CTQ-2023-00001
U.S. Court of Appeals for the Second Circuit Docket No. 22-1251-cv

Court of Appeals

of the

State of New York

NAFEESA SYEED,

Plaintiff-Appellant,

– against –

BLOOMBERG L.P.,

Defendant-Respondent.

CONSOLIDATED BRIEF FOR DEFENDANT-RESPONDENT IN RESPONSE TO BRIEFS OF (I) *AMICI CURIAE* STATE OF NEW YORK AND CITY OF NEW YORK AND (II) *AMICI CURIAE* ANTI-DISCRIMINATION CENTER, INC. AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK

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Defendant-Respondent Bloomberg L.P. ("BLP") hereby responds to the amici curiae briefs submitted by the State of New York and City of New York (together, the "Government") and Anti-Discrimination Center, Inc. and National Employment Lawyers Association / New York (together, the "ADC/NELA").

PRELIMINARY STATEMENT

Rather than marshal the political will to amend the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL," together with the NYSHRL, the "HRLs"), the Government amici urge this Court to revise the statutes judicially by adopting a novel reading that would radically increase the class of plaintiffs eligible to sue in New York. The Court should decline the Government's invitation and instead apply the straightforward "impact" test adopted fourteen years ago in *Hoffman v Parade Publications* (15 NY3d 285 [2010]), and applied by the lower courts ever since.

Under *Hoffman*, a plaintiff can sue under the HRLs only if she resides in New York or experiences the impact of a discriminatory act in New York. As this Court explained, that "impact" test is compelled by the HRLs' plain text and confines the statutes "to those who are meant to be protected—those who work in" or live in New York. (*Id.* at 291.)

Plaintiff-Appellant Nafeesa Syeed cannot meet *Hoffman*'s "impact" test because at all relevant times she resided in, worked in, and was present in

Washington, D.C. Her only alleged connections to New York are that her employer for whom she worked in Washington, D.C., was based in New York and that she allegedly inquired about (but did not actually apply for) a reporter position at her company based in New York and applied for an editor position in New York that she does not allege her employer filled at all (let alone with a less-qualified male candidate). Under *Hoffman*, which likewise involved a New York-based employer that purportedly discriminated against a nonresident employee who worked out of state, those facts are insufficient to support an HRL claim because the allegedly discriminatory decision not to promote Syeed had no impact on her in New York. That should be the end of the analysis. Syeed's claims must be dismissed.

The Government amici recognize that Syeed has a *Hoffman* problem. So they propose a novel "impact" theory that Syeed never advanced: Although the alleged discriminatory act had no impact on Syeed in New York, the Government argues, BLP's alleged failure to promote her supposedly had an impact on New York City and New York State by depriving them of Syeed's civic and economic activity. According to the Government, that "impact" on the City and State is sufficient to satisfy *Hoffman*.

To call the Government's position "radical" is an understatement. No court has ever adopted the Government's position. The Government's position is also at

odds with the plain text of the HRLs, which by their terms permit plaintiffs to sue only to vindicate harms to themselves, not harms to New York City or New York State. And the Government's position cannot be reconciled with *Hoffman*, which focused on the impact *on the plaintiff*, not on nebulous harms to the jurisdictions that enacted the HRLs. If adopted by this Court, the Government's "impact-on-the-locale" standard would dramatically expand the class of plaintiffs eligible to bring HRL claims and unnecessarily burden state courts and agencies with complaints brought by individuals with little-to-no connection to New York City or State. There is no indication in the text of the statutes or the legislative history that the enacting legislatures intended such an unusual result.

The position espoused by ADC/NELA is even more radical. They ask the Court to overrule *Hoffman*, stare decisis be damned. As an initial matter, it is completely inappropriate for ADC/NELA in their role as amici to inject this new argument into the appeal. Neither Syeed nor the Government argue that *Hoffman* should be discarded. The Court need not entertain the argument merely because amici took an overly aggressive position in their brief.

