, imprisonment not exceeding one year or both.⁸⁴ Local governments can also seek injunctive relief in Supreme Court, ordering either the removal of the building or an abatement of any conditions in violation of the Uniform Code.⁸⁵

However, as will be seen, the Uniform Fire Prevention and Building Code does not provide sufficient enforcement to bolster and maintain healthy housing conditions. The code does not contain specific violations for peeling paint hazards and, more specifically, violations for lead-paint hazards are woefully absent.

B. Poorly run code enforcement agencies embolden negligent landlords.

As a result of the Uniform Code’s confusing enforcement scheme and lack of adequate deterrents to prevent violations, bad actors who violate the Uniform Code are often able to

⁸¹ N.Y. Exec. Law § 376-a

⁸² N.Y. Exec. Law § 381

⁸³ Real Property Law § 235-b

⁸⁴ N.Y. Exec. Law § 382(3)

⁸⁵ N.Y. Exec. Law § 382(2)

continue their hazardous behavior. One legal services provider working out of Allegany County in Western New York explained that, at times, the state oversight body – the Office of Buildings, Standards and Codes – encourages code enforcement officers to contact property owners directly in order to secure landlords’ voluntarily compliance rather than issuing violations pursuant to the code.⁸⁶ This preference for voluntary compliance means that code enforcement officers sometimes will not perform inspections at all or will fail to document violations. Instead, they will personally inform landlords and property owners that they were alerted to an issue and request that the property owner make any necessary repairs.⁸⁷

By contrast, in New York City, local law requires landlords to keep their premises in reasonably safe condition with respect to lead-based paint hazards. Indeed, in a 1995 decision in a personal injury action, *Juarez v. Wavecrest Mgt.*⁸⁸ the Court of Appeals held that, as a consequence of provisions of HM (Admin. Code § 27–2115[c] and former, § 27–2013[h][1]), landlords in New York City had both a specific duty to abate lead paint hazards and also had an implied right of entry in order to effectuate such repairs, and thus were generally on notice of any lead hazards that injured a child. This holding of *Juarez* was later incorporated into the City’s 2004 omnibus statute on lead poisoning prevention (“LL1/04”).⁸⁹

Residents outside of New York City, however, have little, if any, primary prevention remedies under state and local law, and they have little recourse if landlords fail to comply. As a result, these residents can only rely on the threat of a negligence suit under traditional common-law principles. Even there, the burden of proof is on the tenants to show that their landlords

⁸⁶ Zoom meeting with David Kagle, Legal Assistance of Western New York on 10/7/2020

⁸⁷ *Id.*

⁸⁸ 88 NY2d 628 [1996]

⁸⁹ The duty to take action was later codified at NYC Admin. Code §§27-2056.3 and 27-2056.4(a)

knew (or should have known) about lead-based paint hazards⁹⁰ (the pitfalls of negligence suits are discussed in more detail later on).

In preparing this memo, I spoke with advocates from legal service groups in western and central New York who helped illustrate the ongoing issues with code enforcement. For example, in Allegany County as well as in communities throughout western New York, code enforcement offices are understaffed and struggle to make it out to properties in order to do an inspection within a reasonable time frame. Moreover, in one Allegany County community, inspectors do not always write-up reports and are wary about providing testimony in court.⁹¹ Once landlords have been alerted that a code inspection or a complaint occurred they can retaliate against tenants by threatening eviction, refusing to renew their lease, or otherwise harassing them; and many tenants living outside of New York City lack the protections of rent regulation laws which guarantees tenants the right to lease renewal.⁹² Although Real Property Law (“RPL”) § 223-b⁹³ contains an anti-retaliation clause, legal service providers and tenant advocates have indicated that it is easy for landlords and property owners to overcome because tenants bear the burden of demonstrating retaliation.⁹⁴

RPL § 223-b provides:

In any summary proceeding to recover possession of real property, judgment shall be entered for the tenant if the court finds that the landlord is acting in retaliation for [a complaint by the tenant to a governmental authority of the landlord's alleged violation of any health or safety law] and further finds that the landlord would not otherwise have

⁹⁰ *Chapman v. Silber*, 97 NY2d 9 [2001]

⁹¹ Zoom meeting with David Kagle, Legal Assistance of Western NY on 10/07/2020

⁹² See New York City Rent Stabilization Law, Admin Code § 26-511c(4); New York City Rent Stabilization Code 9 NYCRR §§ 2524.1(a), 2524.1(b) 2524.2 (a)

⁹³ RPL § 223-b provides: “no landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation of a good faith complaint.”

