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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

TERRY NEWSON,

Plaintiff-Respondent,

—against—

VIVALDI REAL ESTATE LTD.,

Defendant,

JASON HOROWYTZ and STEPHANIE DWAN,

Defendants-Appellants.

CASE NO. 2024-00261

BRIEF OF *AMICI CURIAE* COALITION FOR THE HOMELESS, TENANTS & NEIGHBORS, AND UNLOCK NYC IN SUPPORT OF PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

In this appeal, Defendants-Appellants Jason Horowytz and Stephanie Dwan argue that the New York City Human Rights Law ("NYCHRL") does not impose vicarious liability on owners of housing accommodations for the discriminatory conduct of their real estate brokers. Their flawed reading of the City's antidiscrimination statute would weaken fair housing protections in New York and make it more difficult to hold discriminating landlords to account. The Court should reject their arguments and affirm the lower court's Decision and Order dated December 21, 2023.

This is an issue of first impression in this Court, but courts interpreting the NYCHRL's federal and state fair housing counterparts have considered—and consistently rejected—Defendants-Appellants' position. Under the Fair Housing Act ("FHA") and the New York State Human Rights Law ("NYSHRL"), vicarious liability rules make principals liable for the conduct of their agents acting within the scope of their authority. This is a bedrock principle of fair housing law. Landlords whose brokers discriminate, whether due to the landlords' instruction or otherwise, cannot be shielded from liability simply because they did not themselves participate in the discriminatory conduct. And landlords are incentivized to carefully select their agents to ensure they comply with fair housing laws. As the Second Circuit has explained, vicarious liability rules in fair housing

law "increase the costs [to landlords] of using brokers who discriminate, and thereby potentially reduce such discrimination." *Cabrera v. Jakabovitz*, 24 F.3d 372, 388 (2d Cir. 1994).

Defendants-Appellants' view—that landlords are not liable for the actions of their agents under the NYCHRL—would turn those principles on their head. Their position is particularly inapt in New York City, where most applicants for housing, including *Amici Curiae*'s members and clients, never communicate or interact with a landlord. As explained below, applicants for housing in New York instead typically communicate with a landlord's agent, usually a third-party real estate broker, who acts on the landlord's behalf, conveying the landlord's pricing terms and rental policies to acceptable prospective tenants and rejecting unacceptable prospective tenants. If the Court were to accept Defendants-Appellants' argument, landlords would be insulated from liability unless they were found to have personally and directly discriminated against a prospective tenant.

Such a result would undermine the key remedy provided under the City's fair housing laws for prospective tenants who have been subjected to discrimination: obtaining an apartment, either through an injunction or an out-of-court settlement. Severely limiting this remedy would fundamentally undercut the NYCHRL's uniquely broad and remedial purposes and would reduce the statute to a much-diminished version of the federal law that it was intended to expand upon.

Put simply, a ruling in Defendants-Appellants' favor would be a major step backward for civil rights in New York. Although appellate courts have not expressly addressed vicarious liability under the NYCHRL's fair housing provisions, the New York City Commission on Human Rights currently interprets and enforces the statute against landlords pursuant to vicarious liability rules consistent with the law's federal and state counterparts.

For the reasons in Plaintiff-Respondent's brief, and for those set forth below, this Court should reject Defendants-Appellants' attempt to impose dramatic limits on New York City's fair housing provisions.

INTERESTS OF *AMICI CURIAE*

The Coalition for the Homeless is the nation's oldest advocacy and direct service organization helping homeless individuals and families. The Coalition has been instrumental in establishing and protecting the right to shelter for homeless men, women, and children in New York City, and has been involved in antidiscrimination efforts in housing since its founding.

Tenants & Neighbors is a membership organization that works to preserve affordable housing in New York State, build diverse communities, and strengthen tenant protections.

Unlock NYC is a not-for-profit organization that helps New Yorkers report and combat source of income discrimination by providing technical support to voucher holders seeking apartments.

The *Amici* were involved in the passage of amendments to the NYCHRL and/or have helped enforce its fair housing provisions. The enforcement of the NYCHRL and the coverage of the its fair housing provisions are of critical importance to these *Amici*'s members and clients, who face discrimination in New York's housing market, particularly source of income discrimination, the type of discrimination at issue in this case.

