

07-1404-CV

**IN THE UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT**

ROBERT A. LOEFFLER ET AL.
Plaintiffs-Appellants,

v.

STATEN ISLAND UNIVERSITY HOSPITAL
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Case No. Below: 95 CV 4549 (SJ)

**BRIEF OF THE OPPORTUNITY AGENDA
AS AMICUS CURIAE
IN SUPPORT OF
THE PLAINTIFFS'-APPELLANTS' REQUEST FOR REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, The Opportunity Agenda states that it is a project of the Tides Center, which is a not-for-profit corporation organized under the laws of the State of California.

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This amicus curiae brief is submitted, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, on behalf of The Opportunity Agenda, in support of the appeal of the Plaintiffs-Appellants' (the "Loefflers") from the District Court's decision. All parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Opportunity Agenda, a project of the Tides Center, is a communications, research, and advocacy organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to the enjoyment of good health, irrespective of race, gender, nationality, socioeconomic status, or disability. The organization's recent activities have included research and advocacy regarding inadequate access to health care and, particularly, hospital services in the City of New York, where The Opportunity Agenda is headquartered. The subject matter of this case is therefore of keen interest to the organization.

The Opportunity Agenda's parent organization, the Tides Center, is a not-for-profit 26 U.S.C. § 501(c)(3) California corporation that provides core management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. The Tides Center actively promotes change toward a healthy society, one which is founded on principles of social justice, broadly shared economic opportunity, fundamental respect for individual rights, the vitality of communities, and a celebration of diversity.

This brief is submitted and approved by Alan Jenkins, Executive Director of The Opportunity Agenda and Project Manager with the Tides Center.

ARGUMENT

In rejecting the Loefflers' claim for monetary damages pursuant to the New York City Human Rights Law (“NYCHRL” or the “City Human Rights Law”), the District Court applied the identical evidentiary requirements for the NYCHRL claim as it did for the Loefflers' claims under the Rehabilitation Act of 1973 and the New York State Human Rights Law, each of which require a showing of intentional discrimination. *Loeffler v. Staten Island Univ. Hosp.*, 95 CV 4549 (SJ), 2007; *4 WL 805802 at 10-11 (E.D.N.Y. Feb. 27, 2007). Specifically, the court stated:

“Analysis of claims asserted under the Rehabilitation Act applies equally to claims asserted under the NYSHRL. . . . The same analysis applies to claims asserted under the NYCCRL [sic]. . . . Therefore [appellants’] claims for damages under the Rehabilitation Act, the NYSHRL, and the NYCCRL [sic] will be evaluated together under the Rehabilitation Act framework.” *Id.* at *4.

The District Court went on to conclude that the Rehabilitation Act framework and, therefore, its interpretation of the City Human Rights Law, required the Loefflers to demonstrate, inter alia, that “the failure to provide services was due to intentional discrimination.” *Id.* at *4.

That conclusion was legally incorrect in at least two respects. The District Court erred both in holding that the City Human Rights Law is coterminous with the federal Rehabilitation Act and New York State Human Rights Law, and in concluding that a damages claim under the City Human Rights Law requires evidence of discriminatory intent. The text and history of the City Human Rights

Law clearly demonstrate the greater breadth of that law and its coverage of policies with unjustified discriminatory *effects*, irrespective of discriminatory intent. In addition, the broader reading of the City Human Rights Law prescribed by the New York City Council is necessary to address adequately the range of contemporary discrimination of concern to the Council.

I. The Plain Text and Legislative History of the City Human Rights Law Make Clear that its Protections Extend Beyond State and Federal Law to Prohibit Unjustified Discriminatory Impact as Well as Intentional Discrimination

