UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHAUNA NOEL and EMMANUELLA SENAT,	:	
Plaintiffs,	:	
-against-	:	15-CV-5236 (LTS) (KHP)
CITY OF NEW YORK,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER

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POINT I

THE POLICY'S IMPOSITION OF DISPROPORTIONATE RACIAL DISADVANTAGE IN ANY SINGLE CD TYPOLOGY CONSTITUTES A COMPLETE, CONSUMMATED, AND SUFFICIENT INJURY.

Contrary to defendant's complaint that CD typologies are a "fictitious concept,"[1] the Opinion in *Noel v. City of New York*, 2023 WL 3160261 (S.D.N.Y. Apr. 28, 2023) (the "SJ Opinion") did recognize that CD typologies are appropriate for analysis. SJ Opinion, at *5-6 (setting out the CD-typology analyses of plaintiffs' expert), and at *7 (finding plaintiffs had demonstrated "that multiple racial demographic groups are affected within multiple CD typologies" and identifying circumstances where one CD typology might be better than another).

Contrary to defendant's view that *Comer* only has applicability to a "specific suburban area,"[2] HUD regulation makes clear that conduct is unlawful not only when it discourages or obstructs housing choices in a jurisdiction-wide way, but also when it does so "in a community, neighborhood or development." 24 C.F.R. § 100.70(a).[3] *The regulation provides no exception when there is "discrimination-offset" in another community, neighborhood, or development.* In other words, disproportionate racial disadvantage in an area is, though the SJ Opinion failed to recognize this, a complete, consummated, and sufficient injury. *See* Point II, *infra* at 2.

Akin to "community, neighborhood or development," each lottery has a geographic preference area (generally one CD) that is a subpart of the jurisdiction. Classifying each geographic preference area by that area's majority or plurality racial group[4] (as determined by existing

[1] Defendant's June 29, 2023 Memorandum in Opposition to Motion for Reconsideration, ECF 985 ("D Opp"), at 6.

[2] *Id*.

[3] Originally promulgated Jan. 23, 1989, 54 FR 3284, at 3285.

[4] We are using the term "racial group" to include the category "Hispanics of any race."

residential demographics of the preference area) was a reasonable analytic step,[5] one that did not compel a particular result when then analyzing *all* lottery applicants in *all* lotteries in the typology.[6]

When one takes one CD typology at a time, the application of *Comer* is straightforward: the unrebutted analysis shows that there are specific racial groups suffering material disadvantage in that CD typology (groups denied by the policy from enjoying the level playing field without regard to race to which they are entitled).

POINT II

THE SJ OPINION'S DOCTRINE THAT A PROTECTED-CLASS GROUP'S BEING "HELPED AND HURT" IN DIFFERENT AREAS INSULATES A DEFENDANT FROM LIABILITY IS FOREIGN TO FAIR HOUSING ACT JURISPRUDENCE.

Neither defendant nor the SJ Opinion point to any statutory or regulatory text, or to any case law, supporting the proposition that a defendant is insulated from liability when its policy

[5] *See* Mar. 6, 2020 Declaration of Professor Beveridge ("Beveridge ECF 883"), Ex. 3. The exhibit shows the demographics of each lottery's preference area. In 154 of 168 cases, the preference area was a single CD (a geographic area); in five others, the preference area was a pair of CDs, of which each had the same demographics. For the nine others, it was *the policy* that created a combined geographical area; Beveridge simply recognized and reported on the residential demographics of those combinations. *See also* Nov. 6. 2020 Declaration of Professor Beveridge ("Beveridge ECF 914"), ¶¶ 23 and 25, at 6 (footnote omitted) ("I aggregated individual lotteries to the CD-typology level to enable lotteries of different sizes to be weighted appropriately and to create more robust results… It was important to study all racial groups, because one could not assume that only one group was being helped or hurt (or that only one group was 'protected'). Again, I used all the data, and then let the data tell the story."). *See also* Mar. 8, 2021 Declaration of Professor Beveridge ("Beveridge ECF 948"), ¶ 10, at 3 (footnote omitted) (as "not disputed by Dr. Siskin, I accounted for each applicant of each racial group in each typology.").