⁹⁴ Zoom meeting with Todd Arena, Albany Law School; Rebecca Garrard, Citizen Action; and Melanie Goldberg, Legal Services of Central New York on 10/19/2020

commenced such action or proceeding. The tenant shall not be relieved of the obligation to pay any rent for which he is otherwise liable.

Retaliation claims brought under § 223-b are typically in the context of hold-over proceedings in which the landlord is seeking to evict due to the tenant's failure to vacate the premise after the landlord has terminated the tenancy. Although the anti-retaliation law does exist, it is easy for landlords to evade it, particularly, where a tenant has withheld rental payments as an attempt to coerce property repairs. This puts tenants in a precarious position, as many may be reluctant to contact code enforcement inspectors for fear of losing their homes. Additionally, some tenants may be reluctant to contact their local code enforcement office in order to request an inspection out of concern that the inspector will simply condemn the property rather than order repairs — whether there are grounds for condemnation or not. According to legal service providers and tenant advocates, instead of working to remedy the situation, municipal officials and even members of the judiciary simply advise tenants to move out.⁹⁵ This does nothing to improve housing quality standards and it perpetuates the same issues for potential future tenants.

In sum, the Uniform Code does not properly protect tenants living outside of New York City from the dangers of lead-paint hazards, and from a host of other hazardous conditions that require the property owner to make necessary repairs.

III. TENANTS IN NEW YORK STATE DO NOT HAVE ADEQUATE REMEDIES FOR HAZARDOUS HOUSING CONDITIONS

As discussed above, New York's laws lack any meaningful enforceable provisions mandating primary prevention measures for lead-based paint. This flaw is further compounded by the reality that even if such mandates existed, tenants would still lack adequate remedies to seek compliance by landlords or enforcement by local agencies. By comparison, in New York

⁹⁵ *Id.*

City, tenants not only have specific protections from the dangers of lead-poisoning due to extensive local laws, but they also have access to a central complaint hotline system, and -- should tenants need to access judicial remedies -- they have available to them a specialized housing court that is more robust than local courts or housing court parts located outside New York City.⁹⁶

A. Communities outside New York City generally do not have access to a central complaint system that helps monitor landlord behavior and property maintenance.

In New York City, a tenant who is concerned about lead-paint hazards such as peeling or chipping paint can report these concerns to the local code enforcement agency by dialing 311 (New York City's general help line for city services), which will connect them to HPD or such other relevant code enforcement agency.⁹⁷ The 311 system serves as a watchdog, working to provide protections for tenants living in buildings where landlords may not be in compliance with the parameters of New York City's LLI/04.⁹⁸

LLI/04 requires building owners (for buildings constructed prior to 1960) to send out notices to occupants at the start of each new year inquiring whether any children of applicable age (under age six) are residing within the unit.⁹⁹ Where children under the age of six reside, landlords must inspect for lead hazards at least once a year (and more often if necessary), document their inspection results, and safely correct the hazards.¹⁰⁰ If a 311 complaint concerns possible lead-based paint hazards, an HPD inspector is mandated to inspect the apartment within

⁹⁶ The City of Buffalo has a dedicated housing court established in 1978 and the Rochester City Court created a specialized housing court in January 2020.

⁹⁷ 311 operators must ask whether the caller lives with children under the age of six, even if the caller is contacting 311 for a non-paint related housing issue. Admin. Code § 27-2056.9(b)

⁹⁸ Codified at Admin. Code §§ 27-2056. 1 *et seq* and §§ 17-179 *et seq*.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

ten days of the initial call. If lead-paint hazards are found, HPD is mandated to issue a violation within ten days, which makes the landlord subject to fines. Additionally, if the landlord fails to timely and safely remedy the hazards, the City must do so (and then bill the owner).¹⁰¹

