To be argued by:
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CTQ-2023-00001

COURT OF APPEALS OF THE STATE OF NEW YORK

NAFEESA SYEED,

Plaintiff-Appellant,

v.

BLOOMBERG L.P.,

Defendant-Respondent.

ON APPEAL FROM THE CERTIFIED QUESTION BY THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
IN CASE NO. 22-1251, DOCKET NO. 20-CV-7464

BRIEF OF *AMICI CURIAE* ANTI-DISCRIMINATION CENTER, INC., AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK (NELA/NY)

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Pursuant to Rule 500.23(a)(4)(iii): (a) no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; (b) no party nor party's counsel contributed money that was intended to fund preparation or submission of the brief; and (c) no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief. This statement is also recited in the supporting affirmation of counsel for *amici curiae.*

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Central to Anti-Discrimination Center's mission is the robust use and interpretation of New York City's Human Rights Law ("City HRL"). Its executive director was principal author for the Human Rights Commission of 1991's Comprehensive Amendments to the City HRL; principal author of 2005's Restoration Act; and principal author of Local Law 35 of 2016, a law that clarified both the City HRL's purposes and the tools that must be used for interpretation.

NELA/NY is the approximately 300-member New York chapter of The National Employment Lawyers Association, the nation's only professional bar organization comprised exclusively of lawyers who represent individual employees. Through its various activities, including amicus work, NELA/NY promotes effective legal protections for employees and offers a perspective on the impact of laws and regulations on working people and the workplace relationship.

INTRODUCTION

If respondent had its way, no court would ever examine what response to the certified question best serves the uniquely broad purposes of the New York City Human Rights Law ("City HRL").[1] Just robotically apply *Hoffman* as though it had addressed or had reason to address the certified question (it did not); as though it had examined relevant statutory language, including language making evident the City's own interest in creating and maintaining discrimination-free environments, language reciting the purpose of the City HRL to eliminate and prevent discrimination from playing *any* role in actions relating to employment, language in the substantive provision of the City HRL prohibiting employment discrimination against all persons (without qualification), and language providing for general jurisdiction (it did not examine any of these things); and as though it had engaged in liberal construction analysis (*Hoffman* did not do this, either).

The District Court, believing itself bound by *Hoffman*, also did not examine any of the foregoing regarding the issue as to which a question has been certified.

Respondent's proposed resolution to the certified question is radically inconsistent with the language, structure, and purpose of the City HRL, a law

[1] This brief focuses on the City Human Rights Law, but, as shown in Point VI, *infra*, the result is the same under the New York State Human Rights Law ("State HRL").

designed to have no tolerance for discrimination in public life and to meld the broadest vision of social justice with the strongest law enforcement deterrent.

The certified question is answered as follows:

(1) It is improper to impose an "impact in New York" requirement.

(2) The proper standard is whether an action covered by a substantive provision of the City HRL has a non-trivial nexus with the City. Under that standard, all applicants for a job based in the City who have been discriminated against based on protected class status have a cause of action, regardless of pre-employment residence.

(3) Even if an "impact in New York" requirement were to be imported to the hiring or promotion context, a reasonable interpretation of such a requirement would mean that all applicants for a job based in the City who have been discriminated against based on protected class would still have a cause of action, regardless of pre-employment residence.

PREFATORY NOTE ON LEGISLATIVE HISTORY

A Legislative Material Appendix ("LMA") is also submitted herewith. One unusual aspect of the legislative history deserves mention immediately. NYC Local Law 35 of 2016 ("LL35"), 2016 NYC Leg. Ann. 177, LMA at 18, ratifies three state court decisions: *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 61 (1st Dept. 2009); *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29 (1st Dept. 2011); and *Albunio v. City of N.Y.*, 16 N.Y.3d 472 (N.Y. 2011). LL35, LMA at 18, codified as NYC Admin. Code § 8-130(c).

LL35 ratified not only the specific holdings of the cases, but the way the cases "understood and analyzed the liberal construction requirement" of the City HRL.

The committee report accompanying LL35 ("2016 Committee Report")[2] explained that these cases "illustrate best practices when engaging in the required analysis"; that they "do not just establish specific ways in which the HRL differs from its federal and state counterparts; they also illustrate *a correct approach to liberal construction* and then develop legal doctrine accordingly"; and that it is "important for courts to examine the reasoning of the cases . . . and *for courts to employ that kind of reasoning when tackling other interpretative problems that arise under the HRL.*" LMA at 23 and 25 (emphases added). In short, the approach, tools,

[2] New York City Council Committee on Civil Rights, Committee Report on Local Law 35 of 2015, Mar. 8, 2016, 2016 NYC Leg. Ann. 170-74, LMA at 21-25.

analyses, and conclusions of *Williams, Bennett, and Albunio* are not optional: all aspects must be followed.

ARGUMENT

POINT I
HOFFMAN NEITHER CONTEMPLATED NOR DECIDED THE CERTIFIED QUESTION BEFORE THIS COURT.

The certified question is before this Court precisely because *Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285 (N.Y. 2010), did not have occasion to contemplate, let alone decide, this question. "The Court of Appeals has not decided the specific question raised in this case." *Syeed v. Bloomberg L.P.*, 58 F.4th 64, 68 (2d Cir. 2023). "Nor does *Hoffman* provide clear guidance from which we can predict how the New York Court of Appeals would answer our question." *Id.*

Hoffman was concerned with what that narrowly divided Court (4-3) saw in 2010 as a plaintiff who "[a]t most" had pled that his employment had a "tangential connection to the city . . . ." *Hoffman*, 15 N.Y.3d at 292. The certified question, by contrast, deals with the broad class of non-residents of New York City who, absent what is defined by the text of the City HRL as an unlawful discriminatory practice, would have a deep and continuing connection to the City: working (and, in many cases, after getting employment), living here. In other words, the polar opposite of tangential.

Hoffman simply did not consider this fact pattern presented here. As the Circuit pointed out, *Hoffman* was a discriminatory discharge case, not one that dealt with discriminatory failure-to-hire or failure-to-promote. *Syeed*, 58 F.4th at 68.

There is no reason to assume that *Hoffman's* statement of those unequivocally covered by the City HRL – "nonresidents who work in the city," *Hoffman*, 15 N.Y.3d at 290 – was intended by the Court to be read as containing an additional, unstated restriction: "nonresidents who *already* work in the city." *Cf.* NYC Admin. Code 8-130(b) ("Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct"). Moreover, if the status of currently not residing or being employed in the City were, under *Hoffman's* reasoning, enough to automatically deny coverage of the City HRL, the decision would only have needed to say that the plaintiff "was neither a resident of, nor employed in" the City, not immediately have gone on to identify as relevant that plaintiff did not "state a claim that the alleged discriminatory conduct had any impact" in the City. *Hoffman*, 15 N.Y.3d at 292. At the least, that meant that *Hoffman* was not providing a comprehensive determination of what constitutes "impact" in the City in the contexts of failures-to-hire and failures-to-promote nonresidents where those non-residents, upon hire or promotion, will work in the City (separately discussed in Point V, *infra*).