A. The Plain Text of the City Human Rights Law Requires Broad Construction Independent of Federal and State Law

The District Court ignored the basic canon of construction that any inquiry into the interpretation of a statute must begin with its text. The federal courts have “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54, (1992). When the statutory “language is plain”, the sole function of the courts—at least where the disposition required by the text is not absurd—“is to enforce it according to its terms.” *Arlington Cent. School Dist. Board of Education v. Murphy*, 548 U.S. 291, 303, (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, (2000) (in turn quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 290 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, (1917)); see also *United States v. Venturella*, 391 F.3d 120, 125 (2d Cir. 2004) (“Well-established principles of

construction dictate that statutory analysis necessarily begins with the ‘plain meaning’ of a law’s text and, absent ambiguity, will generally end there.” (quoting *Collazos v. United States*, 368 F.3d 190 (2d Cir. 2004))). The New York Court of Appeal has similarly stated that the “[t]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory ‘language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words’ used.” *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (quoting *People ex rel. Harris v. Sullivan*, 74 N.Y.2d 305, 309 (1989); see also *City of New York v. Les Hommes*, 94 N.Y.2d 267, 273, (1999) (regarding the need to show “a healthy respect for the plain language employed” and where finding the language of a New York City ordinance to be clear, holding that “[i]n the end, we must enforce the City’s administrative guidelines as written”).

In this case, the text of City Human Rights Law, as modified by the Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 of 2005, (hereafter the “Restoration Act”), states unambiguously that the City Human Rights Law is to be construed to grant broader protection against discrimination than either state or federal anti-discrimination laws.

The City Human Rights Law was originally enacted in 1965. After the 1991 passage by the New York City Council of amendments to the City Human Rights Law intended to broaden its reach, a number of federal district courts nonetheless interpreted claims under the law as coterminous with those under federal and state anti-discrimination statutes. *McGrath v. Toys “R” Us, Inc.*, 788 N.Y.S.2d 281

(2004), *Forrest v. Jewish Guild for the Blind*, 786 N.Y.S.2d 382 (2004), *Levin v. Yeshiva Univ.*, 730 N.Y.S.2d 15 (2001), *Priore v. New York Yankees*, 761 N.Y.S.2d 608 (1st Dep’t 2003). In response, the New York City Counsel acted explicitly and definitely to clarify the independent and broader coverage of the City law. On October 3, 2005, the City Council enacted the “Local Civil Rights Restoration Act of 2005,” N.Y.C. Local Law No. 85 of 2005, with the express purpose of “clarify[ing] the scope of New York City’s Human Rights Law.”¹ *Id.* at §1. Section 1 of the provision declares:

“It is the sense of the Council that New York City’s Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City’s Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.” *Id.*

¹ As noted by the district court, the Restoration Act was passed on October 3, one day before appellants filed their opposition to the motion for summary judgment on October 4. Although the district court expressed timeliness concerns as to parties’ supplementary papers addressing the Restoration Act, the court nonetheless considered the submissions of both parties on the Act, and purported to construe the City Human Rights Law as amended. Additionally, because the provisions of the Restoration Act simply clarify the meaning of the pre-existing protections of the City Human Rights Law, New York state courts have thus determined that the provisions of the Restoration Act are entitled to retroactive application. *Yanai v. Columbia Univ.*, 2006 N.Y. Misc. LEXIS 2407, at *7 (Sup. Ct. N.Y. County 2006); *Sorrenti v. City of New York*, 2007 N.Y. Misc. LEXIS 6487, at *13 (Sup. Ct.N.Y. County 2007).

Regarding public accommodations, Section 3(4) of the Restoration Act reasserted, among other things, the existing prohibition on, “directly or indirectly,” withholding from, refusing or denying to any person “any of the accommodations, advantages, facilities or privileges thereof,” because of that person’s actual or perceived protected classification, adding “partnership status” to the list of covered classifications.

Section 7 of the Restoration Act amended the administrative code of the City of New York to provide: “The provisions of this *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.*” (emphasis in the Restoration Act). In short, the New York City Council could not have been more explicit in its textual mandate that the City Human Rights Law be construed both independently of comparable state and federal statutes, and liberally to achieve its “uniquely broad and remedial purposes.” “Where [words] are plain, and their meaning certain, there can be no doubt that in construing it [the Court] must give the words their full effect.” *Smith v. Turner*, 48 U.S. 283, 294, at *24 (1849); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) (following the plain meaning where the words are clear).