In all events, ADC/NELA do not provide any compelling reason to overrule *Hoffman*. Their contention that *Hoffman* was overruled legislatively is demonstrably false. To the contrary, the State Legislature and the City Council have declined to amend the HRLs to address *Hoffman* despite amending other

aspects of the HRLs. That legislative inaction is strong evidence that *Hoffman* was correctly decided and should remain the law. ADC/NELA's complaint that *Hoffman* is unworkable is belied by the fact that the lower courts have had no difficulty applying the "impact" test for more than a decade. As this Court explained, the *Hoffman* rule is "relatively simple for courts to apply and litigants to follow" and "leads to predictable results." (15 NY3d at 291.)

There is simply no compelling justification for overturning *Hoffman*. And *Hoffman* dictates the outcome of this case. Because Syeed did not experience in New York any impact from the alleged discriminatory act, she cannot bring claims under the NYSHRL or NYCHRL.

ARGUMENT

I. *HOFFMAN* RESOLVED THE QUESTION PRESENTED IN BLP'S FAVOR.

The Government amici agree with the parties that *Hoffman* is binding precedent and the most relevant decision pertaining to the Question Presented. They nevertheless argue that *Hoffman* is not dispositive because, unlike Syeed, the *Hoffman* plaintiff did not allege that he was seeking a job located in New York. (Gov. Br. 16–18; *see also* ADC/NELA Br. 6–7.) That is a distinction without a difference. *Hoffman* dictates the outcome of this case because it held that a nonresident plaintiff neither present nor employed in New York does not experience a discriminatory impact in New York and therefore cannot sue for

discrimination under the NYSHRL or NYCHRL. (15 NY3d at 291.) Syeed neither resides nor works in New York, and she has not alleged any facts suggesting that she experienced the impact of any discriminatory decision in New York. Her claim therefore fails under *Hoffman*, as the district court correctly concluded. (A-57–A-64.)

Perhaps recognizing Syeed's *Hoffman* problem, the Government amici seek to inject a new "impact-on-the-locale" theory into the case. In her briefs, Syeed argued that she satisfies *Hoffman* because the alleged decision not to promote her had an impact "on the terms, conditions or extent of [her] employment within the boundaries of New York City." (Syeed Br. 16.) BLP showed in its answering brief why that theory is deficient. (BLP Br. 9–31.) The Government amici now propose a different, novel "impact" theory: In their view, Syeed satisfies *Hoffman*'s "impact" test because BLP's alleged decision not to promote her purportedly had an impact on *New York State and New York City*, even if it had no impact on Syeed in New York.

The Court should not permit the Government amici to raise a new "impact" theory not pressed by Syeed. (*See Lezette v Bd. of Educ.*, 35 NY2d 272, 282 [1974].) And even if it were properly raised, the Government's novel impact-on-the-locale theory does not satisfy the plain text of the HRLs, is inconsistent with

Hoffman, and impermissibly broadens the reach of the HRLs to cover nonresidents who are neither present nor employed in New York.

A. *Hoffman*'s "Impact" Test Turns on Whether the Plaintiff Experienced a Discriminatory Impact in New York.

The *Hoffman* Court adopted a straightforward test governing the geographic reach of the NYSHRL and NYCHRL that centers on the impact of an alleged discriminatory act on the plaintiff. To satisfy *Hoffman*'s "impact" test, a plaintiff must plead that she felt the impact of the alleged discriminatory conduct within the boundaries of New York. (*See* 15 NY3d at 289–91.) It is not enough to allege that a defendant employer resides in the City or State or that a discriminatory decision was made in New York. (*Id.* at 290.) Instead, the "impact" test turns on whether the plaintiff resided, worked, or was physically present in New York when the alleged discriminatory conduct occurred, *i.e.*, whether she experienced the impact of the alleged harm in New York. (*Id.* at 291.) Accordingly, because the *Hoffman* plaintiff worked, resided, and was located in Georgia at the time his New York-based employer terminated him, his NYSHRL and NYCHRL claims were not viable. (*Id.* at 292.)