The upshot is that this Court must do what the New York City Council commands be done "in every case and with respect to every issue"; that is, "apply the liberal construction provisions" of the City HRL. 2016 Committee Report, LMA at 23.

POINT II

HOFFMAN FAILED TO EXAMINE MULTIPLE ELEMENTS OF RELEVANT STATUTORY LANGUAGE AND FAILED TO ENGAGE ALTOGETHER IN THE REQUIRED LIBERAL CONSTRUCTION ANALYSIS.

Hoffman ignored (and in one case, hid) a variety of terms in NYC Admin. Code § 8-101, which is the policy section of the City HRL on which *Hoffman* purported to rely. Recall that *Hoffman* focuses on the premise that the City HRL is designed only to protect the City's "inhabitants." *Hoffman* recites NYC Admin. Code § 8-101 as finding and declaring that prejudice "threaten[s] the rights and proper privileges of [the city's] *inhabitants*," *Hoffman*, 15 N.Y.3d at 289 (emphasis added by *Hoffman*), but it leaves out the critical remainder of that very sentence: "and menace[s] the institutions and foundation of a free democratic state." NYC Admin. Code § 8-101. Very clearly, there is an interest beyond and in addition to the interest of "inhabitants"; that is, the interest of the City itself. Yet, *Hoffman* took no account of this vital interest, impermissibly treating this statutory language as nugatory.

Even when *Hoffman* does not leave out language, as when it recites the policy section as stating that: "[i]n the city of New York . . . there is no greater danger to the health, morals, safety and welfare of the city *and its inhabitants* than the existence of groups prejudiced against one another," *Hoffman*, 15 N.Y.3d at 289 (emphasis added in opinion), *Hoffman* does not grapple in any way with the

significance that language includes identifying the danger to the health, morals, safety and welfare "of the city."

The foregoing provisions make clear that the City's own interests (not just those of its inhabitants) are implicated by discriminatory conduct. *See Chauca v. Abraham*, 30 N.Y.3d 325, 334 (N.Y. 2017) (citation omitted) (reciting the legislative history of the 2005 Restoration Act for the proposition that violations of the City HRL "by their very nature, inflict serious harm 'to *both* the persons directly involved *and* the social fabric of the city as whole'") (emphasis added). *Hoffman's* failure to recognize this means that its foundational premise was mistaken.[3]

There is additional relevant language in the City HRL's policy section that *Hoffman* ignored, including the opinion's failure to discuss (let alone parse) any of the elements of the law's purpose to "eliminate and prevent discrimination from *playing any role in actions* relating to employment . . . ." NYC Admin. Code § 8-101 (emphasis added). How that language could be consistent with giving a free pass

[3] *Hoffman* fares no better with its selective quotations from what were NYC Admin. Code § 8-104 and 8-105, now recodified as NYC Charter, Chapter 40, section 904 and 905. Neither section begins with a "within the city" limitation applicable to all paragraphs. Section 904 has four paragraphs, of which only paragraph (a) refers to "in the city" (paragraphs (b), (c), and (d) do not). None bear on the law enforcement function of the City HRL. Section 905 has 10 paragraphs, of which only paragraph (a) – another non- law-enforcement paragraph – references "within the city." Notably, paragraph (d), dealing with investigations and complaints – has no such reference. Section 900 (the Declaration of Intent) states simply and without geographic or other limitation: "It is the public policy of the city to promote equal opportunity and freedom from unlawful discrimination through the provisions of the city's human rights law."

to employers in New York City to make discriminatory decisions in New York City is something *Hoffman* chose not to answer.

Moreover, the substantive employment discrimination provision involved here – refusal or failure to hire or employ, NYC Admin. Code § 8-107(1)(a)(2) – proscribes employers (and their employees and agents) from refusing or failing based on the protected class status of "any person." NYC Admin. Code § 8-107(1)(a). (The "any person" locution is echoed through the other substantive provisions of the City HRL.) *Hoffman* ignored this term. *Cf. Hoffman*, 15 N.Y.3d at 296 (Jones, J., dissenting) (the "impact" rule "appears nowhere in the text of the Human Rights Laws").

Finally, *Hoffman* failed to subject either the language or the issue before it to the requisite liberal construction analysis *at all*. This failure was particularly egregious since the Committee Report accompanying the Restoration Act ("Restoration Act Committee Report")[4] stated explicitly that one of the principles that "should guide decision makers" when analyzing City HRL claims is that "discrimination should not play a role in *decisions* made by employers, landlords and providers of public accommodations." Restoration Act Committee Report, at

[4] New York City Council Committee on General Welfare, Committee Report on Int. 22-A, the "Local Civil Rights Restoration Act of 2005," Aug. 17, 2005, 2005 NYC Leg. Ann. 536-39, LMA at 13-16.

LMA 14 (emphasis added); *see also Williams*, 61 A.D.3d at 76 and 78 n.27 (citing the play-no-role principle to apply interchangeably to both *conduct* and *decisions*).

To reiterate: *Hoffman* engaged in no liberal construction analysis whatsoever. *See Hoffman*, 15 N.Y.3d at 289-91 (the only policy considerations addressed were the *workability* of a standard proscribing discriminatory decisions made in the City and concern about allowing the law to cover "too many" discriminatory decisions made in New York City about out-of-city employees – the latter not liberal construction analysis but a policy judgment for the City Council).

As such, *Hoffman* is among the cases inconsistent with Restoration Act requirements and, accordingly, not entitled to precedential weight. *See Williams*, 61 A.D.3d at 67 (finding that City Council debate on the legislation "made plain the Restoration Act's intent and consequences," specifically the statement that "[t]here are many illustrations of cases . . . that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [sic] the text of specific provisions of the law or both," and that with the Restoration Act, "these cases and others like them will no longer hinder the vindication of our civil rights.").

As *Williams* held, and the City Council ratified when it enacted LL35: "all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes" and "*cases that had failed to respect these*

differences were being legislatively overruled." 2016 Committee Report, LMA at 24 (emphasis added) (quoting *Williams*, 61 A.D.3d at 67-68).