Moreover, if HPD conducts an inspection for issues other than peeling paint, the inspectors must affirmatively inquire as to whether any children under the age of six reside in the home. If children under six do live in the unit, HPD must inspect for lead-paint hazards anyway, regardless of the reason for the inspection request.¹⁰² Most tenants living outside New York City do not have a similar 311 watchdog available nor do they have the robust protections provided by LLI/04.¹⁰³

Outside of New York City, tenants who are worried about potential lead-paint hazards have only limited remedies, since lead-based paint hazards are not, in and of themselves, a violation of the Uniform Code. With respect to hazardous conditions in general, tenants may attempt to contact their landlords and request repairs. However – unlike in New York City, where, under Admin Code § 27-2056.9(b), HPD is mandated to inspect within 10 days of a complaint of a potential lead hazard – there is neither statute nor regulation providing that this must be done in a timely manner, or, indeed, that a lead-based paint hazard is a violation. If or when inspectors come to a tenant’s residence, they may write-up reports and they have the power to order property owners to fix violations, but it is unclear if written reports are even mandated. Under Executive Law § 382(2) criminal sanctions may be imposed for failure to fix code violations. If these steps have been taken to no avail, tenants could consider withholding rent as

¹⁰¹ Admin Code. §§ 27-2115(l)(3), 27-2125, 27-2128.

¹⁰² Admin. Code § 27-2056.9(a)

¹⁰³ As of July 2000, the City of Buffalo has employed a 311 call system similar to that of New York City’s. It was formerly known as the Mayor’s Complaint Line. The 311 system also includes an online Self Service Portal. <http://www.buffalony.gov/463/Contact-311>

the statutory “Warranty of Habitability “of RPL § 235-b makes the tenants’ obligation to pay rent and the landlord’s duty to maintain the premise mutual and interdependent,¹⁰⁴ however, such an action could result in an eviction proceeding. RPL § 235-b will be discussed in more detail below. While an eviction proceeding may give tenants the opportunity to explain to a judge that rent was not paid due to poor conditions,¹⁰⁵ for tenants, this means interacting with a complex court system and it is up to a local judge to decide whether or not to order repairs.

B. The Uniform Justice Court Act does not confer Town and village Courts with the power to order equitable relief.

Unlike New York City, which has a designated Housing Court,¹⁰⁶ housing issues in the rest of the state are generally heard in city, village or town courts. In New York City, § 110(c) of the NYC Civil Court Act establishes this dedicated housing court part and empowers – indeed, mandates – the New York City Housing Court to utilize adjudicative tools to devise remedies and impose sanctions where needed to maintain safe housing.¹⁰⁷ To that end, the NYC Housing Court works with HPD as a part of a “broad statutory mechanism.”¹⁰⁸ There is no comparable housing part provision in the Uniform District Court Act, the Uniform City Court Act or the Uniform Justice Court Act (“UCJA”).

The New York State court system is consists of a plethora of trial level courts, including Supreme courts, city courts, town and village courts, district courts, and county courts.¹⁰⁹ Pursuant to UJCA § 212, town and village courts (also known as Justice Courts) have all the

¹⁰⁴ Real Property Law § 235-b (1); *Law v. Franco*, 180 Misc 2d 737, [Sup Ct, Bronx Co. 1999]

¹⁰⁵ Landlord Won’t Make Repairs, Legal Assistance of Western NY, <https://www.lawny.org/node/131/landlord-wont-make-repairs> [last accessed Oct. 5, 2020]

¹⁰⁶ NYC Civil Court Act § 110

¹⁰⁷ *Id.*

¹⁰⁸ *D’Agostino v. Fort-Three East Equities Corp.* 16 Misc3d 59 [Sup Ct. N.Y. Co. 2007]

¹⁰⁹ See generally: <http://ww2.nycourts.gov/courts/8jd/structure.shtml>

powers that the Supreme Court would have in like actions and proceedings,¹¹⁰ and housing issues are generally heard in these local courts.