As amended by the Restoration Act, the City Human Rights Law, in express language, requires courts interpreting this law “to take seriously the requirement that this law be liberally and independently construed.” Council Report of Governmental

Affairs Div., Comm. on Gen. Welfare, Aug. 17, 2005, at 2 (2005) [hereinafter “Council Report”] (quoting Remarks by Mayor David N. Dinkins at public hearing on Local Laws, June 18, 1991, at 1). It states unambiguously that “[t]he provisions of this title shall be construed liberally for the accomplishments of the uniquely broad and remedial purposes thereof” NYCHRL §8-130. The Restoration Act emphasizes the need for compliance with the principle of liberal construction, explaining that the City Human Rights Law “has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.” N.Y.C. Local Law No. 85 of 2005 §1. The language of the City Human Rights Law and the Restoration Act, taken together, reflect the City Council’s explicit intention for courts to apply independent and liberal construction, interpreting the law broadly to provide the most robust and rigorous protection against discrimination for those in New York City.

Thus, the District Court clearly erred in construing the City Human Rights Law identically with the New York State Human Rights Law and the federal Rehabilitation Act. Contrary to the District Court’s ruling, the text and history of the City Human Rights Law required independent construction in which the state and federal provisions represented merely a “floor” below which coverage could not fall. Local Law No. 85 of 2005 §1.

The District Court relied on *Mohamed v. Marriott Int’l, Inc.*, 905 F.Supp. 141, 157 (S.D.N.Y. 1995) in holding that claims under the City Human Rights Law should be analyzed under the same framework as the Rehabilitation Act and New

York State Human Rights Law. *Loeffler*, 2007 WL 805802 at *4. The *Marriott Int'l* court held that “[t]he wording of the city ordinance and the manner in which it has been applied show a clear intent to parallel the obligations and the remedies provided by the State of New York and the United States.” *Marriott Int'l, Inc.*, 905 F.Supp. at 157. Whatever the validity of *Marriott Int'l* when it was decided in 1995, it was plainly inapplicable in 2005 when the District Court rendered its decision in this case. Indeed, *Marriott Int'l* represents precisely the type of narrow construction that the New York City Council explicitly rejected through passage of the Restoration Act. N.Y.C. Local Law No. 85 of 2005 §1. Because the Restoration Act, passed in 2005, expressly rejects a coterminous reading of the City Human Rights Law and “similar or identical” state and federal civil rights laws, *Marriott Int'l's* 1995 holding is inapposite, and the district court erred in relying upon it.

In footnote 5 of the District Court’s decision, the Court found that given a lack of controlling precedent to the contrary, there was no need to analyze the Loefflers' City Human Rights Law claim independently. *Loeffler*, 2007 WL 805802, at *4, n.5 (asserting that the Loefflers could not point to, nor did the court find, controlling precedent “that materially alters the analysis of [appellants’] NYCRL [sic] claims as discussed below”). However, where, as here, the text of the provision is clear as to proper construction, there is no need for controlling precedent. That the interpretation of the statute in this particular context, and as amended by the Restoration Act, was a matter of first impression did not alter the District Court’s obligation to adhere to the City Council’s explicitly stated intent regarding the law’s

interpretation. The District Court thus ignored the principle that, “when a statute speaks with clarity to an issue, judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished.” *Metropo. Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

Moreover, while there was no controlling post-Restoration Act precedent on the precise point at issue, the Loefflers did correctly point to several state court decisions that call for independent and liberal construction of the City Human Rights Law. Plaintiffs’ Reply Memorandum of Law in Opposition Upon the Passage of the “Restoration Act” Amending the New York City Human Rights Law (citing, *e.g.*, *Farrugia v. North Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 724 (Sup. Ct. N.Y. County 2006) (“The [NYCHRL] was intended to be more protective than the state and federal counterpart.”); *Jordan v. Bates Adver. Holdings, Inc.*, 816 N.Y.S.2d 310, 317 (Sup. Ct. N.Y. County 2006); *Pasaturo v. Home Sewing Ass’n*, Index No. 100018/04, at 33-34 (Sup. Ct. N.Y. County 2006); *Yanai v. Columbia Univ.*, 2006 N.Y. Misc. LEXIS 2407, at *7)). Indeed, in *Bates Advertising*, the state court recognized the express intent of the City Council to overturn pre-Restoration Act decisions that applied federal civil rights law standards to the City Human Rights Law:

Although New York state courts have applied the same standards as federal courts in considering employment discrimination claims, in enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this court is bound to honor. The Administrative Code’s legislative history clearly contemplates that the New

York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation. Thus, the case law that has developed in interpreting both the state Human Rights Law and title VII of the Civil Rights Act of 1964 should merely serve as a base for the New York City Human Rights Law, not its ceiling.

Bates Adver. Holdings, 816 N.Y.S.2d at 317 (citations omitted). These decisions by state courts on an issue of local law are strongly persuasive on the question of the law's independent construction. Given the District Court's finding of no controlling precedent, that court erred in failing to conduct an independent analysis of the City Human Rights Law's meaning.

The City Human Rights Law, as amended, does not require a court to accept a particular interpretation, but only requires that the court consider the NYCHRL claim independently with the objective of advancing the purposes of the law. Neither the NYCHRL nor the Restoration Act preclude a court from reaching the same result to which an interpretation under a similar federal or state civil rights law would lead, so long as the court engages in independent construction and concludes that the interpretation utilized best serves the broad remedial purposes of the NYCHRL. Independent construction is not a new or burdensome task for courts considering civil rights claims. Indeed, Congress anticipated the co-existence of federal anti-discrimination law with local laws that would provide broader and different protections. It inserted explicit provisions disclaiming preemption of state and local law in the public accommodations and employment sections of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-6(b), 2000e-7; the Fair Housing Act, 42 U.S.C. §3615; and the Americans with Disabilities Act, 42 U.S.C. §12201(b).

B. The Legislative History of the City Human Rights Law Confirms that New York City Rejected Restrictive Interpretations of the City Law that Limited Its Reach to that of Federal and State Law

Insofar as the text of the City Human Rights Law is not sufficiently clear, the court should look to its legislative history, which similarly requires a broader reading of the provision than the district court afforded it. *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) (“When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history.”), followed by *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338 (2d Cir. 2006); *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2007) (“If the [plain] meaning of a statute is ambiguous, the court may resort to legislative history to determine the statute’s meaning . . .”).

The legislative history in this case similarly points to a broad and independent reading of the City Human Rights Law. When, after the 1991 amendments to the City Human Rights Law, some courts continued to interpret that law as coterminous with state and federal anti-discrimination provisions, *McGrath*, *Jewish Guild for the Blind*, *Levin v. Yeshiva Univ.*, *Priore*, the City Council enacted the Restoration Act to “clarify” the city law’s “progressive,” “broad and remedial” construction. Local Law No. 85 of 2005 §§1, 7; Council Report, at 2.

Legislative committee reports are the authoritative source of the legislature’s intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Thornburg v. Gingle*, 478 U.S. 30, 43 n.7 (1986). Here, the Report of the Committee on General Welfare

strongly reinforces the plain meaning of the statute's text. The Report explains that the Restoration Act

aims to ensure construction of the City's human rights law in line with the purposes of fundamental amendments to the law enacted in 1991. . . . "a human rights law that is the most progressive in the nation. . . . [T]here is no time in the modern civil rights era when vigorous local enforcement of anti-discrimination laws has been more important. Since 1980, the federal government has been steadily marching backward on civil rights issues."

Council Report, at 2 (quoting Remarks by Mayor David N. Dinkins at public hearing on Local Laws, June 18, 1991, at 1-2). The City Council intended for the City Human Rights Law to be "the most progressive in the nation" and created a law intended to provide greater protection than federal civil rights jurisprudence after 1980. This comports with New York City's long tradition of extending human rights and anti-discrimination protections beyond those provided by state and federal law. *See, e.g., N. Y. State Club Ass'n. v. City of New York*, 487 U.S. 1 (1988) (upholding New York City prohibition of discrimination by private clubs against First Amendment challenge); NYCHRL §8-107(1), (2), (4), (5), (9), (18) (prohibiting discrimination based on sexual orientation or domestic partner status).