At best, *Hoffman* offers no useful guidance here.[5]

[5] *See* discussion, *infra*, Point IV(M), as to why *Hoffman* should be formally overruled.

POINT III

RESPONDENT'S CONTENTION THAT THE CITY COUNCIL IMPLICITLY RATIFIED *HOFFMAN* BY FAILING TO OVERRULE IT SPECIFICALLY HAS BEEN REJECTED; THE OBLIGATION TO REVISE NON-COMPLIANT LEGAL DOCTRINE IS ONGOING.

Respondent proposes the already-rejected idea that, since the City Council could have specifically rejected *Hoffman*, the fact it did not indicates the Council's "acceptance of its interpretation." (Respondent's Brief at 23-24.) The argument is profoundly disingenuous.

The principal case cited by respondent deals with *legislative inaction*. *Desrosiers v. Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 497 (N.Y. 2017). Here, the City Council has been active. The Council rejected the proposition that it should have to amend specific provisions of the law to overcome narrow interpretations: the amendment of the liberal construction provision of the law was itself intended as a means by which to prevent and rectify such judicial error. Specifically, the Council rejected this Court's decision in *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 433-34 (N.Y. 2004), a case that had held that if the Council wanted to depart from federal case law doctrine "it should have amended the law to rebut that doctrine specifically." *Williams*, 61 A.D.3d at 73-74; *see also Chauca*, 30 N.Y.3d at 333 (recognizing legislative abrogation of *McGrath*).

As *Williams* explained:

> The Council saw the change to § 8-130 as the means for obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law. . . . § 8-130's specific construction provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions."

Williams, 61 A.D.3d at 74, *citing* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. 255, 280).[6] *See also* 2016 Committee Report LMA at 24-25 (the Report confirmed that LL35 approved *Williams'* methods, reasoning, and conclusions, and specifically recited the language just quoted). This is the opposite of "ratifying" *Hoffman*.

LL35 states: "Following the passage of [the Restoration Act], *some* judicial decisions have correctly understood and analyzed the requirement of section 8-130 . . . that *all* provisions of the New York city human rights law be liberally and independently construed." LL35, Section 1, LMA at 18 (emphases added). The legislative history made the implication explicit: "Some courts have recognized and followed [the Restoration Act's] vision, *but others have not*…" 2016 Committee

[6] *See Chauca*, 30. N.Y.3d at 344, n.5 (citations omitted) (Wilson, J., dissenting) ("Gurian's article, although separate from the legislative history, is an 'extensive analysis of the purposes of the Local Civil Rights Restoration Act, written by one of the Act's principal authors' that was used extensively in *Williams* and has thus been ratified by section 8–130(c)."). The article was also cited in the 2016 Committee Report, LMA 23, n. 265.

Report, LMA at 23 (emphasis added).

The Council was forward-looking with its legislation: it reaffirmed the *continuing* obligation of Courts to use proper liberal construction analysis in all circumstances. "The purpose of this local law is *to provide additional guidance* for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances." 2016 Committee Report, LMA at 18 (emphasis added). Among the purposes of ratifying *Albunio, Williams,* and *Bennett* were to "reaffirm that courts must apply the liberal construction provision in every case and in respect to every issue," and to "accelerate the process by which [] doctrines inconsistent with the Restoration Act are abandoned." *Id.*, LMA at 23. The law was intended to "remind courts that *legal doctrine might need to be revised to comport with section 8-130 of the Administrative Code*." *Id.*, LMA at 25 (emphasis added).[7] This is not anything like

[7] In the face of the Council's specific intention that non-compliant rulings be reexamined, recitations of cases that discuss a legislature's ability to change a specific interpretation; or presume that a legislature knew and accepted decisional law when it did not specifically change a judicial interpretation; or reference precedents that a legislative body has chosen not to correct (*see* Respondent's Brief, at 17, 18, 18, n.9, 23, and 25, n.12) are inapposite. As for the principle that *stare decisis* means that precedent should not be overruled without "extraordinary and compelling justification" (*see* Respondent's Brief, at 18 and 19, n.9), *Hoffman* contravened Restoration Act requirements when it was decided, contravenes the requirements of LL35, and is squarely within the express contemplation of the Council in passing LL35, as explained in the text accompanying this note. *Hoffman* must either be treated as not having any precedential value or as a case as to which extraordinary and compelling reasons to overrule exist. Note that none of respondent's cases referenced in this note treat interpretations of the City or State HRLs.

"legislative inaction" that could be interpreted as ratifying *Hoffman* (or any other case that had failed to perform the mandatory analysis).

POINT IV

PROSPECTIVE EMPLOYMENT OF NON-RESIDENTS IN NEW YORK CITY IS WELL WITHIN THE ZONE OF INTERESTS THAT THE CITY HRL SEEKS TO PROTECT.

The City HRL's language and structure and the mandatory application of the Restoration Act and LL35 principles of interpretation all require that the certified question be answered in the affirmative.

A. Operative text.

It is an unlawful discriminatory practice for an employer or an employee or agent thereof to, *inter alia*, "refuse to hire or employ" a person due to protected class status, NYC Admin. Code § 8-107(1)(a)(2), just as it is unlawful to discriminate against such person "in terms, conditions or privileges of employment." NYC Admin. Code § 8-107(1)(a)(3). There is no geographic limitation stated.[8]

B. First principles.

We begin with the principle stated by *Bennett* and ratified by LL35: "*Bennett* provided, among other things, important reconfirmation that there are *no* provisions of the law *or judge-made doctrines* that stand outside the liberal construction requirements of § 8-130." 2016 Committee Report, LMA at 24, summarizing

[8] *See also* NYC Admin. Code; § 8-502(a) (emphases added) ("Except as otherwise provided by law, *any* person claiming to be a person aggrieved by an unlawful discriminatory practice as defined in chapter 1 of this title or an act of discriminatory harassment or violence as set forth in chapter 6 of this title shall have a cause of action in *any* court of competent jurisdiction); N.Y. Exec. Law § 297(9) (emphases added) (*Any* person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in *any* court of appropriate jurisdiction").