ARGUMENT

I. Defendants-Appellants' Narrow Reading of the Human Rights Law is Inconsistent with the Restoration Act of 2005 and Local Law 35

As an initial matter, Defendants-Appellants ask the court to adopt a narrower construction of the NYCHRL than its federal and state fair housing counterparts. That result would be inconsistent with the NYCHRL's uniquely broad and remedial mandate.

A. The federal Fair Housing Act and the New York State Human Rights Law impose broad liability on property owners for the discriminatory conduct of their agents.

"It is well established" that the federal Fair Housing Act ("FHA") "provides for vicarious liability," and incorporates tort-related vicarious liability rules that make principals or employers vicariously liable for acts of their agents or

employees in the scope of their authority or employment. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Federal courts have consistently applied such vicarious liability rules to hold property owners liable when their agents discriminate. The scope of liability under the FHA is broad, making owners liable even when they have not instructed their agents to discriminate. In *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994), for example, the leading case in the Second Circuit, the court held that a landlord could be liable for a broker's practice of "steering" non-white applicants to particular properties even though the landlord often "never met with the applicants at any time before they moved in, and instead relied on [the broker] to answer any questions the future tenants might have about the lease." *Id.* at 387. It was enough, the court held, that the defendant landlord supplied brokers with listings and provided instructions for leasing his apartments. *Id. at* 386–88; *see Cleveland v. Caplaw Enters.* 448 F.3d 518, 522–23 (2d Cir. 2006) (holding that landlord could be vicariously liable where plaintiffs alleged that broker performed "servicing and leasing" of the property for the landlord). Federal regulations interpreting the FHA impute liability to persons whose "agent or employee" engages in discriminatory housing practices, "regardless of whether the [principal] knew or should have known of the conduct that resulted in a discriminatory housing practice." 24 C.F.R. § 100.7(b).

Moreover, under the FHA, a landlord does not need to have exercised actual control over their agent to be liable; rather, the landlord need only have the "right to control" the agent by virtue of their ownership of the property. *Khodeir v. Sayyed*, 348 F. Supp. 3d 330, 345 (S.D.N.Y. 2018). Landlords can be vicariously liable for discrimination against tenants whom they have never met. *United States v. Hylton*, 944 F. Supp. 2d 176, 191 (D. Conn. 2013), *aff'd*, 590 F. App'x 13 (2d Cir. 2014). And principals can be liable when they instruct their agents *not* to discriminate and do not closely oversee their agents' operations. *Mancuso v. Douglas Elliman LLC*, 808 F. Supp. 2d 606, 630 (S.D.N.Y. 2011).

The New York State Human Rights Law ("NYSHRL") applies similarly broad liability principles in the housing context.[1] *See State Div. of Human Rights v. Muia*, 176 A.D.2d 1142 (3d Dep't 1991) (holding owner liable under NYSHRL for discriminatory conduct of son who showed apartments and communicated with applicants through telephone service); *A-1 Realty Corp. v. State Div. of Human Rights*, 35 A.D.2d 843, 844 (2d Dep't 1970) (holding real estate company liable for race discrimination by its employee).

[1] The NYSHRL is now even more protective than when these cases were decided. *See Hous. Rights Initiative v. Corcoran Group LLC*, 2024 WL 776827, *2 (Sup. Ct., N.Y. County Feb. 26, 2024) ("While NYSHRL claims used to be analyzed under the more stringent standards of the Fair Housing Act [ ] considering how closely the amended language of the NYSHRL mirrors the NYCHRL courts now analyze these claims under the more liberal standards of the NYCHRL." (quoting *Syeed v. Bloomberg L.P.*, 568 F. Supp. 3d 314, 321 (S.D.N.Y. 2021))).

Property owners and landlords are not *necessarily* liable under the FHA and state law when a broker discriminates. Rather, plaintiffs bear the burden of establishing that an agency relationship exists, which under the FHA depends upon the existence of three factual elements: "(1) 'the manifestation by the principal that the agent shall act for him'; (2) 'the agent's acceptance of the undertaking'; *and* (3) 'the understanding of the parties that the principal is to be in control of the undertaking.'" *Cleveland*, 448 F.3d at 522 (quoting *Cabrera,* 24 F.3d at 385 and citing Restatement (Second) of Agency § 1 cmt. b (1958)). Thus, in order to survive a motion to dismiss, a plaintiff must adequately allege all three elements as to a landlord and its broker and must prove each element in order to prevail at trial.