Under UJCA § 204 (Summary Proceedings), a Justice Court may entertain summary proceedings to recover the possession of real property located in a particular village or town and permits the recovery of overdue rent pursuant to such a proceeding without any monetary limit.¹¹¹ However, Justice Courts apparently do not have the equitable power to order repairs.¹¹² In contrast, § 203 of the Uniform City Court Act confers New York's City Courts with several powers in law and equity, and unlike UJCA § 204, the City Court Act includes injunctive remedies and enables City Courts to enforce housing standards in addition to adjudicating rental disputes and the power to foreclose liens on real property. Section 203 also empowers City Courts to impose and collect a city penalty for violation of state or local laws for the establishment and maintenance of housing standards. This includes but is not limited to the multiple dwelling law and the multiple residence law.¹¹³ For example, in *Revelation Church of God in Christ v. Mason*,¹¹⁴ the Albany City Court made use of the city court's equitable power under the Uniform City Court Act and held that § 203 (a)(8) empowered the court to order the landlord to make repairs. In that case, the tenant withheld rent because of chronic leaks in the unit's roof but the landlord sought to evict the tenant for non-payment. Ultimately, the court ordered the landlord to make the necessary repairs, but also ordered the tenant to pay back 50%

¹¹⁰ This general provision can also be found in § 212 of the NYC Civil Court Act, the Uniform City Act and the Uniform District Court Act.

¹¹¹ UJCA § 204

¹¹² The Challenges of Justice Courts Practice, New York State Bar Association 2018 Partnership Conference, <https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=86274> [last accessed Dec. 2, 2020]

¹¹³ NY Uniform City Court Act § 203 (a) (2)

¹¹⁴ 49 Misc 3d 1204[A], 2015 NY Slip Op 51398[U] [City Ct. Albany 2015]

of rental arrears in the amount of \$1,000.¹¹⁵ The equitable power of city courts is unavailable in cases outside a city court’s jurisdiction¹¹⁶—one legal service provider from Legal Services of Central New York indicated that a lot of housing cases fall under the jurisdiction of the Justice Courts.¹¹⁷

C. Tenants have limited avenues under which they may access equitable remedies or recover damages even pursuant to the Warranty of Habitability.

In addition to navigating a complex court system with only limited powers to grant relief, tenants outside New York City face other barriers that make recovering remedies for damages challenging.

The “Warranty of Habitability,” RPL § 235-b provides that tenants “shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.”¹¹⁸ A housing or sanitation code violation is relevant for considering whether a breach of warranty has occurred.¹¹⁹ While RPL § 235-b may appear beneficial to tenants on its surface, it presents a number of issues. First, § 235(b) allows only for recovery of damages when a landlord has breached the warranty, and redress is only available if the tenant has not abandoned the premises.¹²⁰ In practice, this means that in order to potentially recover, tenants must continue to reside in an unsafe environment, as damages may not be awarded for any period in which the plaintiff did not live in the apartment.¹²¹ The second issue with § 235-b (1) is that the burden of proof is on the tenant to show, by a preponderance of the evidence that the home was not fit to

¹¹⁵ Mason, 2015 NY Slip Op 51398[U] at *3

¹¹⁶ See *Stuhr Gardens Associates, LLC v. Doe*, 2016 N.Y. Slip Op. 30796[U] [City Ct. Peekskill 2016]

¹¹⁷ Zoom meeting with Melanie Goldberg, Legal Services of Central New York on 12/02/2020

¹¹⁸ RPL § 235-b (1)

¹¹⁹ See *Park West Management Corp. v Mitchell*, 47 NY2d 316 (1979) (a housing or sanitation code violation is relevant but not determinative of a breach of warranty).

¹²⁰ *Id.*

¹²¹ *Leventritt v. 520 E. 86th St., Inc.*, 266 AD2d 45 [2d Dept 1999]

live in. At a hearing, tenants may introduce photographs and videos which show dangerous housing conditions, but code inspectors who are resistant to testifying, or who will not release their reports absent a subpoena, or a Freedom of Information Law request, could potentially hinder a tenant's case even in spite of the provision that their testimony is not necessary.¹²² Thus, seeking relief under RPL § 235-b can be a time consuming, frustrating and expensive experience for tenants. It puts them in a position where relief is awarded contingent on how long they are able to endure an unsafe environment.