Bennett, 92 A.D.3d at 34-35 (emphases added). Failing to appreciate this was the District Court's first error. Contrary to the implication in the District Court's decision, the liberal construction requirement applies not only to construing "types of discrimination against which the statute is meant to protect," but also to construing the "scope of the persons to whom those protections are [intended to be] offered." *See Syeed v. Bloomberg L.P.*, 568 F. Supp. 3d 314, 333 (S.D.N.Y. 2021) (not examining whether the courts who had looked at the latter question had engaged in liberal construction analysis).[9]

[9] The common temptation to try to carve out exceptions must be resisted, as judges of this Court have protested. *See Chauca*, 30 N.Y.3d at 334-46 (Wilson, J., dissenting); *Makinen v. City of N.Y.*, 30 N.Y.3d 81, 89-97 (N.Y. 2017) (Garcia, J., dissenting). In the former, then Judge Wilson stated:

> T]he City Council sought to free the NYCHRL from the strictures of statutory and decisional law. The 2016 committee report described the most recent revisions as requiring courts to apply the liberal construction provision 'in every case and with respect to every issue' and to understand that 'legal doctrine might need to be revised to comport with the requirements of § 8–130' (2016 Report at 8–9, 13). '[T]here are no provisions of the law *or judge-made doctrines* that stand outside the liberal construction requirements" (*id.* at 10 [emphasis added]).

Chauca, 30 N.Y.3d at 343 (Wilson, J., dissenting). In the latter, Judge Garcia states:

> The City Council could not have been clearer: the Human Rights Law must be construed liberally, to provide maximum protection, in "all circumstances" (Local Law No. 35 [2016] of City of N.Y. § 1 [emphasis added]). Contrary to the majority's claim, the liberal construction requirement of Administrative Code § 8–130 applies globally to all provisions of the Human Rights Law."

Makinen, 30 N.Y.3d at 93, n.1 (Garcia, J., dissenting).

Once that is understood, the task, per *Williams*, is always to ask: "What interpretation 'would fulfill the broad and remedial purposes of the City's Human Rights Law'?" *Williams*, 61 A.D.3d at 74-75. Or, as *Albunio* held: "we *must* construe" City HRL provisions "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 N.Y.3d at 477-78.

C. Landscape.

As discussed*, supra*, Point II, *Hoffman* did not engage in liberal construction analysis. The District Court, believing it was constrained by *Hoffman*, did not engage in liberal construction analysis in respect to the certified question. None of the decisions relied on by the District Court on this point engaged in liberal construction analysis. Nor do any of the decisions relied on by respondent engage in liberal construction analysis,[10] and respondent does not attempt a liberal construction analysis for this Court to consider.

D. Interests.

A fair reading of NYC Admin. Code § 8-101 leaves no doubt that it is not only the interests of the New York City's "inhabitants" that are sought to be

[10] *Pakniat v. Moor,* 192 A.D.3d 596 (1st Dept. 2021), *leave to appeal denied* 37 N.Y.3d 917 (N.Y. 2022), (Respondent's Brief at 6), does suggest an impulse to engage in liberal construction analysis, *id*. at 597 (noting that "plaintiff is correct that the State and City Human Rights Laws are meant to deter discriminatory behavior by New York employers"), but believed that it was constrained by *Hoffman. Id.*

protected, but also the interests of the City itself. To recite again what *Hoffman* left out, "there is no greater danger to the health, morals, safety and welfare *of the city*" than "the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences," including those based on protected-class status. NYC Admin. Code § 8-101 (emphasis added). Discrimination "menace[s] the institutions and foundation of a free democratic state." *Id.* The goal is to "*eliminate* and *prevent* discrimination from *playing any role*" in actions "related to employment, public accommodations and housing . . . ." *Id.* (emphases added).

In passing LL35 in 2016, the City Council succinctly summarized the Council's intentions over time. The comprehensive 1991 amendments to the City HRL and the Restoration Act "expressed a very specific vision: a Human Rights Law designed as a law enforcement tool *with no tolerance for discrimination in public life*." 2016 Committee Report, LMA at 23 (emphasis added).

"Public life" – as to which there is to be "no tolerance" – surely encompasses how jobs in the City are filled. More broadly, protection of "public life" from discrimination necessarily encompasses *who gets to participate* in public life. In other words, the City HRL wants that determination not to have anything to do with a person's protected-class status. That goal cannot be achieved if a large sub-class of prospective participators (those not yet resident in New York) are not permitted to participate because of protected-class status.

As the ability to participate in the public life of the City without regard to protected-class status is a fundamental purpose of the statute, denial of that ability constitutes an injury to any individual who is precluded. Indeed, the City HRL was amended in part to underscore the fact that "victims of discrimination suffer serious injuries, for which they ought to receive full compensation . . . ." *Williams*, 61 A.D.3d at 68, *citing* Restoration Act Committee Report, LMA at 14. The Council did not say that "victims of discrimination *except for those not yet resident in New York City* suffer serious injuries" or that "*except for those not yet resident in New York City* [they] ought to receive full compensation." There is no basis on which to manufacture such a limitation.

E. The failure to protect any *one* activity "related to employment" undermines the City HRL's goal to have *all* such activities be discrimination-free.

The City HRL is not only designed to protect discrimination from polluting already existing employment relationships, but also to protect from discrimination the ways that those relationships are formed, and retaliatory conduct even after the relationship has ended.

Advertisements for jobs that directly or indirectly indicate a discriminatory preference are barred. NYC Admin. Code § 8-107(1)(d). Even before someone has applied, in other words, the City seeks to protect potential applicants from distinction based on protected-class status. By its plain meaning, this protects those encountering the advertisement outside of the City's borders.

No subterfuges can be used to close the door to those seeking a job. It is illegal to represent "that any employment or position is not available when it is in fact available" because of the protected-class status of "any person." NYC Admin. Code § 8-107(1)(a)(1).

It is then illegal to refuse to hire or employ "any person" because of protected-class status. NYC Admin. Code § 8-107(1)(a)(2).

It is then illegal to discriminate against "any person" based on protected-class status "in terms, conditions, or privileges of employment." NYC Admin. Code § 8-107(1)(a)(3).

It is then illegal to discharge or bar from employment "any person" based on protected-class status. NYC Admin. Code § 8-107(1)(a)(2).

Finally, the City HRL's broad anti-retaliation protection encompasses *post*-employment conduct directed against "any person." NYC Admin. Code § 8-107(7).[11]

The only way to understand the City HRL is as an interlocking structure intended to protect the integrity of the *entire* employment process – the only interpretation consistent with the policy of eliminating discrimination from playing

[11] The question is whether the conduct is "reasonably likely to deter a person form engaging in protected activity." *Williams*, 61 A.D.3d at 71 and 71, n.12; *see also Calise v. Casa Redamix Concrete Corp.,* 2022 WL 355665, at *2 and *7 (S.D.N.Y. Feb. 4, 2022) (allegations that defendant had interfered with discharged employee's future job prospects sufficient to state claim under Americans With Disabilities Act and, therefore, under City HRL).

any role in actions "related to employment . . . ." NYC Admin. Code 8-101. To permit discrimination at the "early stage" actions related to employment – like advertising and hiring – would render the later-stage goal of having workplaces free of discrimination impossible to achieve.