These vicarious liability principles create critical protections for tenants by holding landlords accountable for their agents' actions, discouraging landlords from discriminating, and enabling those who have faced discrimination to obtain housing, either through court-ordered injunctions or out-of-court settlements.

B. The Restoration Act requires courts to construe the NYCHRL as or more broadly than its federal and state counterparts.

The New York City Council has amended the NYCHRL several times to emphasize that the City's antidiscrimination law must not be interpreted more narrowly than its federal and state counterparts. In 2005, the Council passed into law the Restoration Act, which provided that the NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes

thereof." Local Law No. 85 (2005) of City of N.Y. §§ 1, 7; *see* Administrative Code of City of N.Y. § 8–130(a). This was deemed necessary because "[i]t [was] the sense of the Council that [the NYCHRL] ha[d] been construed too narrowly to ensure protection of the civil rights of all persons covered by the law." Local Law No. 85 (2005) of City of N.Y. § 1. The Restoration Act mandated that "[i]nterpretations 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.*; *see Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (describing the Restoration Act as a "one-way ratchet" to interpreting the NYCHRL "more liberally" than its state and federal counterparts). In 2016, the City Council passed Local Law 35, recognizing several court decisions that affirmed the NYCHRL's broad scope. *See* Local Law No. 35 (2016) of City of N.Y. The Council has also expanded the NYCHRL's housing protections, including by prohibiting discrimination against tenants who use government-subsidized vouchers to pay their rent, *see* Local Law No. 10 (2008) of City of N.Y., and, most recently, making it unlawful to discriminate against certain New Yorkers with criminal records when applying for housing, *see* Local Law No. 24 (2024) of City of N.Y.

Courts have consistently held that the NYCHRL's remedial provisions are broader than its federal counterparts. *See, e.g.*, *Chauca v. Abraham*, 30 N.Y.3d 325, 333 (2017) (holding that standard for punitive damages for discrimination under the NYCHRL requires lower degree of culpability than federal civil rights laws given the NYCHRL's "broad and remedial purpose"); *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 76-77 (1st Dep't 2009) (declining to adopt more stringent "severe and pervasive" test for sexual harassment under NYCHRL from federal law). As the *Williams* court explained, "the Council instructed the courts—reflected in text and legislative history—that it wanted the City HRL's provisions to be construed *more broadly than federal civil rights laws and the State HRL, and wanted the local law's provisions to be construed as more remedial than federal civil rights laws and the State HRL*." *Id.* at 74; *see id.* at 68 ("[The Restoration Act] represent[s] a desire that [the NYCHRL] meld the broadest vision of social justice with the strongest law enforcement deterrent." (citation omitted)); *accord.* Local Law No. 35 (2016) of City of N.Y. § 2 (recognizing *Williams* as having "correctly understood and analyzed the liberal construction requirement[s]" of the NYCHRL). Defendants-Appellants' narrow reading of the NYCHRL would make the NYCHRL significantly less protective than its federal counterpart, a result that would directly conflict with the Council's expressed legislative intent.

II. Brokers, Not Landlords, Are Most Commonly Implicated in Housing Discrimination in New York City Because of their Role in Facilitating Rentals

Separate and apart from the Council's admonition that the NYCHRL must be construed broadly, a narrow construction of the City's antidiscrimination statute would be particularly ill-suited to the realities of New York City's rental market. As explained below, Defendants-Appellants' interpretation of the NYCHRL would effectively exempt most discriminating landlords from liability under the statute.

In New York, rental apartments are typically listed by a broker who enters into an agreement with a landlord, either on an exclusive basis or through open listings whereby multiple brokers show units on behalf of a landlord.[2] As such, landlords usually do not communicate directly with prospective tenants. Instead, they set criteria for rentals that brokers or agents then convey to renters when reviewing applications and interacting directly with prospective tenants.[3] Indeed, broker rentals are by far the most common way to lease an apartment. According to a recent search on the popular apartment listing website StreetEasy, out of 11,132 apartments in New York City listed at the end of April 2024 for rent, only

[2] *See, e.g.*, Emily Nonko, *NYC Rental Brokers: Why They Exist and How to Work With Them*, Curbed, May 11, 2016, available at https://archive.curbed.com/2016/5/11/11656154/rental-broker-nyc-advice (accessed Apr. 23, 2024) (explaining that "[o]utside of New York, apartments are regularly rented between the owner and tenant, without any agent involved" but that "in New York, it's typical for both the apartment owner and the potential renter to be represented by agents, who then take fees for securing the space").