The *Hoffman* Court noted that this "impact" test would ensure that the HRLs applied only to those individuals the laws were intended to protect. (*Id.* at 291.) Moreover, the test is "relatively simple for courts to apply and litigants to follow, [and] leads to predictable results." (*Id.*) Since *Hoffman*, New York courts have

had no difficulty applying the "impact" test, which they correctly understand to turn on a plaintiff's residence or presence or employment in New York at the time a discriminatory act is alleged to have occurred.[1] (*See, e.g.*, *Wolf v Imus*, 170 AD3d 563, 564 [1st Dep't 2019] [noting that the test "turns primarily on [the nonresident plaintiff's] physical location at the time of the alleged discriminatory acts"]; *Benham v eCommission Sols., LLC*, 118 AD3d 605, 606 [1st Dep't 2014] [dismissing HRL claims because "the alleged conduct occurred while plaintiff was physically situated outside of New York"]; *Hardwick v Auriemma*, 116 AD3d 465, 467–68 [1st Dep't 2014] [same].) Federal courts have followed suit. (*See, e.g.*, *Vangas v Montefiore Med. Ctr.*, 823 F.3d 174, 182 [2d Cir. 2016] [plaintiff terminated by a City-based company did not state a claim under the NYCHRL because she did not work in the City]; *Shiber v Centerview Partners LLC*, 2022 WL 1173433, at *4 [SD NY Apr. 20, 2022, No. 21-cv-3649-ER] [dismissing HRL claims because plaintiff worked in New Jersey and her allegations that "she eventually would have been required to work" in New York once the pandemic abated were "not enough" to "show that [she] suffered an impact in" New York]; *Wang v Gov't Emps. Ins. Co.*, 2016 WL 11469653, at *7 [ED NY Mar. 31, 2016,

[1] The Government has identified only three federal cases, and no state cases, which have failed to apply the impact test set forth in *Hoffman*. Those federal cases are not persuasive for the reasons discussed below. *See* Point I.C.3, *infra*.

No. 15-cv-1773-JS] [plaintiff's NYCHRL claim failed because she did not live or work in the City and alleged only that she was denied a promotion that would have allowed her to work in the City].)

B. Syeed's Discrimination Claims Fail *Hoffman*'s Impact Test.

Syeed's NYSHRL and NYCHRL claims fail under a straightforward application of *Hoffman* because she did not experience in the City or State any impact of the alleged discriminatory decision not to promote her. Syeed was never a resident of New York. (A-3.) She can therefore bring an HRL claim only if she felt the impact of the alleged discrimination in the City or State of New York, which requires that she either be employed or present in those locales. (*See Hoffman*, 15 NY3d at 291.) However, Syeed lived and worked in Washington, D.C., not New York, when BLP allegedly decided not to promote her. (*See* A-17–A-26.) And she does not allege that she set foot in New York in the months before or after the allegedly discriminatory decision was made. Syeed thus felt the impact of the purportedly discriminatory decision only in Washington, D.C. Because Syeed cannot allege that the asserted discriminatory conduct impacted her in any way in New York, she cannot satisfy *Hoffman*'s impact test and cannot proceed with her claims under the NYSHRL or NYCHRL. (*See Benham*, 118 AD3d at 606 ["Because the alleged conduct occurred while plaintiff was physically situated outside of New York, none of her concrete allegations of harassing behavior or

other discriminatory conduct had the 'impact' on plaintiff in New York required to support claims under the State and City HRL."].)

C. The Court Should Decline to Adopt the Government Amici's Novel Test Assessing Impact on the City or State.

Even though the alleged decision not to promote Syeed did not impact her in New York, the Government amici contend that her HRL claims should proceed because the alleged failure to promote her supposedly had an "impact on the State and the City." (Gov. Br. 22; *see also* ADC/NELA Br. 8–9, 19–20.) In the Government's view, *Hoffman*'s "impact" test is satisfied even if the plaintiff does not feel any impact of a discriminatory act within New York so long as the decision has some effect on New York City or New York State (whatever that means). Putting aside that Syeed herself did not advance this impact-on-the-locale theory, the Court should reject the Government's theory for several reasons.