[6] It is true, of course, that in a city that is diverse in the aggregate but locally segregated it is intuitively obvious that taking a citywide applicant pool and then favoring those applicants that come from the more segregated local area would cause the dominant group to be advantaged and one or more of the non-dominant groups to be disadvantaged. *Cf. Langlois v. Abington Hous. Auth.,* 234 F. Supp. 2d 33, 62 (D. Mass. 2002) (citing the "overarching intuitive principle" that, "where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents *cannot but* work a disparate impact on minorities."). But whether defendant's community preference policy followed the overarching intuitive principle and in fact caused racially disproportionate disparate impacts in a CD typology was ultimately determined by examining all *applicants* in the typology helped by the policy and all *applicants* in the typology hurt by the policy.

both hurts a protected-class group in one area but helps it in another ("discrimination offset"). To the best of our knowledge, there is none. All this should already be dispositive, but there is more.

Discrimination-offset, as previously noted, is foreclosed by *Buchanan v. Warley*, 245 U.S. 60 (1917), which rejected the permissibility of Blacks being disfavored in White areas, while at the same time being favored in Black areas.[7]

Defendant continues to claim that plaintiffs did not show a disparate impact on a protected-class group, again not citing any case law.[8] But discrimination-offset is also foreclosed by consistent case law under the Fair Housing Act concerning the practice of "steering." More than 40 years ago, the Supreme Court defined illegal racial steering as "directing prospective home buyers interested in equivalent properties to different areas according to their race." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979).

The issue in steering is not that one is necessarily being denied *all* housing, but rather that a defendant acts to deny you *some* housing. *See, e.g., United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 442 (5th Cir. 1973) (defendant violated the FHA when it did not want to build a house for a Black plaintiff in one part of town but offered to build the identical house in another part of town); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) ("It is the freedom of choice for the purchaser which the Fair Housing Act protects."); and *Cabrera v. Jakabovitz*, 24 F.3d 372, 377-78 (2d Cir. 1994)[9] ("realty agency directed the White tester in each pair to look at apartments

[7] Note that defendant has *no* substantive response regarding *Buchanan* in D Opp.

[8] *See, e.g.,* D Opp, at 8 (simply reciting that the SJ Opinion "did not demonstrate a disparate impact" on a protected-class group).

[9] Westlaw shows *Cabrera* as being superseded by statute on other grounds (related to mixed-motive analysis), as recognized by *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581 (2d Cir. 2016). The superseding is actually in relation to Title VII. In any event, *Cabrera's* holding as to steering is untouched.

in predominantly White neighborhoods, but directed the African–American or Latino tester," *inter alia*, "to look at apartments in predominantly minority neighborhoods…"); *see also* 24 C.F.R. § 100.70(d)(4) (regulation provides that it is illegal to assign any person "to a particular section of a community, neighborhood or development").

Making it harder for a racial group in one area and making it easier in another is exactly what the policy does; "discrimination offset" is wholly incompatible with anti-steering case law.

Discrimination-offset creates other problems. First, it runs into the statutory language of both the FHA and the City HRL about the illegality of denying even a single dwelling.[10]

Second, how much "help" is needed to offset the "hurt"? Relative size of the areas involved? Number of units being made available?

In other words, ignoring the simple principle that denial of a housing accommodation based on race is always illegal[11] is not only contrary to statute and unsupported by case law, but also unworkable as a practical matter. (Ironically, in the hypothetical discussed with defendant's expert,[12] Dr. Siskin expressed the view that any local imbalance not evened out on a citywide basis *would* constitute disparate impact.[13])

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[10] *See* Plaintiffs' May 5, 2023 Memorandum in Support of Motion to Reconsider, ECF 973 ("P Brief"), at 7. Note that D Opp offers no substantive response.

[11] *See* Point VI, *infra* at 11.

[12] *See* P Brief, at 12-13; D Opp, at 9-10 (note, *inter alia*, that defendant disclaims the SJ Opinion's analysis: the SJ Opinion "did not adopt the City's alternative disparate impact methodology.").