[3] *See id.*

175 were listed by the owner or landlord, or less than two percent; more than 98 percent were listed by a broker or agent.[4]

As a result, when rental applicants experience housing discrimination, it is usually by an agent or a broker, not a landlord, even though the landlord frequently sets the relevant discriminatory policy. Since January 2021, *Amicus* Unlock NYC has maintained a database of allegations of source of income discrimination that has grown to include over 2,000 complaints. The vast majority of voucher holders report experiencing discrimination by a broker or an agent, not a landlord. Of the 1,393 individuals identified by Unlock NYC as having allegedly committed source of income discrimination during phone calls or text exchanges, 86 percent worked for a brokerage firm and identified themselves as licensed real estate salespersons, brokers, or agents. By contrast, only nine percent of respondents alleged to have discriminated were large corporate landlords that employ in-house leasing agents, and just one percent were landlords or owners themselves.

The experiences of New Yorkers illustrate how brokers play a central role in conveying and enforcing a landlord's discriminatory policies. For instance, when a client of the Legal Aid Society in one recent case before the New York City Commission on Human Rights emailed a broker about accepting a voucher in a co-

[4] *See* https://streeteasy.com. (Search criteria: New York City rentals for rent by owner) (accessed Apr. 23, 2024).

op building, the broker said that "the board has never approved vouchers so I can't help you ... I apologize but it's not in my control." Compl. ¶ 9, *McGaney v. Veritas Prop. Mgt. LLC,* No. M-H-G-21-93361 (N.Y. City Comm'n. on Human Rights Jan. 29, 2021). Numerous low-income housing applicants have reported similar instances of alleged discrimination to *Amicus* Unlock NYC's complaint database. For example, in one text exchange reported to Unlock NYC, an apartment applicant with a city-issued voucher texted a broker in November 2023 about an apartment, and the broker responded, "He [the landlord] doesn't accept this voucher only sec 8 sorry … I'm not the landlord." A broker told another applicant in September 2023, "Landlord doesn't accept vouchers;" and, the same month, a different broker said, "im sorry, owner is not accepting [vouchers]." In *Housing Rights Initiative v. Compass, Inc.* (No. 21-cv-2221 (S.D.N.Y.)), civil rights testers called dozens of brokers who, in recorded conversations, declined to accept vouchers on behalf of landlords. When asked whether vouchers were accepted, one broker said, "I'm not the landlord but I know that the landlord doesn't accept that," *id.* First Am. Compl. ¶ 116, Dkt. 271; another broker replied, "Oh, no, [the landlord] will not ... She just doesn't. She wants very well qualified people," *id.* ¶ 129; others responded: "We do accept [vouchers], but for this apartment, the owner is not going to accept it for this one in particular," *id.* ¶ 135, and, "Unfortunately, yeah, this landlord doesn't accept Section 8. I'm sorry," *id.* ¶

127. As one housing activist and voucher holder told *The New York Times*, "I've had a lot of brokers tell me the reason they don't want to take people with CityFHEPS vouchers is because of the stigma that's attached — historical stigmas of laziness, don't want to work, don't take care of their apartments, don't take care of their children."[5]

Brokers are rarely rogue actors. In New York, a broker is "a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal." *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 (2001). As agents who have consented to act on behalf of a landlord and subject to its control, *see Meyer*, 537 U.S. at 285, brokers are legally and ethically obligated to act on the landlord's behalf, even when they are not officially employees of the landlord. New York law requires the broker to obtain authorization from the property's owner before posting property information. 19 NYCRR 175.25(b)(2)(i) (providing that "[n]o property shall be advertised unless the real estate broker has obtained authorization for such advertisement from the owner of the property"). And brokers further have an ethical obligation to represent the interests of the landlord. *See Realtor Code of*

[5] Mihir Zaveri, *Discrimination Weakens Tool for Reducing N.Y. Homelessness, Lawsuit Says*, N.Y. Times, May 25, 2022, available at https://www.nytimes.com/2022/05/25/nyregion/ny-vouchers-homeless-discrimination.html (accessed Apr. 23, 2024).