While the warranty of habitability is used most often as a defense for rental non-payments, under RPL § 235-b judges have the authority to order repairs made by the landlord as well as the authority to order housing-code inspections. When there is a breach of the warranty of habitability, a tenant is entitled to damages, generally calculated in terms of an abatement of rent and injunctive relief ordering the breach to be remedied.¹²³ In New York City, injunctive relief may be awarded pursuant to the New York City Administrative Code.¹²⁴

In New York City, courts may require building property owners to correct conditions that are in violation of the code in addition to other sanctions and remedies for violations of the code.¹²⁵ Furthermore, NYC Admin. Code § 27-2122 empowers courts to issue a preliminary order to correct or abate violations of the code, or to comply with an order or notice of HPD, as the court may deem necessary to protect the health and safety of the occupants of a building until the entry of a final judgment or order.¹²⁶

¹²² RPL § 235-b (3)

¹²³ See: *Bartley v. Walentas*, 78 AD2d 310 [2d Dept 1980]

¹²⁴ Admin. Code §§ 27-2120–2124

¹²⁵ Admin. Code § 27-2120

¹²⁶ Admin. Code § 27-2122

It is also easier for New York City tenants and tenant advocates to demonstrate to the court that their home is not fit to live in pursuant to Multiple Dwelling Law § 328 (3).¹²⁷ Under this provision, in any Housing Court case¹²⁸ either a visual display (such as on a computer monitor) or a printed computerized violation files of HPD or other NY City code enforcement department is *prima facie* evidence for which the court shall take judicial notice.¹²⁹ This inevitably cuts down on the difficulty and delay of having to either encourage or subpoena local code enforcement inspectors to testify as to the nature of the housing code violations for a particular unit.

Recent changes in landlord-tenant law such as the passage of the Housing Stability and Tenant Protection Act of 2019 could have the potential to provide additional relief and protections for tenants outside New York City. For example, General Obligations Law § 7-108(c) now permits tenants to inspect their unit after signing a lease but prior to moving in. This gives tenants the opportunity to note the condition of their unit with the landlord or landlord's agent. However, low-income tenants who are in need of immediate housing may not benefit by this rule at all. It is unclear whether this provision requires move-in inspections to occur within a reasonable amount of time prior to move in, and many people who live paycheck to paycheck may not have the luxury of signing a lease well in advance of moving day on the first of the month. It is certainly not unusual for tenants to sign leases a week before they must vacate one unit and move into the next.

D. Negligence suits are not an effective deterrent in shaping landlord behavior.

¹²⁷ Multiple Dwelling Law § 328 (3)

¹²⁸ NYC Civil Court Act § 110

¹²⁹ Multiple Dwelling Law § 328 (3)

Negligence cases may be of little utility – outside of New York City— in shaping landlord behavior and are often difficult to win for a number of reasons, including the challenge of demonstrating that landlords had notice of lead-paint conditions, establishing causation (a necessary element used to prove negligence in tort actions), and exclusions of lead-poisoning coverage built into standard liability insurance policies.

Unlike in New York City – where, pursuant to *Juarez v. Wavecrest Mgt.* and LL1/04 landlords presumptively are on notice of lead hazards as long as they know (or should have known) of the presence of children under age six – tenants’ children in tort suits for lead poisoning have the burden of demonstrating that the landlords had actual or constructive notice of lead-paint conditions in their property.¹³⁰ As held in *Chapman v. Silber*, such notice can be established by proof that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) know that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lives in the apartment.¹³¹ If the injured child is unable to demonstrate that the landlords knew or should have known about lead-hazards, it cannot succeed. As an example, in *Dutcher v. Vandelooy*,¹³² the plaintiff’s attempt to obtain summary judgment on liability for lead exposure foundered on his inability to show either actual or constructive notice of lead hazards. As to the one, plaintiff did “not present any evidence that defendants had actual knowledge that paint was chipping or peeling inside his apartment,” as there was “no proof that [tenant] complained or notified [landlord of defective] interior conditions until plaintiff registered an elevated blood lead level.”

¹³⁰ *Cunningham v. Anderson*, 85 AD3d 1370 [3d Dept 2011]

¹³¹ *Chapman v. Silber*, 97 NY2d 9 [2001]

¹³² 34 Misc 3d 1223[A], 2012 NY Slip Op 50210[U] [Sup Ct, Albany County 2012]

As to the other, “since plaintiff failed to present any competent admissible evidence regarding the existence of lead hazards in common areas, his argument that constructive knowledge of the hazards posed by the front and rear hallways and stairs should be imputed to defendants” failed.¹³³

The other issue tenants encounter when attempting to establish a negligence claim is demonstrating causation. Lead was once ubiquitous and was used in newspaper ink, car gasoline, glass, cookware and waterpipes. High levels of lead have been found deep in the soil in New York City as well as other parts of the state.¹³⁴ When lead is found everywhere it is easy for landlords and property owners to claim a lack of causation by implying lead-poisoned plaintiffs were sickened from a source other than dangerous housing conditions.