[13] *See* excerpt of transcript of Aug. 26, 2019 deposition of Dr. Siskin ("Siskin I"), Ex. 10 to Mar. 6, 2020 Declaration of Craig Gurian in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 885 ("Gurian ECF 885 Dec"), at 76:24-77:23 (describing a system where 100 percent of units go to existing residents of a borough and all of those considered and who receive units in one borough are White, all considered and receive units in a second borough are Black, etc., but where citywide results have an "even" number of winners of all races); at 78:12-79:23 (asserting that there is no disparate impact under this scenario); and at 80:15-81:21 (stating that if the citywide results were no longer in equipoise because of a flurry of construction in the White borough, there would be disparate impact, and reiterating that keeping on developing an equivalent number of units in each borough would mean the continuation of a no-

POINT III

THE QUALITY OF THE HOUSING FOR WHICH OPPORTUNITIES ARE SKEWED IS IRRELEVANT TO THE QUESTION OF LIABILITY AND FOREIGN TO FAIR HOUSING ACT JURISPRUDENCE.

The idea that a plaintiff must demonstrate that the housing she was obstructed from competing for must be in some objective way be "better" than other housing (that may or may not be sought or made available) before liability attaches is also unsupported by statutory or regulatory text or case law. Neither the SJ Opinion nor defendant offer any, and plaintiffs have not found any.

On the contrary, the cases already cited make clear that there is liability even when properties in different areas are equivalent or identical, and even where members of a racial group who are getting discouraged in one area are getting a leg up in another (Blacks were being offered housing in Black areas without competition from Whites).[14]

As previously noted,[15] the confusion here is between liability (where the question is simply "have you been disadvantaged, independent of quality of alternative") and damages (where relative quality can be looked to). *See, e.g.*, *United States v. Hylton*, 944 F.Supp.2d 176, 197 (D. Conn. 2013) (the discussion of damages is entirely separate from the discussion of liability, and it is in the damages section that the "loss of housing opportunity" – having to stay in less-good housing – is addressed and compensated).[16]

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disparate-impact, separate but equal system). In this telling, the continuing denial of a level playing field in one borough is not necessarily actionable but is contingent on what happens with housing opportunities in other boroughs.

[14] *See* discussion, *supra*, at 2-4.

[15] *See* P Brief, at 12.

[16] Defendant asks, "[W]hy did Plaintiffs separate the lotteries into groups, let alone groups arranged by racial demographics?" *See* D Opp, at 8. Because the Fair Housing Act and the City HRL are interested in whether a policy causes race-based disadvantage. *See* footnote 3, *supra*, at 1; Beveridge ECF 883, ¶ 42, at 14 ("Given a segregated city with great variation in the demographic composition of its community districts, one's first hypothesis would be that a community preference system, laid atop these patterns, would cause disparate impacts and permit less integration than would an equal access lottery system."); and Beveridge

POINT IV

DEFENDANT CANNOT AND DOES NOT REBUT THE FACT THAT THE APPLICATION POOL IN A LOTTERY DOES NOT CORRELATE TO THE PRE-EXISTING RACIAL DEMOGRAPHICS OF THE COMMUNITY DISTRICT IN WHICH THE HOUSING IS LOCATED.

In plaintiffs' opening brief, we pointed out that:

> The SJ Opinion's reasoning that there is merely "correlat[ion]" between distribution of advantage and disadvantage, on one hand, and "preexisting racial demographics," on the other, SJ Opinion, at *7, is incorrect and overlooks a critical fact and element of analysis. The application pool in a lottery does *not* correlate to the preexisting racial demographics of the community district in which the housing is located.[17]

Defendant does not challenge the accuracy of this statement but claims it is unsupported.[18] In fact, in his opening declaration, Beveridge identified the demographics of the *applicants* to lotteries in each of the CD typologies. On the next page, Table 1 reproduces the applicant demographics for all apparently eligible *outsider applicants* in each CD typology, followed by the demographics of all apparently eligible *applicants* (both insiders and outsiders) in each CD typology.

ECF 948, ¶¶ 7-9, at 2-3 (emphasis added) (a policy that is "seemingly neutral, but which operates in a way that results in racial disparities" is "exactly what the issue of disparate issue is about." And "there was certainly no harm in testing the hypothesis that patterns could be identified within a grouping of lotteries with similar dominant-group properties: *if defendant's system did not cause impacts, the data would have revealed that.*).

[17] *See* P Brief, at 3.

[18] *See* D Opp, at 4.