Ethics, art. 1 ("When representing a . . . landlord . . . or other clients as an agent, [realtors] pledge themselves to protect and promote the interests of their client.").[6]

The upshot is that, absent vicarious liability, landlords would evade liability under the NYCHRL except in the extremely unusual circumstance where they interact directly with a tenant. An owner could successfully move to dismiss a complaint under the NYCHRL unless a plaintiff could allege that the landlord had *themselves* discriminated. Given the particular features of New York's rental market, Defendants-Appellants' interpretation of the NYCHRL would dramatically diminish the statute's reach. Landlords could refuse to comply with the NYCHRL without facing liability so long as they engage a broker to discriminate for them. And critically, individuals who have been discriminated against could not obtain housing as a remedy, either in settlements or court injunctions, because brokers do not have title to the properties they lease and therefore tenant-victims would be unable to obtain that relief from them. *See infra* at 15-18.

III. Owners Are Vicariously Liable for Housing Discrimination Under the NYCHRL

Defendants-Appellants' position is inconsistent with the NYCHRL's fair housing provisions and its legislative history.

[6] *Available at* https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2024-code-of-ethics-standards-of-practice (accessed Apr. 23, 2024).

A. The key remedy for housing discrimination under the NYCHRL is the provision of housing, which requires owner liability.

Under the NYCHRL, the ultimate remedy for refusing to rent or lease a housing accommodation in violation of Section 8–107(5)(1)(a) of the NYCHRL is to make housing available to a prospective tenant. Courts ordering injunctive relief under the NYCHRL have explained the importance of providing housing to an aggrieved tenant, holding that providing housing is necessary because "[e]ven the threat of homelessness constitutes irreparable injury." *See, e.g.*, *Olivierre v. Parkchester Preserv. Co., L.P.*, No. 452058/2022, 2022 WL 18456529, *4 (N.Y. Sup. Ct. July 29, 2022) (ordering landlord to process applicant's application); *Rodriguez v. 308 Hull LLC*, No. 451200/2018, 2018 WL 4698012, *5 (N.Y. Sup. Ct. Oct. 1, 2018) (ordering landlord and broker who denied prospective tenant's application to desist from renting apartment to any other applicant). Injunctive relief awarding housing for a fair housing violation is a "remedy which, to the extent possible, eliminates the discriminatory effects of the improper action." *Irizarry v. 120 W. 70th Owners Corp*., No. 86-3503, 1986 WL 8073, *6 (S.D.N.Y. July 15, 1986).

The provision of housing is the key available remedy under the NYCHRL when an "agent or employee" of an owner discriminates. Specifically, the NYCHRL makes it unlawful:

> (a) . . . for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, *or any agent or employee thereof;*
>
> (1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, height, weight, marital status, partnership status, or immigration or citizenship status of any person or group of persons, or because of any lawful source of income of such person or persons . . .:
>
> (a) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation . . .

Administrative Code of City of N.Y. § 8–107(5)(a)(1)(a) (emphasis added). Upon a finding of discrimination, the order shall require "such affirmative action . . . including but not limited to . . . renting or leasing, or approving the . . . rental or lease of housing accommodations . . . ." *Id.* § 8-120(a)(7).[7] That is, a finding of

[7] The section provides as follows:

> (a) If, upon all the evidence at the hearing, and upon the findings of fact, conclusions of law and relief recommended by an administrative law judge, the commission shall find that a respondent has engaged in any unlawful discriminatory practice . . .the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served . . . an order requiring [the] respondent to cease and desist from such unlawful discriminatory practice . . . . Such order shall require the respondent to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of this chapter . . . . including, but not limited to:
>
> 7. Selling, renting or leasing, or approving the sale, rental or lease of housing accommodations, land or commercial space or an interest therein, or the provision of credit with respect thereto, without unlawful discrimination;
>
> 8. Payment of compensatory damages to the person aggrieved by such practice or act;
>
> […]; and

discrimination by "any *agent*" of a property owner mandates a remedy that may include "approving the . . . rental or lease of [the] housing accommodation[]." *Id.* (emphasis added). Indeed, the only housing-specific remedy provided for in the NYCHRL is the provision of housing. *See id.*

Of course, a broker or agent who has no title to a property cannot themselves make housing available to an aggrieved plaintiff. Only an owner who has title to the property can legally "approv[e] the . . . rental or lease of [the] housing accommodations." Thus, in order to effectuate the NYCHRL's key statutory remedy for housing discrimination, a finding of liability against an "agent or employee" of the landlord requires a finding of liability against the landlord, too.