In *Cunningham v. Anderson*,¹³⁵ the landlord admitted he knew about the chipped lead paint-hazards in the apartment rented by the plaintiff’s family; indeed, the landlord had previously been cited for lead-paint hazards. However, the landlord argued that the plaintiff’s congenital conditions and Attention Deficit/Hyper-activity Disorder had been caused by a number of other factors not related to the apartment’s chipped paint.¹³⁶ The defendant pointed to the plaintiff’s childhood habits of putting cigarette butts and newspaper into his mouth, both items that at one time contained lead. The court held that given this, the plaintiff could not show he had been lead poisoned solely because of household lead-paint hazards, and judgement was entered for the defendant landlord.¹³⁷ Both this case and *Dutcher*, as well as many others,

¹³³ *Dutcher*, 2012 NY Slip Op 50210[U] at *5

¹³⁴ Christopher Werth, *Lead in the Land*, WNYC, [May 16, 2019], available at <https://www.wnyc.org/story/lead-in-the-land/>

¹³⁵ 85 AD3d 1370 [3d Dept 2011]

¹³⁶ *Id.*

¹³⁷ *Id.*

highlight the ongoing issue with treating lead-paint abatement measures as a tort to be solved in civil courts.

In addition to the inadequate tort remedies available to tenants and their children, New York also permits insurance companies to exclude lead poisoning coverage from standard liability policies sold to landlords. This makes it even more difficult for lead poisoned children and their families to receive relief.¹³⁸ Indeed, one Buffalo-based personal injury attorney interviewed for this paper remarked that the insurance liability exclusions have essentially robbed tenants of any recovery options; even if a tenant were to pursue action against a building owner, the associated costs of litigation alone surpass any potential recovery.¹³⁹

Without preventive measures, property owners will continue to persevere against negligence claims made against them. New York State cannot fix its lead-paint hazard issues by relying on the courts alone.

CONCLUSION

Despite having some of the oldest housing stock in the country as well as one of the nation's highest rates of childhood lead-poisoning, the State of New York does not have a comprehensive lead-poisoning prevention scheme. In order to prevent lead-poisoning before it happens, New York should focus on testing buildings and implementing effective primary prevention programs that center the needs of people who are most at risk—New York's renters.

New York needs stronger housing code enforcement that requires the abatement of lead-paint hazards and gives tenants the power to compel enforcement in order to protect themselves

¹³⁸ Blair Horner, *Lead Poisoning Threat Persists in NY*, WAMC, [Feb. 19, 2018], available at <https://www.wamc.org/post/blair-horner-lead-poisoning-threat-persists-ny>

¹³⁹ Zoom call with David Kagle, Legal Assistance of Western New York; Joseph Kelemen, Western New York Law Center; Steve Halpern, Western New York Law Center, and John Lipsitz, Lipsitz & Ponterio: on 10/21/2020

and their families from dangerous housing conditions. There must also be parity between local code enforcement agencies and the state. Currently, New York's county, city, village, and town court systems do not provide tenants with the same access to justice that New York City's Housing Court does.

Title X of the Public Health Law and its implementing regulations have helped alleviate some of New York's elevated blood lead levels by mandating lead screening for children under the age of six and utilizing health surveillance data in order to launch programs such as the Childhood Lead Poisoning Primary Prevention Program. However, this is not enough. CLPPPP does not provide legal recourse for tenants living in dwellings likely to contain lead-based hazards nor does it provide a mechanism for tenants to ask a court to compel health departments to inspect houses for lead hazards under the Public Health Law.

Lead-poisoning is preventable. Children who are not exposed to lead-hazards cannot be lead poisoned. However, New York's tenants cannot be expected to avoid lead-based paint hazards on their own. The state should consider the success of New York City's Local Law 1 of 2004 and work to create a similar model that better protects tenants and their children.