Each element also needs to be discrimination-free to accord with the statutory command not only to "eliminate" discrimination in actions related to employment, but also of "preventing" it. NYC Admin. Code § 8-101. Both terms must be given meaning. Not protecting all applicants for employment in the City from discrimination undermines the express intention of the Council to create and maintain the full lifecycle of activities related to employment as discrimination-free.

F. Applying *Williams* analysis.

Cases ratified by LL35 "illustrate a correct approach to liberal construction analysis"; it is "therefore important for courts to examine the reasoning of the cases . . . and then *for courts to employ that reasoning* when tackling other interpretative problems that arise under the HRL." 2016 Committee Report, LMA at 25.

Williams was focused on interpreting the law to *maximize deterrence* – doing so "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, *citing* Restoration Act Committee Report, LMA at 14. Excluding non-resident applicants for employment or promotion achieves exactly the opposite result. Employers would

learn that they can (discreetly or openly) discriminate against vast numbers of applicants, so long as those applicants do not currently reside in New York City. There would be no incentive to create a workplace that has zero tolerance for discrimination.[12] Indeed, an employer determined to discriminate against a particular protected class group could decide to focus its recruitment efforts precisely on applicants who do not currently reside in the City.

Excluding non-resident applicants teaches another lesson inconsistent with the imperative of maximizing deterrence. Those involved in personnel matters – as well as other managers and supervisors – learn that *some* kinds of apparently proscribed discrimination are *permitted*: the trick is to figure out how to get close to the line without crossing it.

By contrast, a rule that protects everyone – resident and non-resident – from discrimination related to employment based in New York City maximizes deterrence. It encourages those who make employment decisions to follow a simple rule: never discriminate based on protected-class status.

Williams next requires that "analysis of the City HRL must be guided by the need to make sure that discrimination plays *no* role." *Williams*, 61 A.D.3d at 76. It

[12] *Cf. Williams*, 61 A.D.3d at 76 (finding that that there is "a wide spectrum of harassment cases falling between 'severe or pervasive' on the one hand and a 'merely' offensive utterance on the other," and that, in doing so, the test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status").

is difficult to imagine very many jobs where there would not be applicants from outside of the City. Contrast a rule that allows discrimination to play whatever role an employer elects it to play in respect to those not currently resident in the City to one that provides coverage of all applicants, regardless of current residence. Only the latter rule ensures that discrimination plays no role in actions related to discrimination.[13] *Cf. Williams*, 61 A.D.3d at 76 (retaining the "severe or pervasive" test would, impermissibly, "mean that discrimination is allowed to play *some significant role* in the workplace").

Finally, City HRL analysis must take account of "the Restoration Act principle that . . . discrimination violations are *per se* 'serious injuries…'" *Id.* at 76-77 (citation omitted). Those not currently resident in the City are not any less seriously injured when they are not hired or promoted because of protected class. This is another reason to treat the term "any person" as meaning "any person" and not "any person already resident in the City."

[13] The phrase used in the policy section of the City HRL is "plays no role in *actions* related to employment . . . ." NYC Admin. Code § 8-101 (emphasis added). But, as noted earlier, the term "actions" is understood to encompass both decisions and other conduct. *See* Restoration Act Committee Report, LMA at 14 ("discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations."); *see also Williams*, 61 A.D.3d at 76 and 78 n.27 (citing the play-no-role principle to apply interchangeably to both conduct and decisions). It could not be otherwise. The City HRL, as other civil rights statutes, is only interested in actions that have as a component either one or more discriminatory motives or impacts. Put another way, the action always involves a discriminatory decision, and a discriminatory decision always yields discriminatory conduct.

Respondent would have this Court rule "you are fair game for being discriminated against until you are living in New York." That is antithetical to the legislative desire that the City HRL "meld the broadest vision of social justice with the strongest law enforcement deterrent." 2016 Committee Report, LMA at 24, *citing Williams*, 61 A.D.3d at 68, which had quoted *Return to Eyes on the Prize*, 33 Fordham Urb. L.J. at 262.

G. Applying *Albunio* analysis.

Albunio requires that City HRL provisions be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 N.Y.3d at 477-78. The terms discussed herein can reasonably be construed to encompass hiring and promotion coverage for those not yet resident in the City. Note as part of the "reasonably possible" test that, even in *Hoffman*, seven of the 11 appellate judges who considered the matter – including the author of *Williams* and *Bennett* – rejected the appropriateness of an impact test.[14]

H. Local Law 35 further limited judicially created exceptions and exemptions.

Even when an exemption or exception is stated explicitly in the text of the City HRL (and an impact test is not one of those), LL35 provided that "[e]xceptions to and exemptions from the provisions of this title shall be construed narrowly in

[14] All four justices of the Appellate Division panel, *Hoffman v. Parade Publs.*, 65 A.D.3d 48 (1st Dept. 2009), and the three judges in dissent in this Court's overruling of the Appellate Division, disagreed with the "impact" test. *Hoffman*, 15 N.Y.3d at 292-96.

order to maximize deterrence of discriminatory conduct." LL35, LMA at 18; codified as NYC Admin. Code § 8-130(b). Judicially created exemptions and exceptions have no warrant to ignore this central mandate.

Thus, even if this Court were not prepared to recognize *Hoffman* as inconsistent with the requirements of the Restoration Act and LL35, *extending* *Hoffman* to a different issue would undermine, not maximize, deterrence of discriminatory conduct.

I. The consequences of excluding non-residents from coverage would devastate the statutory scheme.

Beyond the many job applicants not currently residing in the City who could lawfully be excluded from City-based jobs based on their protected-class status if the certified question were answered in the negative, a wide range of other protections of the City HRL would be neutered. These include any of the following occurrences while a non-resident: encountering discriminatory advertisements for jobs based in New York City, NYC Admin. Code § 8-107(1)(d); seeking housing located in New York City, NYC Admin. Code § 8-107(5); applying to a New York City college or university, NYC Admin. Code § 8-107(4); and being retaliated against for having opposed discrimination within the jurisdiction, NYC Admin. Code § 8-107(7).

J. Assertions of "extraterritoriality" misconstrue the issue.

Applying the City HRL to prospective employment *based in New York City* is *not* extraterritorial. It is a *New York City workplace* that is being policed.

Part of that policing involves making sure, *Hoffman* to the contrary, that discriminatory *decisions* have no place in City workplaces. *See* footnote 13*, supra at* 25 (explaining that the term "actions" in NYC Admin Code § 8-101 is used to mean both decisions and conduct). Another part of that policing involves making sure that the composition of the *New York City workplace* does not reflect an *ongoing local skewing effect* caused by discriminatory decisions about prospective employment in New York City, including those decisions made elsewhere.