Defendants-Appellants' position that landlords cannot be vicariously liable for their agents' conduct makes little sense in this context. Absent vicarious liability, the key statutory remedy in the NYCHRL for housing discrimination would be unavailable where an "agent" of an owner, *id.* § 8–107(5), as opposed to the owner itself, discriminates against a prospective tenant. Defendants-Appellants' position would thus effectively put out of reach the ultimate remedy of

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10. Payment of the complainant's reasonable attorney's fees, expert fees and other costs. The commission may consider matter-specific factors when determining the complainant's attorney's fee award […].

Administrative Code of City of N.Y. § 8-120.

the NYCHRL. This would not only undercut the NYCHRL's broad remedial goals; it would defy the basic tenets of statutory construction that a statute "must be construed as a whole and its various sections must be considered together and with reference to each other" and that "a statutory construction which renders one part meaningless should be avoided." *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (internal citations and quotations omitted).

B. The City Council intended to make landlords liable under the NYCHRL

The legislative history of the recent amendments to the NYCHRL further demonstrates the City Council's intent to hold landlords accountable for housing discrimination and make housing available to prospective tenants who have faced discrimination. In 2008, the City Council passed Local Law 10 to amend the NYCHRL to prohibit discrimination on the basis of source of income, the kind of housing discrimination alleged in this case. According to Local Law 10, "some *landlords* refuse to offer available units because of the source of income tenants, including current tenants, plan to use to pay the rent," and "*landlords* discriminate against holders of section 8 vouchers because of prejudices *they* hold about voucher holders." *See* Local Law No. 10 (2008) of City of N.Y. § 1 (emphasis added). As then-Councilmember Bill de Blasio, the chair of the Council's Committee on General Welfare, explained, "I'm proud to be the lead sponsor on [Local Law 10], which prohibits discrimination by landlords against tenants based

on lawful source of income." Mar. 26, 2008 Comm. on Gen. Welfare Hr'g Tr. 2:10-12.[8]

Moreover, the NYCHRL was intended to provide a meaningful remedy for housing discrimination, not just to prohibit it. The Council stated in its announcement of the passage of the law that "[t]his protective legislation will help maximize the *use* of available Section 8 vouchers and help low-income families *access the housing* for which they are eligible."[9] *See also* Dec. 12, 2007 Comm. on Gen. Welfare Hr'g Tr. 5:9-13 (Councilmember Bill de Blasio, stating that "we also want to make sure that people can find affordable housing in an increasingly difficult environment, and we believe that this legislation will help in that effort as well for low-income New Yorkers.").[10] As explained above, absent vicarious landlord liability, this remedy would largely be nullified.

C. Defendants-Appellants' interpretation of the NYCHRL has no basis in law.

[8] Available at https://legistar.council.nyc.gov/View.ashx?M=F&ID=674919&GUID=FCB852D4-1A18-427A-8600-8DFEF0DD4286 (accessed Apr. 23, 2024).

[9] Press Release, New York City Council, *Preserving Access to Affordable Housing, Council Votes to Protect Low-Income Renters from Discrimination* (Mar. 26, 2008), available at https://legistar.council.nyc.gov/View.ashx?M=F&ID=673795&GUID=D658F8B9-9435-4DA6-B89D-F62DB4EFB145 (accessed Apr. 23, 2024).

[10] Available at https://legistar.council.nyc.gov/View.ashx?M=F&ID=673125&GUID=D302380F-E6D1-4D85-A742-EC687B3D9B04 (accessed Apr. 23, 2024).