Table 1[19]

Exhibit 10, Section 2b - Demographic Distribution of Outsider Apparently Eligible Applicants (demographic group as percentage of all outsiders in CD typology)

CD Typology	White	Black	Hispanic	Asian	Refused	All Other	Total
Majority White	10.06%	34.08%	34.60%	7.39%	6.28%	7.58%	100.00%
Majority Black	6.05%	40.70%	35.30%	4.90%	5.89%	7.15%	100.00%
Majority Hispanic	4.01%	38.63%	42.21%	3.63%	5.26%	6.27%	100.00%
Majority Asian	4.11%	32.60%	33.13%	17.51%	6.86%	5.79%	100.00%
Plurality White	10.52%	36.43%	31.31%	7.00%	6.80%	7.94%	100.00%
Plurality Black	7.03%	38.84%	35.60%	5.61%	5.59%	7.33%	100.00%
Plurality Hispanic	7.67%	35.80%	37.29%	5.71%	6.19%	7.34%	100.00%
All Typologies	7.52%	37.10%	36.39%	5.82%	5.99%	7.19%	100.00%

Exhibit 10, Section 3b - Demographic Distribution of All Apparently Eligible Applicants (demographic group as percentage of all insiders and outsiders in CD typology)

CD Typology	White	Black	Hispanic	Asian	Refused	All Other	Total
Majority White	10.57%	33.36%	34.89%	7.32%	6.32%	7.54%	100.00%
Majority Black	5.80%	42.13%	34.30%	4.66%	5.95%	7.16%	100.00%
Majority Hispanic	3.85%	38.30%	42.98%	3.49%	5.22%	6.16%	100.00%
Majority Asian	3.80%	28.87%	30.35%	24.25%	6.81%	5.92%	100.00%
Plurality White	10.72%	36.68%	30.72%	6.95%	6.94%	7.99%	100.00%
Plurality Black	6.70%	40.53%	34.69%	5.10%	5.65%	7.33%	100.00%
Plurality Hispanic	7.75%	35.42%	37.51%	5.76%	6.22%	7.35%	100.00%
All Typologies	7.57%	37.21%	36.33%	5.71%	6.02%	7.16%	100.00%

The Court will notice first that the demographics of the outsiders is very similar to the demographics of all applicants (because outsiders make up such a high percentage of all applicants). Most importantly, without the policy, *all* these applicants in *all* the CD typologies would compete on a level playing field without regard to race *all* the time. Without the policy, the

[19] *See* Beveridge ECF 883, excerpt of Ex. 10. Equivalent data for all entrants is found at Ex. 9.

demographics of the *residents* of the CD typologies (as opposed to the demographics of the *applicants* for housing in the CD typologies) would not be relevant or salient.

But imposing the policy is a choice that defendant made and continues to make, and **it is the imposition of that insider-favoring policy, and only that insider-favoring policy, that causes the demographics of CD typologies (and the underlying CDs) to become salient**.[20]

These resident demographics are very different from the applicant demographics. Table 2, below, reproduces the weighted CD typology demographics.[21]

Table 2

Exhibit 4 - CD Typologies, with Project Counts and Demographics

CD Typology	No. of Lotteries	% White	% Black	% Asian	% Hispanic	% All Other
Majority White	40	60.65	6.34	11.67	18.78	2.56
Majority Black	38	7.66	58.97	3.98	26.44	2.96
Majority Hispanic	52	2.62	30.24	1.75	63.95	1.45
Majority Asian	1	24.95	2.14	53.04	17.58	2.29
Plurality White	11	43.11	25.26	11.01	16.80	3.82
Plurality Black	8	26.27	39.40	3.87	28.33	2.13
Plurality Hispanic	18	24.46	14.50	20.80	37.41	2.84
All Lotteries	168	23.32	28.58	9.17	36.46	2.48

When one compares Table 1 with Table 2, it is evident that the demographics of applicants for housing in a CD typology (Majority White, for example) are dramatically different from the demographics of those living in the CD typology.

[20] *See* P Brief, at 3-4 (explaining causation) and D Opp (offering no substantive response to plaintiffs' point as to causation).

[21] *See* Beveridge ECF 883, Ex. 4. Residential demographics for individual lotteries (along with their CD typology classification) are found, *id.*, Ex. 3. *See also id.*, ¶¶ 22-25, at 9-10.