Albunio is again instructive. If some version of the "within New York City" concept must be imported, what is the most plaintiff-friendly, reasonable framing? It is the one encompassing "discriminatory decisions made or discriminatory results occurring within New York City," the one that least impinges on the City HRL's goal to eliminate and prevent discrimination from playing any role in actions related to employment. This construction does not involve applying the law in an extraterritorial fashion. (To the extent that an out-of-jurisdiction agent or employee is involved in the challenged action, that fact is incidental to the principal consequence: a result in the City.)

Even were the Court to somehow conclude that hiring and promotion for a City-based position involved extraterritorial application of the City HRL, that is no bar to coverage. Respondent does not claim that it is beyond the authority of the City to provide for extraterritorial application, but rather that the statute does not expressly state that intent. (Respondent's Brief, at 19.)

Note that respondent provided the Court with a misleading view of *Goshen v. Mut. Life Ins. Co. of N.Y.*, 286 A.D.2d 229, 230 (1st Dept. 2001), *aff'd* 98 N.Y.2d 314 (N.Y. 2002). (Respondent's Brief at 19.) In fact, this Court's affirmance in *Goshen* did not rely on the Appellate Division's reasoning but hinged instead on this Court's conclusion that applying a General Business Law statute relating to deceptive acts or practices "to out-of-state transactions in the case before us would lead to an unwarranted expansive reading of the statute, *contrary to legislative intent*." *Goshen,* 98 N.Y.2d at 325 (emphasis added). Here, by contrast, all evidence confirms that an expansive reading of the City HRL accords precisely with legislative intent.

It is true that the City HRL does not *explicitly* use the words "this title is intended to have extraterritorial application." But concluding that extraterritorial application (if it were that) was not intended by the City Council collides with the specific rules of construction for the City HRL that are supposed to apply in all cases (per *Albunio*, *Williams*, and *Bennett*) and a series of more general principles of

statutory construction: "Statutes will not be construed to render them ineffective," N.Y. Statutes § 144; "In construing a statute which is ambiguous the construction to be adopted is the one which will not cause objectionable results," N.Y. Statutes § 141; "A construction of a statute which tends to sacrifice or prejudice the public interests will be avoided," N.Y. Statutes § 152; and "Generally, remedial statutes are liberally construed to carry out the reforms intended and to promote justice," N.Y. Statutes § 321.

How could the goal of the City HRL be "a law enforcement tool with no tolerance for discrimination in public life," 2016 Committee Report, LMA at 23, possibly be achieved if all or nearly all the statute could be evaded in respect to those not already resident in New York City? It could not.

As the City Council could not have intended the consequences set out in Section I, *supra*, extraterritorial application (if that is what it is to be labeled) is the only construction consistent with the Council's intentions.

K. The utility of a "non-trivial nexus with New York City" test.

When actions (including decision making) have a non-trivial nexus with the City, the interests of the City are implicated and thus a cause of action can be maintained. When such actions do not have any nexus with the City, or have only a trivial nexus with the City, those interests are not implicated and thus a cause of action cannot be maintained.

Application of this test avoids a variety of anomalous results. For example, the Council is certainly interested in proscribing even the most transitory discriminatory treatment at a public accommodation like being turned away when trying to buy a shirt at a store (regardless of the customer's residence). But how could it be interested in that and not be interested in proscribing discrimination that can have effect over the course of years (whether in employment, housing, or public accommodations like schools)?[15]

If you are a non-resident denied a City-based opportunity (*e.g.,* employment, housing, or education) based on protected-class status, it cannot be that learning of the discriminatory treatment while inside the City's borders secures "impact" on you or the City, while learning the outcome outside of the City negates "impact."

The non-trivial nexus with the City test can be applied easily. Certainly, discriminatory actions related to City workplaces, housing, and public accommodations have that nexus, regardless of where in the United States those actions were initiated or where the discrimination came into play. Moreover,

[15] This problem is of no interest to respondent. Examine, for example, a construction company, bent on discrimination, that has jobs immediately available. Applicants may apply in person at the New York City office or, alternatively, via email, making sure to include a photograph. Whenever the employer encounters a Black applicant in person, the applicant is told to his face, "No, you're Black." When the employer encounters an applicant identified as Black by the required photo attachment to the email, the applicant is rejected with a reply email stating, "No, you're Black." Under respondent's "straightforward reading" of the City HRL requiring "no exegesis," Respondent's Brief, at 15, the in-person applicant, having been physically present in New York City at a relevant time, has a claim; perversely, the applicant who used email does not.

discriminatory decisions and policies made in the City related to those contexts of discrimination have that nexus, regardless of whether those decisions and policy also have some other "impact."

If, on the other hand, an out-of-city manager is traveling through the City and informs someone that they have been turned down for an out-of-city job, the happenstance of that in-City communication does not constitute anything more than a trivial nexus with the City. Likewise, there is only a trivial nexus with the City if a *non-discriminatory* decision or policy made in the City affects a plaintiff in a discriminatory way in respect to employment, housing, or public accommodations located outside of the City because of discrimination against that plaintiff that was injected into the process or ratified exclusively by those working for the employer outside of the City.

This is the approach taken in *Williams:* a wide range of conduct (harassment not severe or pervasive) is covered; conduct that constitutes no more than "petty slights and trivial inconveniences" is not. *Williams*, 61 A.D.3d at 80. *Williams* created that test as an affirmative defense for a defendant to demonstrate. To be even more defendant-protective here, proof of the existence of a non-trivial nexus would be part of a plaintiff's burden of persuasion. Whatever fanciful hypotheticals that may be spun about the City HRL reaching into an employment matter in Colorado

(remember: covering "too much" is a legislative, not a judicial concern), the plaintiff would be put to the test of *demonstrating that the nexus was non-trivial*.

L. Additional considerations.

Respondent suggests its crabbed interpretation of the City HRL is harmless because a non-resident plaintiff can secure relief under another jurisdiction's laws. (Respondent's Brief, at 29.) Aside from the fact that virtually no jurisdictions, if any, have civil rights legislation equivalent in scope to that of the City HRL,[16] the potential availability of other laws is irrelevant to the task at hand: determining what construction of the City HRL best effectuates its purposes. Respondent has cited nothing to suggest that the Council believed out-of-jurisdiction protections were sufficient to vindicate the City's vital interest in securing discrimination-free workplaces within the City.