Defendants-Appellants' alternative interpretation of the NYCHRL is unsupported by the statute or case law. As an initial matter, their reliance on the Court of Appeals' decision in *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450, 461 (2021) is misplaced. *See* Defs.-Appellants Br. 15-17. In *Doe*, the Court of Appeals held that corporate shareholders, agents, limited partners, and employees could not be liable under the NYCHRL as "employers" pursuant to the statute's employment discrimination provisions. *See id.* at 460-62 (analyzing shareholder liability under common-law principles and Section 8–107(13)(b) of the NYCHRL); *see also* Administrative Code of City of N.Y. § 8-107(13)(b) (delineating employer liability under NYCHRL's employment discrimination provisions).[11] Insofar as *Doe* says anything at all about the issue at hand—namely, whether an *owner* or *landlord* of a housing accommodation can be liable for their agents' discriminatory conduct under the NYCHRL's housing provisions—it reinforces the principle that common-law tort principles apply to the statute's antidiscrimination liability

[11] The court in *Doe* explained that Section 8–107(13)(b), the provision of the NYCHRL that addresses employer liability for employment discrimination, distinguishes between "employers" and an individual "employee or agent with managerial or supervisory responsibility," thereby indicating that those latter individuals "are not employers within the meaning of the [NYCHRL]." *Id.* at 459-60. By contrast, Section 8–107(13)(a) addresses employer liability for non-employment related discriminatory practices, including housing discrimination, making employers strictly liable for their employees' and agents' unlawful discriminatory practices. *See infra* at 22.

provisions. *See id.* at 461 (holding that "[t]he text of the City HRL demonstrates no intent to displace [ ] settled legal principles" of common-law tort liability).[12]

Defendants-Appellants also repeatedly assert that a claim under the NYCHRL is "*not* a tort action," and that vicarious liability principles therefore do not apply. Defs.-Appellants Br. 23-25.[13] That argument also misses the mark. Like federal courts interpreting the FHA, New York courts rely on common-law tort principles for assistance in interpreting the NYCHRL. *See, e.g.*, *Doe*, 36 N.Y.3d at 461 (applying common-law principles to determine scope of vicarious liability under the NYCHRL); *Chauca*, 30 N.Y.3d at 331 (importing common law theories of damages when considering punitive damages under the NYCHRL). Whether a harm under the NYCHRL "is" a tort is beside the point; what is relevant

[12] Indeed, the outcome in *Doe* is entirely consistent with vicarious liability rules under the Fair Housing Act. *See Meyer*, 537 U.S. at 286 ("[I]t is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents.").

[13] The cases Defendants-Appellants cite in support of this argument are inapposite. Defendants-Appellants' cases address only whether certain procedural requirements that apply to common-law tort actions against government entities—such as filing a notice of claim with the relevant government agency prior to filing a suit or serving a pre-suit demand—also apply to statutory claims brought under the New York State Human Rights Law or the NYCHRL. Defs.-Appellants Br. 24-25; *see Margerum v. City of Buffalo*, 24 N.Y.3d 721, 721-22 (2015) (holding that filing a notice of claim is a prerequisite to bringing a claim against a city for "personal injury, wrongful death or damage to real or personal property," but not to claims brought under the State Human Rights Law); *Kimmel v. State*, 29 N.Y.3d 386, 395 (2017) (explaining that tort claims against the state can only be brought in the Court of Claims); *Amorosi v. S. Colonie Ind. Cent. Sch. Dist.*, 9 N.Y.3d 367, 371 (2007) (one-year statute of limitations for all non-tort claims under the Education Law applied to the State Human Rights Law). None of them purports to hold that courts should not look to common-law liability principles when interpreting the NYCHRL.

here is that the NYCHRL looks to common-law agency principles for determining the scope of vicarious liability. *Doe*, 36 N.Y.3d at 460 (explaining that the NYCHRL, like a common-law tort action, "imposes vicarious liability on the corporation for torts of its employees and agents committed within the scope of their job duties").

Defendants-Appellants next argue that only "employers" may be vicariously liable for housing discrimination under the NYCHRL because Section 8-107(13)(a) of the statute mentions "employers" but does not specifically refer to "owners of housing accommodations." Defs.-Appellants Br. at 17. That argument is yet another misfire. Section 8-107(13)(a) of the NYCHRL makes employers strictly liable for their employees' unlawful discriminatory practices, including housing discrimination. *Id.* ("An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than [the employment and apprenticeship provisions of the NYCHRL]."); *see Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 480 (2010) (explaining that Section 8-107(13)(a) creates strict liability for employers). Defendants-Appellants fail to explain why Section 8-107(13)'s failure to expressly mention "owners" must be read to exclude "owners" from vicarious liability under an entirely different section of the statute.