A review of testimony heard by the Committee on General Welfare reinforces the fact that the core purpose of the Restoration Act is to require independent and broad interpretation of all of the law's protections. Testimony by the respected Brennan Center for Justice at New York University School of Law explained that the Restoration Act was a more effective approach than "for the Council to limit itself to specifically overruling individual interpretations it finds unduly restrictive,"

particularly because courts had previously disregarded such specific changes to the NYCHRL in the past, as in the case of the Council’s 1991 amendments to the law. Local Civil Rights Restoration Act of 2005: Hearing on Prop. Int. No. 22-A Before the Comm. On Gen. Welfare, N.Y. City Council, July 8, 2005 (statement of the Brennan Center for Justice at New York University School of Law) (citing *Gurry v. Merck & Co.*, 2003 U.S. Dist. LEXIS 6161 (S.D.N.Y. Apr. 11, 2003) (treating the City law retaliation claim as identical to a more restrictive federal rule finding only “material” harm actionable)); *Priore*, 761 N.Y.S.2d 608 (1st Dept. 2003) (limiting employment discrimination liability to that proscribed by the State Human Rights Law, despite a more expansive proscription created by a 1991 NYCHRL amendment). The Association of the Bar of the City of New York testified that specific amendments, such as those in the Restoration Act relating to retaliation and discrimination against domestic partners, “should no longer be necessary after [the Restoration Act] is enacted because [the Restoration Act] requires courts to construe the City’s Human Rights Law independently and in light of the Council’s clear intent to provide the greatest possible protection for civil rights.” Letter from Bettina B. Plevan, President, Association of the Bar of the City of New York, to Gifford A. Miller, Speaker, New York City Council 4 (Aug. 1, 2005).

C. The Text of the City Human Rights Law Explicitly Imposes Liability for Practices that Have a Disparate Impact, Regardless of Discriminatory Intent

The same text and legislative history make clear that, contrary to the District Court’s holding, the New York City Human Rights Law does not require a showing

of discriminatory intent. In analyzing appellants' claim under the City Human Rights Law, the District Court erroneously applied the more restrictive standard of proof that is applicable under the federal Rehabilitation Act:

To prevail on a claim for monetary damages pursuant to the Rehabilitation Act, a plaintiff must show that (1) he is handicapped as defined in the Rehabilitation Act, (2) he is otherwise qualified for the service sought, (3) he was excluded from the service due to his handicap, and (4) *the failure to provide services was due to intentional discrimination.*

Loeffler, 2007 WL 805802, at *4 (emphasis added) (citing *Bartlett v. N.Y. State Bd. Of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998)).

That interpretation was contrary to the plain text of the City Human Rights Law, particularly as amended by the Local Civil Rights Restoration Act of 2005. The City Law, as amended, plainly outlaws policies and practices with a discriminatory or disparate *impact*, and does not require a showing of discriminatory intent. Section 8-107(17)(a) of the City Human Rights Law provides, *inter alia*, that:

“An *unlawful* discriminatory practice based upon disparate impact is established when: 1) the [Human Rights] commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and (2) the covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact....” (emphasis in original).

It is both well established and clear from the foregoing language that the term “disparate impact” connotes the predication of liability based on policies or practices with an unjustified discriminatory *effect*, with no required showing of discriminatory

intent. *See, e.g., Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232-41 (2005) (explaining that “disparate impact” claims under Title VII of the Civil Rights Act of 1964 do not require evidence of discriminatory intent and finding that certain disparate impact claims are cognizable under the Age Discrimination in Employment Act); *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 574-75 (2d Cir. 2003) (explaining that in “disparate impact claims” under the Fair Housing Amendments Act and Americans with Disabilities Act, “plaintiff need not show the defendant’s action was based on any discriminatory intent,” quoting *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir. 1988)).²

Sec. 8-502 of the City Human Rights Law provides that “any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title . . . shall have a cause of action in any court of competent jurisdiction for