POINT V

ELABORATING ON THE SJ OPINION'S FINDING ON WHAT HAPPENS AT THE CD-TYPOLOGY LEVEL WILL STREAMLINE TRIAL AND CLARIFY THE RECORD FOR APPEAL.

The SJ Opinion found that plaintiffs "have shown that multiple racial demographic groups are affected within multiple CD typologies…" SJ Opinion, at *7. Independent of whether the Court accepts that localized disparate impacts are actionable, and independent of whether the Court accepts that "helps and hurts as insulation from liability" is not a doctrine existing under or consistent with the Fair Housing Act, it is important to detail the finding to make clear where and for which groups the in-typology disproportionate racial impacts existed.

The facts about impact at the CD typology level set out by Beveridge are summarized in Table 3 for all entrants, below, and in Table 4 for apparently eligible entrants, next page.[22]

Table 3: only substantial disparities meeting both 80-percent test & minimum 2.0-standard-deviations test are listed

GROUPS DENIED OPPORTUNITY TO COMPETE ON LEVEL PLAYING FIELD					
		Among all applicants ("Entrants")			
Community District Type		**White**	**Black**	**Hispanic**	**Asian**
Majority White			**X**	**X**	**X**
Majority Black		**X**		**X**	**X**
Majority Hispanic		**X**	**X**		**X**
Majority Asian		**X**	**X**	**X**	
Plurality White			**X**	**X**	
Plurality Black		**X**		**X**	**X**
Plurality Hispanic			**X**		

[22] That beneficiary status does not uniformly correlate to any particular race – *see* P Brief, at 13-14 and D Opp, at 10 – is beside the point. The policy is facially neutral. The question is "what disproportionate racial impacts does the policy impose on which racial groups in what areas?" As we have noted many times, this is a natural experiment where Beveridge was able to let the data answer the question of the impacts.

Table 4: only substantial disparities meeting both 80-percent test & minimum 2.0-standard-deviations test are listed

GROUPS DENIED OPPORTUNITY TO COMPETE ON A LEVEL PLAYING FIELD				
	Among Apparently Eligible Applicants			
Community District Type	**White**	**Black**	**Hispanic**	**Asian**
Majority White		X	X	X
Majority Black	X		X	X
Majority Hispanic	X	X		X
Majority Asian	X	X	X	
Plurality White			X	X
Plurality Black	X		X	X
Plurality Hispanic				

The facts are not disputed – defendant's expert did not perform these analyses and did not report different results.[23]

It is important that the Court elaborate as requested herein. From a trial point of view, both parties agree that evidence regarding impact is relevant to how the policy perpetuates segregation.[24] Having these facts and elements resolved will streamline matters for the jury.

[23] *See* Plaintiffs' Mar. 6, 2020 Initial Brief for Summary Judgment, ECF 882 ("PI Brief"), at 16-25 (addressing the race-based lack of a level playing field in respect to all entrants and to apparently eligible applicants). *See also id.*, at 27-32 (addressing disparate impact at the bottom line). *See also, e.g.,* Defendant's Response to Plaintiffs' Rule 56.1 Statement, ECF 901, ¶¶ 43-47, at 16-19 (repeatedly confirming that "Dr. Siskin did not classify the data into CD typologies to conduct his analysis"); and *id.*, ¶ 71, at 33 (not disputing that "Defendant's expert concedes that Professor Beveridge is correct in concluding that, by both the 'outsider-to-insider-change' method and the 'highest-insider-share' method and in connection both with all entrants and with apparently eligible entrants, 'the racial group with applications that are disproportionately CP beneficiaries within a majority CD typology will always be the majority race and will more likely be the plurality race within a plurality CD typology.'").

[24] *See, e.g.,* Beveridge ECF 883, ¶ 139, at 43 ("In view of the design of defendant's community preference policy, the allocation policy of which operates to filter down substantially the percentage of moves that can be made by outsiders to a community district, the policy could not help but to perpetuate segregation more (permit fewer racially integrative moves) than would be the case without the policy"); *see also* Siskin I, at 78:21-24 (stating, in discussing the hypothetical borough-by-borough preference policy, "It would have obviously a very questionable allocation problem which would go to the question of perpetuating segregation.").

Having them resolved will, if it becomes necessary to appeal, enable the Circuit to focus on the question of whether discrimination-offset is countenanced under the Fair Housing Act and, if not, proceed to grant summary judgment for plaintiffs regarding the existence of the disparate impacts.