1. The Government's Theory Has No Textual Support.

The Government's theory, which would extend the reach of the NYCHRL and the NYSHRL to cover any discriminatory act alleged to affect the City or State, is untethered to the statutory text. The NYSHRL and NYCHRL are titled "*Human* Rights Laws," meaning that they are intended to protect the rights of *individuals*. Both statutes thus confer rights and causes of action to individuals seeking to vindicate harms that they suffered. As *Hoffman* explained, the NYSHRL is intended "to protect 'inhabitants' and persons 'within' the state."

(15 NY3d at 291 [citing Executive Law § 290(2), (3)].) The NYCHRL likewise concerns itself with protecting "only . . . those who inhabit or are 'persons in' the City of New York." (*Id.* at 289 [citing N.Y.C. Administrative Code § 8-101].)

The Government's contention that the HRLs were designed to vindicate harms suffered by the City or State has no support in statutory text. Although the statements of purpose mention that discrimination can harm society writ large, neither statute permits a plaintiff to bring an action to redress harms to the City or State. For example, the HRLs do not authorize the City or the State to bring a claim for injuries to itself resulting from discrimination against a private citizen. Nor do the HRLs authorize an individual to bring an action in a representative capacity on behalf of the City or State to remedy injuries to those locales. Instead, the HRLs deter broader societal harms by allowing individuals to sue on their own behalf for injuries they suffered as individuals and by permitting state agencies to pursue such claims on an individual's behalf. (*See* Executive Law § 297(1), (9) [remedial provisions only to a "person" aggrieved by an act of discrimination]; N.Y.C. Administrative Code §§ 8-109, 8-502 [same].) Any purported harm to the City or State has no legal consequence under the HRLs' substantive provisions. There is thus no reason to conclude that the State and City legislatures intended to allow a plaintiff who otherwise lacks standing to bring a claim under the NYSHRL or NYCHRL to assert such a claim based on purported injuries to the State or City.

The Government's "impact-on-the-locale" theory contravenes the HRLs' text by expanding the statutes' reach to nonresidents who were neither present in, nor suffered any impact within, the City or State. By its terms, the NYCHRL permits actions only for injuries to "those who inhabit" the City or are "'persons in' the City." (*Hoffman*, 15 NY3d at 289–91 [citing N.Y.C. Administrative Code §§ 8-101, 8-104].)[2] The NYSHRL similarly authorizes actions only for injuries to "people of this state"; "individual[s] within" the State; or its "inhabitants." (*Id.* at 291 [citing Executive Law § 290(2), (3)].) As the *Hoffman* Court correctly concluded, those covered individuals comprise persons living or working in New York. (*Id.*)

Syeed—who did not live, work, or interview in New York—does not fall into any of the categories of covered individuals described in the HRLs. The Government's impact-on-the-locale theory would thus provide her with a backdoor to invoke laws that by their terms do not apply to her. Nothing in the HRLs' text, history, or purpose suggests that the State Legislature or City Council intended to create a cause of action for nonresidents for discriminatory acts whose impact is felt outside New York's borders.

[2] As noted in BLP's answering brief, N.Y.C. Administrative Code § 8-104 was repealed only because it was duplicative of provisions in the City Charter; § 8-104's "repeal" therefore did not effect a substantive change. (BLP Br. 22–23.)

The Government contends that the HRLs make it unlawful to discriminate against "any person" or "individual" without any restrictions on where that person or individual lives or works. (Gov. Br. 19; *see also* ADC/NELA Br. 10.) That argument proves too much: If the HRLs really created a cause of action for *any* individual without limitation, then anyone in the United States could sue under the HRLs even if their discrimination claim has no connection to New York. *Hoffman* correctly rejected that position by "narrowing the class of nonresident plaintiffs" despite the terms "any person" and "individual" in the statutes. (15 NY3d at 290.) Indeed, if the Government's expansive reading of "any person" or "individual" were correct, the claims in *Hoffman* would have been permitted to proceed. They were not.

The NYSHRL's extraterritorial provision confirms that the Government's expansive reading of "any person" and "individual" is not correct. (Executive Law § 298-a(1), (2).) The extraterritorial provision clarifies that the NYSHRL applies to certain acts committed outside New York against residents of New York. (*Id.*) If, as the Government argues, the NYSHRL creates a cause of action for every individual that suffers from discrimination without limitation, there would have been no need for the Legislature to clarify that residents can bring claims for acts occurring outside New York's borders.