Respondent makes passing reference in a parenthetical, Respondent's Brief, at 20, to General Municipal Law § 239-s. Even were the Court to take up this undeveloped point, it would find that it changes nothing. First, the provision, apparently enacted in 1965, explicitly states that "[n]othing in this article shall be deemed to limit or reduce the powers of the New York city commission on human rights." N.Y. General Municipal Law § 239-s. Second, the section's focus is that the

[16] *See Return to Eyes on the Prize*, 33 Fordham Urb. L.J. at 284-87; *see also id.* at 288 (concluding that the 1991 Amendments were "consistent in tone and approach: every change either expanded coverage, limited an exception, increased responsibility, or broadened remedies.").

City Commission have concurrent jurisdiction with the State Division. Third, the reference to matters "within the City of New York" begs the question of what interpretation of "within the City of New York" best fulfills the purpose of the City HRL. *Id*. Fourth, the more-recent, comprehensive 1991 amendments to the City HRL changed the proscription against discrimination "in" employment, etc. to the more expansive proscription against discrimination "playing any role" in "actions related to" employment, etc. Local Law 39 of 1991, Section 1, 1991 NYC Leg. Ann. 145, LMA at 2, amending, *inter alia*, NYC Admin. Code § 8-101.

M. Disposing of *Hoffman*.

Hoffman undermined, *inter alia*, the City's own anti-discrimination interests and the City HRL's identification of itself as a law-enforcement tool designed to allow no tolerance for discrimination in public life. *Hoffman's* licensing of discriminatory decisions by every City-based covered entity that deals with an individual located out of the City is breathtakingly destructive of the City Council's command that "discrimination should not play a role in *decisions* made by employers, landlords and providers of public accommodations." Restoration Act Committee Report, LMA at 14 (emphasis added).

Imagine a group of managers based in New York City evaluating applicants for a position in the company's New Jersey back office. The first applicant, not a City resident, can be discussed with the managers free to invoke whatever prejudices

any of them may have. Those same managers are then supposed to suppress these same prejudices when evaluating a City resident who has applied. Likewise, a junior manager is supposed to not take notice of (and later not mimic) her senior managers' discriminatory preferences – including when it comes to hiring in the New York City office. In fact, once the virus of discrimination invades one subset of decision-making, the virus will spread, and the City HRL's goal of creating and maintaining discrimination-free environments will be fatally undermined.

The non-trivial nexus test works better. While decisions about non-residents genuinely made in the City or with the substantive involvement of personnel in the City will have the requisite nexus, claims where what happened in the City was really nothing more than the nominal processing of a decision already made elsewhere, without any substantive review function, will not. A plaintiff could not merely recite the language "non-trivial nexus"; he or she would need to persuade a court that there was a non-trivial nexus. Judges routinely assess whether a claim meets a test.[17]

Hoffman warrants formal overruling and replacement by the non-trivial nexus test.

[17] *Cf. Hoffman,* 15 N.Y.3d at 295-96 (Jones, J., dissenting) (noting that "New York State and federal courts have, until now, tailored jurisdictional limitations to permit nonresident plaintiffs to maintain NYCHRL and NYSHRL claims against employers and have reached reasonable results, despite the lack of clarity as to the appropriate rule").

POINT V

EVEN IF THE COURT WERE TO IMPOSE AN "IMPACT IN NEW YORK CITY" REQUIREMENT FOR HIRING AND PROMOTION CLAIMS FOR JOBS BASED IN NEW YORK CITY, NON-RESIDENTS WOULD MEET THAT TEST.

Per *Anderson v. HotelsAB, LLC*, No. 15CV712-LTS-JLC, 2015 WL 5008771 (S.D.N.Y. Aug. 25, 2015), the impact test was met where the plaintiff "interviewed for, and was denied, a position that included duties in a New York City workplace" because it "denied her the opportunity to work in New York City." *Id.* at *4. Holding otherwise would "deny protection against hiring discrimination to anyone who did not actually cross the employer's threshold in New York," and is thus "inconsistent with the letter and spirit" of the City HRL. *Id.*

Anderson is right, both intuitively and logically. It would be a perversion of the impact test to insist that "impact" only occurs at the moment a City-based employer conveys to an applicant the fact that he or she has been rejected for a City-based job. ("I'm reading this rejection email in New Jersey, so the rejection has no impact on me in New York.") In fact, while impact can be immediate (as in being turned away from shopping in a store for discriminatory reasons), impact can often be both prospective and long-lasting (like the job or school that, absent discrimination, one would be allowed to be engaged in for years).

The appropriate way to measure impact in this context is to compare a plaintiff's life with discrimination to her life without discrimination. In the latter

circumstance, she gets to work (and be present) in the City all the time. In many cases, she will also choose to live in the City and make use of the City's public accommodations. If she has children, she will often choose to send them to public school in the City. With discrimination, by contrast, she is denied each element of that *professional and personal life in the City*. Equally important, the City is denied her presence. The difference in the two circumstances represents considerable "impact."

POINT VI

PROSPECTIVE EMPLOYMENT OF NON-RESIDENTS IN NEW YORK STATE IS WELL WITHIN THE ZONE OF INTERESTS THAT THE STATE HRL SEEKS TO PROTECT.

A wrinkle in this case as it pertains to the New York State Human Rights Law ("State HRL") is that Section 6 of the 2019 amendments to that law, Chapter 160 of the Laws of 2019, LMA at 31-32, which amended the construction provision of the State HRL (N.Y. Exec. Law § 300),[18] was apparently enacted after the complained-about events in this case (Appellant's Brief, at 15, n.2.). Section 16(d) of Chapter 160 provides that Section 6 is among the sections only applicable to claims filed on or after the legislation's effective date. LMA at 35.

If this Court were to believe that the answer to the certified question in respect to the State HRL would be different depending on whether that law were viewed with the older "regular" liberal-construction provision or, instead, with the newer "supercharged" liberal-construction provision, then, we respectfully suggest, the question be answered for the State HRL both retrospectively and prospectively for benefit of the public, the bench, and the bar.

As it happens, the relevant older provisions of the State HRL (narrower than the City HRL is some respects; broader than the City HRL in others) make clear that

[18] The relevant additions are underlined: "The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct. LMA at 31-32.

the certified question should be answered in the affirmative, regardless of what iteration of liberal construction analysis is used.

A. Fulfilling the State Constitution's civil rights provisions.

One of the reasons for which the State HRL is deemed to be an exercise of the police power is "in fulfillment of the provisions of the constitution of this state concerning civil rights." N.Y. Exec. Law § 290(2). The State Constitution, in turn, provides that, "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. Const., art. I, § 11. There is no hint that this protection is limited to residents.