POINT VI

DEFENDANT FAILS TO ADDRESS LANGUAGE IN THE FAIR HOUSING ACT AND THE CITY HRL SPECIFYING THAT IT IS UNLAWFUL TO DENY "A DWELLING" (SINGULAR) OR "A HOUSING ACCOMMODATION" (SINGLUAR), RESPECTIVELY.

In plaintiffs' opening brief, we pointed out the illegality under the Fair Housing Act of denying even a single dwelling, 42 U.S.C. §§ 3604(a) and (b), and the equivalent proscription for denying even a single housing accommodation under the City HRL, NYC Admin. Code §§ 8-107(5)(a)(1) and (2). This is yet another point that defendant fails to address.

POINT VII

DEFENDANT FAILS TO APPRECIATE WHAT THE MANDATORY INDEPENDENT LIBERAL CONSTRUCTION ANALYSIS UNDER THE CITY HRL REQUIRES.

Defendant, recognizing that the SJ Opinion failed to perform liberal construction analysis, assumes that the meaning of the term "disparate impact" is self-evident. Local Law 35 of 2016 reemphasized that this kind of assumption is improper.[25] The Committee Report accompanying the legislation stated that among the purposes of ratifying *Albunio, Williams,* and *Bennett* was "reaffirm[ing] that courts must apply the liberal construction provisions in every case and with respect to every issue…"[26] The ratified cases "illustrate a correct approach to liberal construction

[25] Plaintiffs' Nov. 6, 2020 Legislative Materials Declaration and Exhibits, ECF 915 ("Legislative Materials"), contains both the text and Committee Report regarding the 2005 Local Civil Rights Restoration Act (Exhibits 5 and 6), and the text and Committee Report regarding Local Law 35 of 2016 (Exhibits 7 and 8).

[26] Local Law 35 Committee Report, Legislative Materials, Ex. 8, at 8-9. As noted previously, the full citations to the three cases referenced above are *Albunio v. City of New York*, 16 N.Y.3d 472 (N.Y. 2011); *Williams v. NYCHA*, 61 A.D.3d 62 (N.Y. App. Div. 1st Dept. 2009); and *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29 (N.Y. App. Div. 1st Dept. 2011).

analysis"; it is "therefore important for courts to examine the reasoning of the cases . . . and then for courts to employ that kind of reasoning when tackling other interpretative problems that arise under the HRL."[27]

The Committee Report noted, for example, that:

> [T]he identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the section 8-130 rule that all aspects of the City HRL must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law . . . and for [the court] to create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL—that it is unlawful "to discriminate"—would impermissibly invade the legislative province.[28]

Just as the meaning of "to discriminate" cannot be excluded from the liberal construction requirement, neither can the meaning of "disparate impact."

Here, there are two interpretations. The SJ Opinion allows for in-typology disproportionate racial disadvantage to flourish;[29] plaintiffs' interpretation – rejecting the unprecedented doctrines of insulating a defendant from liability when its policy discriminates against a specific racial group in specific parts of town and discriminates in favor of that racial group (to the disadvantage of other racial groups) in other, specific parts of town, and of making quality-of-housing-denied an element of liability – would foreclose in-typology impacts of disproportionate racial disadvantage.

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[27] Local Law 35 Committee Report, Legislative Materials, Ex. 8, at 13.

[28] *Id.* at 10, *quoting Bennett*, 92 A.D.3d at 34-35. *See also Anderson v. HotelsAB, LLC*, No. 15 Civ. 712(LTS)(JLC), 2015 WL 5008771, at *4 (S.D.N.Y. Aug 24, 2015) (Swain, J.) (confirming the need for liberal construction analysis in "all circumstances" to meet the City HRL's uniquely broad and remedial purposes and rejecting an interpretation that would be inconsistent with the "letter and spirit of the law.").

[29] As does defendant's citywide approach, which also makes in-typology discrimination disappear.