² Federal burden-shifting rules relating to disparate impact of discrimination in public accommodations may prove a useful framework to begin an analysis of the NYCHRL. For example, the Title VI disparate impact scheme requires that: (1) plaintiff demonstrate by preponderance of evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI; (2) defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability; and (3) if the defendant carries this rebuttal burden, the plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the defendant’s proffered justification is a pretext for discrimination. *S. Bronx Coal. for Clean Air v. Conroy*, 20 F. Supp. 2d 565 (S.d.N.Y. 1995), citing *Elston V. Talladega County Bd. Of Educ.*, 997 F.2d 1394 (11th Cir. 1993). This overlays well with the NYCHRL disparate impact language, which requires first a showing that a policy or practice results in disparate impact to the detriment of a protected group, then allows for an affirmative defense of significant business objective or that the policy or practice in question does not contribute to disparate impact, and finally allows plaintiff to still prevail where showing substantial evidence that an alternative policy or practice with less disparate impact is available to defendant. NYCHRL § 8-17(17)(a).

damages, including punitive damages.” NYCHRL §8-502. Chapter One of the City Human Rights Law finds an activity “an unlawful discriminatory practice for any . . . provider of public accommodation” to “directly or indirectly . . . refuse, withhold from or deny . . . [any] accommodations, advantages, facilities or privileges thereof . . . to any person” because of actual or perceived disability, among other protected classifications. §8-107(4). Chapter One also provides that an “unlawful discriminatory practice” is established when a person bringing an action “demonstrates that a policy or practice of a covered entity . . . results in a disparate impact to the detriment of any group protected by the provisions of” the NYCHRL. §8-107(17). The canon of statutory construction that “identical terms within an Act bear the same meaning” applies here. *Reno v. Koray*, 115 S. Ct. 2021, 2026 (1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)); see also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (“[A] term should be construed, if possible, to give it consistent meaning throughout the Act.”). “[U]nlawful discriminatory practice” is used to define both disparate impact, N.Y.C.H.B.L. §8-107(17), and denial of public accommodations generally, §8-107(4), and thus the guarantee of a cause of action for damages to “any person claiming to be aggrieved by *an unlawful discriminatory practice*,” §8-502 (emphasis added), applies equally to claims of practices with disparate impact and general claims of denial of public accommodations.

Thus, under the terms of the Act, a practice with a disparate impact is an “unlawful discriminatory practice” just as intentional discrimination is, and is

equally subject to monetary damages under the Act. An independent reading of the text finds that a cause of action for monetary damages is available where a policy or practice results in a disparate impact on any classification covered in the NYCHRL. While courts are also free to use federal and state law standards to aid in interpretation of NYCHRL claims, such federal and state law frameworks are to be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Law No. 85 of 2005 § 1. The District Court erred in failing to analyze whether, in a light most favorable to the appellants, the non-moving party, there exist genuine issues of fact as to whether the policy and practice of appellee resulted in discriminatory effects.

D. The Legislative History of the City Human Rights Law Reveals that the City Council Specifically Imposed Disparate Impact Liability to Increase the Reach of the City Law Beyond Federal and State Liability Standards

In the Report of the Committee on General Welfare, the City Council set out a number of principles to guide courts' independent analysis of claims under the City Human Rights Law:

[D]iscrimination should not play a role in decisions made by . . . providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation.

Council Report, at 5.

Courts should uphold the City Council's legislative intent and enforce the plain meaning of the text with regard to the legitimacy of claims for monetary

damages due to discriminatory effects. A reading of the City Human Rights Law that excludes discriminatory impact claims for damages would repeat the very narrowing of the law's protections that the Restoration Act was intended to overrule.