Finally, Defendants-Appellants confusingly, and contradictorily, argue that if owners were vicariously liable under the NYCHRL pursuant to common-law liability principles, Section 8-107(13)(a)'s imposition of vicarious liability on "employers" would be "superfluous" because employers are "like *any other owner of a housing accommodation*." Defs.-Appellants Br. 18. That argument does not support their position. Indeed, if they are correct that "owners" *are* employers under the statute, the NYCHRL *would* make owners strictly vicariously liable as "employers" for their agents' conduct pursuant to Section 8-107(13)(a).

IV. The New York City Commission on Human Rights Interprets the NYCHRL to Impose Liability on Landlords

Finally, Defendants-Appellants' interpretation of the NYCHRL is at odds with the New York City Commission on Human Rights' guidance and enforcement of the statute. The Commission is entitled to "great deference" in its interpretations of the NYCHRL. *See Arif v. N.Y. City Taxi & Limousine Comm'n*, 3 A.D.3d 345, 346 (1st Dep't 2004) ("[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference."). The Commission has made clear that it interprets the NYCHRL to impose liability on landlords for the discriminatory conduct of their brokers. Its publicly available guidance to landlords on housing discrimination provides as follows:

> Q: As an owner, am I responsible for the actions of employees, superintendents, independent contractors, brokers, and licensed salespersons working to rent my units?
>
> A: Yes. You are responsible for the actions of anyone who plays a role in processing applications for your rental units, even if that person is not your employee. If you have a number of agents showing your apartments, you should take measures to ensure no one advertises or screens applicants for your property in a discriminatory manner […].

See N.Y. City Comm'n on Human Rights, *FAQ for Landlords: Best Practices for Housing Providers to Avoid Source of Income Discrimination* (Mar. 2023).[14] In its enforcement capacity, the Commission has found owners liable for their agents' discriminatory conduct in published decisions, *see e.g.*, Amended Decision and Order, *Comm'n on Human Rights ex rel. Miladys Agosto v. Am. Constr. Assoc., LLC*, No. M-H-G-15-1031012 (N.Y. City Comm'n on Human Rights Apr. 5, 2017) (holding building owner liable where managing agent refused to accept voucher),[15] and has reached numerous settlements with offending brokers that include liability for landlords.[16]

[14] Available at https://www.nyc.gov/assets/cchr/downloads/pdf/materials/FairHouse_FAQs-Landlord-English.pdf (accessed Apr. 23, 2024).

[15] Available at https://www.nyc.gov/assets/cchr/downloads/pdf/decisions-and-orders/Agosto_D&O_Apr.%205,%202017.pdf (accessed Apr. 23, 2024).

[16] *See, e.g.*, N.Y. City Comm'n on Human Rights, *2021 Settlement Highlights*, https://www.nyc.gov/site/cchr/enforcement/2021-settlements.page (accessed Apr. 23, 2024) ("Landlord Astoria 30 Co. and Broker Pay $61,000 in Civil Penalties for Source of Income Discrimination," explaining that Commission settled with landlords to create set-aside apartments where brokers discriminated against rental applicants).

As *Amici* and undersigned counsel can attest, these vicarious liability rules work. In *Housing Rights Initiative v. Compass, Inc., et al.*, an organizational plaintiff represented by the Legal Aid Society that brought claims under the NYCHRL alleging source of income discrimination has settled with numerous landlords whose brokers refused to accept vouchers; as part of those settlements, landlords have agreed to set aside apartments for homeless New Yorkers with vouchers, including clients of *Amicus* Coalition for the Homeless. These outcomes are consistent with the NYCHRL's text and effectuate its purpose.

CONCLUSION

For the reasons set forth in Plaintiff-Respondent's brief, and for the reasons set forth above, *Amici Curiae* respectfully urge this Court to affirm the lower court's decision and to reject the arguments made by Defendants-Appellants on appeal.

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Respectfully submitted,

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