How to decide? The "primary task of [a] judge hearing a City Human Rights Law claim is to find the interpretation for the City Law that most robustly further[s] the purposes of the City statute." *Williams*, 61 A.D.3d 74-75, n. 20, *quoting with approval* the testimony of the Anti-Discrimination Center.[30] The Court is obliged to interpret the provision "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[31]

The SJ Opinion's interpretation – promulgating new doctrines that allow in-typology disproportionate racial disadvantage to thrive – conflicts with the fundamental principle of the Restoration Act that discrimination "play[] *no* role" in actions related, *inter alia*, to housing. *Williams*, 61 A.D.3d at 76. In contrast, plaintiffs' interpretation carries out that fundamental principle, and, per *Albunio*, is certainly plausible (it is, for example, consistent with the HUD regulations previously cited).

The SJ Opinion's idea of discrimination-offset is also inconsistent with the requirement that the law *maximize* deterrence.[32] The SJ Opinion's interpretation takes the principle of a level playing field without regard to race and then allows the defendant to pursue a policy that causes that level playing not to exist in *virtually all* circumstances. It is plaintiffs' interpretation, by contrast, that would encourage defendants to think seriously about all disproportionate racial impacts caused by their policies.

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[30] *See Williams,* 61 A.D.3d 74-75 (We ask, "as required by the City Council: What interpretation 'would fulfill the uniquely broad and remedial purposes of the City's human rights law'?").

[31] Local Law 35 Committee Report, Legislative Materials, Ex. 8, at 9, *quoting Albunio*, 16 N.Y.3d at 477-78.

[32] Maximizing deterrence "incorporates 'traditional methods and principles of law enforcement,' one of the principles by which our analysis must be guided." *Williams*, 61 A.D.3d at 76. *Williams* was citing the Committee Report that accompanied the Restoration Act. *See* Legislative Materials, Ex. 6, at 537.

Another element of Local Law 35 of 2016 requires the same conclusion. That law added a mirror image to the liberal construction provision: exceptions to and exemptions from the City HRL must be interpreted narrowly to maximize deterrence. NYC Admin. Code 8-130(b).[33] In respect to disparate impact, the City Council prohibited disparate impact. NYC Admin. Code § 8-107(17)(a)(1). It then designed an affirmative defense of necessity. NYC Admin. Code § 8-107(17)(a)(2). The disparate impact provision could have required an impact to be citywide and could have allowed for discrimination-offset. It did neither. Here, the SJ Opinion does not even rely on existing exceptions – it creates its own that, as discussed, allow for more discrimination in more places than does plaintiffs' interpretation.

In short, the specific liberal construction requirements of the City HRL constitute a further mandate for proscribing the in-typology disproportionate racial impacts that plaintiffs have demonstrated.[34]

CONCLUSION

Because the SJ Opinion misstated and ignored controlling case law, omitted and misinterpreted critical evidence before the Court, and created requirements inconsistent with the language and intent of the relevant statutes, reconsideration is necessary to correct clear errors and prevent manifest injustice. *See, e.g., RST (2005) Inc. v. Research in Motion, Ltd*, 597 F. Supp. 2d 362, 365 (S.D.N.Y. 2009) (identifying these bases for a Local Rule 6.3 motion). For the reasons stated in plaintiffs' opening brief (ECF 973) and herein, the Court should grant plaintiffs' motion to reconsider and should:

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[33] *See* Local Law 35, § 2, Legislative Materials, Ex. 7, at 2.

[34] The Fair Housing Act also requires liberal construction as it was designed by Congress to have "broad remedial intent." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). The SJ Opinion did not perform a generalized liberal construction analysis, either.

(1) Independent of its ultimate determination on the cross-motions in respect to disparate impacts, elaborate on its finding by confirming that plaintiffs demonstrated the existence of material disparate racial impacts at the community-district typology level as set out in Tables 3-4, *supra*, at 9-10;[35]

(2) In respect to plaintiffs' claims of disparate impacts under the City HRL, engage in the mandatory liberal construction analysis to determine what interpretation of the provisions of the law at issue best serves the uniquely broad and remedial purposes of the statute, and perform liberal construction analysis with respect to the Fair Housing Act, as well;

(3) Deny defendant's motion for summary judgment in respect to disparate impacts under both the Fair Housing Act and the City HRL; and

(4) Grant plaintiffs' motion for summary judgment in respect to disparate impacts under both the Fair Housing Act and the City HRL.

Dated: New York, New York
July 10, 2023

Respectfully submitted,

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[35] As well as the bottom-line impacts referenced in footnote 23, *supra*, at 10.