Congress excluded damages in Title VII disparate impact cases through the Civil Rights Act of 1991, Pub. L. 102-166, §102(a). At the same time, Mayor Dinkins, in signing the 1991 amendments to the City Human Rights Law that contained no such exclusion of disparate impact cases seeking damages, noted the City's view that "[s]ince 1980, the federal government has been steadily marching backward on civil rights issues." Remarks by Mayor David N. Dinkins at public hearing on Local Laws, June 18, 1991, at 2. In 1983, the U.S. Supreme Court had held that, although discriminatory intent was not an essential element of a Title VI violation, a private plaintiff could not receive compensatory or punitive damages where disparate impact had been shown but discriminatory intent had not. *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 584 (1983). Rather than enshrining this distinction between intent and impact, as Congress did in 1991, the City Human Rights Law maintained violations of discriminatory intent and discriminatory impact as co-equal forms of unlawful discriminatory practices, NYCHRL §§ 8-107(1)-(20), with each creating a cause of action in any competent jurisdiction for damages, including punitive damages. NYCHRL §8-502(a). This Court should thus recognize that the text and history of the City Human Rights Law has among its "uniquely broad and remedial purposes" liability for damages for

successful claims brought under theories of either discriminatory intent or discriminatory effects.³

The District Court thus erred in holding that a claim for damages under the City Human Rights Law must meet the fourth element of the Rehabilitation Act framework by alleging or demonstrating intentional discrimination.

II. The City Human Rights Law's Prohibition of Unjustified Discriminatory Effects is Well Crafted to Address the Complex Nature of Contemporary Discrimination

The City Human Rights Law contains unique protections-including the right to a private action for damages for disparate impact violations-that allow New York City to effectively address modern discrimination. Intentional discrimination on the basis of disability, gender, race and ethnicity are now prohibited by federal, state, and local laws, and are understood by the vast majority of Americans as repugnant to our shared national values of equality. However, deeply entrenched, systemic problems of discrimination endure.

The broader interpretation of the City Human Rights Law, as distinct from state and federal provisions, recognizes New York City's intention to address complex, structural discrimination proactively and thoroughly by addressing both intentional discrimination and practices with discriminatory effects. That coverage

³ Similarly, the City Human Rights Law should be construed independently of *Alexander v. Sandoval*, 532 U.S. 275 (2001), which eliminated a private right of action for disparate impact violations of Title VI regulations by entities receiving federal funds.

responds to the current reality of discrimination, and is consistent with international human rights law principles.

A. The Social Science Consensus Regarding Contemporary Discrimination Strongly Reinforces the Need for the City Human Rights Law’s Broad Coverage of Unjustified Discriminatory Effects

Courts have long considered prevailing social science research on the nature of contemporary racial discrimination relevant to the interpretation of anti-discrimination laws. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (citing social science research by Dr. Kenneth B. Clark and others for the proposition that racial segregation is harmful to children, noting “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority”); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding diversity in higher education to be a compelling governmental interest based, in part, on social science research, noting “[i]n addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'”) (citations omitted)(quoting Brief for American Educational Research Association et al. as Amici Curiae 3; *see, e.g.,* W. Bowen & D. Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (G. Orfield & M. Kurlaender eds. 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (M.

Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).). In this case, the social science consensus clearly supports the broader interpretation adopted by the New York City Counsel, particularly in the health care sector at issue in this case.

Overwhelming social science research indicates that, while levels of overt and conscious discrimination in our society have declined significantly, subconscious or “implicit” bias, particularly against racial minorities, remains a significant obstacle to equal opportunity. *See generally*, Kristin Lane, Jerry Kang, and Mahzarin Banaji, *Implicit Social Cognition and Law*, Annual Review of Law & Social Science, Vol. 3, December (2007).

Implicit bias has been found to affect the quality of care that patients of color receive in the health care setting. Illustrative is a recent study finding that subconscious racial bias in physicians was linked with their tendency to treat white hypothetical patients -- but not similarly-situated black hypothetical patients -- with thrombolysis when each were in the midst of a heart attack. A.R. Green, et al., *Implicit bias among physicians and its prediction of thrombolysis decisions for black and white patients*, 22 J. Gen. Internal Med. 1231, 1231-38 (2007). More broadly, a congressionally-mandated study of racial and ethnic disparities in health care conducted by the Institute of Medicine of the National Academies found growing social science evidence that “implicit” bias by health care providers is one of the many factors contributing to the unequal health care received by many minority patients. Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Healthcare*, The National Academies Press, 162-179 (2003). The

same study noted that “the application of Title VI [of the Civil Rights Act of 1964] beyond intentional discrimination to include policies that may create disparate racial impacts could be an important tool for civil rights enforcement.” *Id.* at 158. The City Human Rights Law was intended to provide just such protection, and should be so construed.