B. Explicitly declared civil rights.

This conclusion is reinforced by the following section of the State HRL: "The opportunity to obtain employment without discrimination because of [protected-class status], is hereby declared to be a civil right." N.Y. Exec. Law § 291(1). The most natural reading of a "civil right" is one that is available to all, especially because it would be natural to expect some of those seeking the "opportunity to obtain employment" to be non-residents, and because that the statutory language does not limit that opportunity to an "opportunity *for those already resident in the State* to obtain employment without discrimination."

C. Other interests of the state.

The State HRL also states that it (the State HRL) is an exercise of the police power "for the protection of the public welfare, health and peace of the people of this state…." N.Y. Exec. Law § 290(2). This, too, is consistent with a *State* interest (not just State-inhabitant interest) in non-discrimination.

Finally, the State is acknowledged to have the "responsibility to act to assure" that "every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity [including because of discrimination] *not only threatens the rights and privileges of its inhabitants*" but, *inter alia,* "menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state…." N.Y. Exec. Law § 290(3) (emphasis added). That there are State interests is clear. There are two phrases to be interpreted.

The first is "every individual *within this state.*" An illiberal construction would render this phrase as "every individual *already* within this state." Any liberal construction would render it as "every individual within *or seeking to come within* this state."[19] It is the latter interpretation that dovetails with the previously discussed

[19] The provision could have been written as "every *resident* within this state," but was not. Clearly, an individual, including a non-resident, comes within the ambit of even a cramped interpretation of the term "within the state" when she or he applies in person for a job based in New York State. There is no functional difference for someone to cause herself to be within the state through online or email communications, or through an interview conducted via Zoom.

purpose of implementing the State Constitutional protection that "no person" be subject to discrimination and with the declaration of the "opportunity to obtain employment without discrimination" as a civil right.

The second phrase to be interpreted is "the responsibility to act to insure . . . ." As with the federal "necessary and proper clause" or with the provisions of the Reconstruction Era federal Constitutional Amendments stating that "Congress shall have power to enforce, by appropriate legislation, the provisions" of the Amendments, here, too, "the responsibility to act to insure" – both a literal and liberal construction would suggest – would proscribe a wide range of conduct detrimental to insuring the equal opportunity of every individual within the state.

Applying the law both to jobs based in New York State and to employment decisions made in New York State would help insure an environment of equal opportunity in New York State for the same reasons as discussed in connection with the City HRL, including not allowing the employment process to become polluted with discrimination at any point and not allowing discriminatory considerations to be at play in New York State workplaces, where they can easily bleed into decisions and other actions related to those who *are* already within the State.

D. N.Y. Exec. Law § 298-a.

Respondent claims that this provision of the State HRL means that non-residents working outside of the State are not covered by the law, citing *Hoffman.*

(Respondent's Brief, at 21.) But *Hoffman* dealt with a circumstance where the non-resident was not working, and had no intention of working, in New York. Moreover, the title and text of N.Y. Exec. Law § 298-a only come into play with respect to "act[s] committed outside of this state against a resident of this state…." N.Y Exec. Law § 298-a(1). The provision, therefore, has no relevance to acts committed, in whole or in part, within New York State. A discriminatory decision made in New York State (the *Hoffman* scenario) is an action committed in the state. (*See* footnote 13, *supra* at 24, discussing how a discriminatory decision is necessarily something that comes within the concept of "action" cognizable under discrimination law.) The circumstance here – an action taken against a non-resident concerning employment based in New York – is best understood as an action taking place within the state because it necessarily produces employment results in New York State.

E. The impact test.

In any event, any reasonable interpretation of the impact test would encompass prospective New York State employment by a non-resident for the reasons stated in Point V, *supra*, in relation to the City HRL.

F. 2019 State HRL Amendment.

The legislative history – far sparser than that of the City HRL amendments – does make a critical point clear: "The bill would require provisions in the Human Right Law to be construed liberally in an effort to maximize the deterrence of

discriminatory conduct." Division of the Budget Bill Memorandum, LMA 36-38, at LMA 37.[20]

It thus reinforces arguments already made. For example, the "responsibility to act to assure" that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, N.Y. Exec. Law § 290(3), already sets out a responsibility to take prophylactic measures beyond those that have an immediate and direct impact on individuals currently within the state. But interpreting this phrase so that the responsibility incorporates the obligation to maximize deterrence of discrimination means that all action that can reasonably be taken to protect a non-discriminatory work environment should be taken.

G. The "non-trivial nexus" test works for the State HRL, too.

The phrase "within the state" should be understood to encompass both decisions and policies made (in whole or part) in the state, regardless of where "impact" is felt; as well as other actions, regardless of geographic initiation, that result in material consequences regarding access to employment, housing, or public accommodations in New York. As such, the "non-trivial nexus" test set out earlier for the City HRL, *supra* at 29-32, can appropriately be applied at the state level. This test is fully consistent with N.Y. Exec. Law § 298-a. An act "committed outside of

[20] The Memorandum is part of the Governor's "Bill Jacket," *available online* at https://digitalcollections.archives.nysed.gov/index.php/Detail/DownloadMedia/object_id/85398/download/1

this state against a resident of this state," N.Y. Exec. Law § 298-a(1), is an act that: (a) does not involve employment in New York state; and (b) does not stem from discriminatory decisions made or discriminatory policies created in the state.

CONCLUSION

It is improper to impose an "impact in New York" requirement. *Hoffman* should be overruled.

The proper standard is whether an action covered by a substantive provision of the City HRL or the State HRL has a non-trivial nexus with the City or State, respectively. Under that standard, all applicants for a job based in the City or State who have been discriminated against based on protected class status have a cause of action, regardless of pre-employment residence.

Even if an "impact in New York" requirement were to be imported to the hiring or promotion context, a reasonable interpretation of such a requirement would mean that all applicants for a job based in the City or State who have been discriminated against based on protected class would still have a cause of action, regardless of pre-employment residence.

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New York, New York

Respectfully submitted,

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CERTIFICATION

Pursuant to Court Rules 500.1(j) and 500.13(c)(1), I certify that:

(a) The foregoing brief was prepared on a computer using Microsoft Word;

(b) That Times New Roman, a proportionally spaced typeface was used;

(c) That the point size of the main text is 14-point, the point size of footnotes is 12-point, and that the line spacing of the main text is double-spaced except for block quotes; and

(d) That the total number of words in body of this brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, statement pursuant to Rule 500.23(a)(4)(iii), table of contents, table of authorities, proof of service, this certification, and the Legislative Materials Appendix is 9,988 words.

Dated: December 27, 2023
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