B. The International Human Rights System Is in Consensus That the Only Effective Way to Address Contemporary Discrimination Is By Prohibiting Both Discriminatory Intent and Unjustified Discriminatory Effects

Federal courts have found international human rights laws relevant in determining the substance of domestic laws protecting similar individual rights. For example, while noting that “the task of interpreting” domestic law remains the purview and responsibility of U.S. courts, the U.S. Supreme Court has recognized the value of international authority as “instructive for its interpretation” of the law. *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005); *see also Grutter v. Bollinger*, 539 U.S. 306, 342-43 (J. Ginsburg, concurring) (noting the international understanding of the need for and limits to affirmative action embodied in the international Convention on the Elimination of All Forms of Racial Discrimination).

As in *Grutter*, the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”) is informative, though not controlling, in the case at bar. In particular, CERD’s goal of “speedily eliminating racial discrimination...in all its forms and manifestations and of securing

understanding of and respect for the dignity of the human person” mirrors New York City’s desire for a broad remedial prohibition on discrimination within its borders.

The consensus of the international system, particularly as embodied by CERD, is that addressing both discriminatory impact and discriminatory intent is necessary to eliminating and remediating discrimination. Ratified by the United States in 1994, State Dep’t, Treaties in Force 422-423 (June 1996), CERD requires state parties to amend “laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists,” and requires states to guarantee access to courts and “adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” International Convention on the Elimination of all Forms of Racial Discrimination arts. 2, 6, Dec. 21, 1965, 5 I.L.M. 350, 660 U.N.T.S. 195 (emphasis added).

CONCLUSION

The Opportunity Agenda respectfully submits that the decision of the District Court with regard to the construction of the City Human Rights Law should be reversed and the case remanded for consideration consistent with the requirements and goals of the City Law.

Dated: February 28, 2008

The Opportunity Agenda

Alan Jenkins by VCW
By /s/ Alan Jenkins Esq.

**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)**

Pursuant to Fed. R. App. P. 32(a)(7), I, Alan Jenkins, counsel for amicus curiae The Opportunity Agenda, hereby certify, in reliance on the word-count function performed by WordPerfect 9.0 on February 27, 2008, that the BRIEF OF THE OPPORTUNITY AGENDA AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS'-APPELLANTS' REQUEST FOR REVERSAL complies with the type-volume limitation of Fed. R. App. P. 29(d) and contains 6,783 words, excluding those portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) in that it has been prepared in a 12-point Times New Roman font.

Dated: February 28, 2008

Alan Jenkins by VCW
/s/ Alan Jenkins Esq.
Alan Jenkins Esq.

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1)(E)
(ANTI-VIRUS CERTIFICATION)**

Pursuant to Local Rule 32(a)(1)(E), I, Alan Jenkins, counsel for amicus curiae The Opportunity Agenda, hereby certify that the Portable-Document-Format version of the BRIEF OF THE OPPORTUNITY AGENDA AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS'-APPELLANTS' REQUEST FOR REVERSAL that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov. was scanned for viruses and that no viruses were detected. We used the Trend Micro Office Scan, Version 7.0, anti-virus detector.

Dated: February 28, 2008

Alan Jenkins by VCW
/s/ Alan Jenkins Esq.
Alan Jenkins

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT A. LOEFFLER ET AL. :
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Plaintiffs-Appellants, :
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-against- : Docket No. 07-1404-CV
 :
STATEN ISLAND UNIVERSITY HOSPITAL :
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Defendant-Appellee. :
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CERTIFICATE OF SERVICE


I, Vaughn C. Williams, hereby certify that, this 28TH DAY OF February 2008, I caused two copies each of the BRIEF OF THE OPPORTUNITY AGENDA AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS'-APPELLANTS' REQUEST FOR REVERSAL to be served on the following counsel of record by Federal Express and one copy by electronic mail to the following addresses:

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