2. The Government's Theory Is Inconsistent with Hoffman.

Hoffman expressly held that a cause of action is available under the NYCHRL only where there is an "impact *on the plaintiff*" within the borders of New York City. (15 NY3d at 290 [emphasis added].) The Government's focus on the supposed "impact" on New York City and New York State cannot be reconciled with *Hoffman*'s teaching that the impact on the plaintiff is what matters.

The Government's "impact-on-the-locale" theory is also inconsistent with *Hoffman*'s holding that a nonresident can invoke the HRLs only if she is present or employed in New York at the time a violation occurs. (*See Hoffman*, 15 NY3d at 289–92.) If adopted, the Government's theory would permit nonresidents like Syeed who were neither present in, nor employed in, New York to bring claims under the NYCHRL and NYSHRL. That would effectively overturn *Hoffman*'s carefully calibrated test, which limits the HRLs' reach to those with a more substantial connection to New York. (*See id.*)

To the extent the Government amici suggest that the City and State have an interest in regulating the conduct of employers based in New York absent any claimed impact in New York on the plaintiff, that position likewise runs headlong into the holding of *Hoffman*. The employer in *Hoffman* was based in New York City, but the Court nevertheless held that the plaintiff could not bring a claim under the HRLs because he did not feel the impact of the allegedly discriminatory

decision in New York. (15 NY3d at 292.) Any interest in regulating the conduct of New York-based employers generally, without any tangible harm experienced by the plaintiff in New York, is therefore plainly insufficient to support an HRL claim under *Hoffman*.

3. The Government's Theory Is Inconsistent with Other Precedent.

Like *Hoffman*, other cases interpreting the NYCHRL and NYSHRL have understood the "impact" test to turn on a discriminatory act's impact *on the plaintiff*, not on the City and State. (*See, e.g.*, *Wolf*, 170 AD3d at 564 [affirming dismissal of HRL claims "because the impact *on plaintiff* from the termination of his employment occurred in Florida, where he lived and worked" [emphasis added]]; *Benham*, 118 AD3d at 606 [dismissing HRL claims because the alleged discriminatory conduct did not "ha[ve] the '*impact*' *on plaintiff* in New York" [emphasis added]]; *Vangas*, 823 F.3d at 183 ["impact of the employment action must be *felt by the plaintiff* in" the City or State [emphasis added]]; *Prochilo v Cifarelli's Crystal Clear Cleaning Corp.*, 2018 WL 11466740, at *13 [ED NY Feb. 2, 2018, No. 16-cv-417-SJF] [same].)

The Government can muster only three federal cases in support of its theory. (*See* Gov. Br. 32–34 [citing cases]; *see also* ADC/NELA Br. 36.) But those decisions are outliers, as the district court explained. A-61–A-64. *Anderson v HotelsAB, LLC* (2015 WL 5008771 [SD NY Aug. 24, 2015, No. 15-cv-712-LTS])

was wrongly decided. And the two other decisions merely parrot *Anderson* without any independent analysis. (*See Scalercio-Isenberg v Morgan Stanley Servs. Grp. Inc.*, 2019 WL 6916099, at *4 [SD NY Dec. 19, 2019, No. 19-cv-6034-JPO]; *Chau v Donovan*, 357 F. Supp. 3d 276, 284 [SD NY 2019].)

As BLP explained in its answering brief, *Anderson* is wholly unmoored from the HRLs' plain language. (BLP Br. 7, 12–13, 16–17.) Indeed, as the district court noted, *Anderson* inexplicably rejected "the central tenet proclaimed in *Hoffman*" that the NYCHRL and NYSHRL were intended "to protect only individuals who work 'in the city,' and 'within the state,' and who feel the impact of the discrimination 'in' the City or State." (A-61–A-63 [citing *Hoffman*, 15 NY3d at 289–90].) Unsurprisingly, the Second Circuit later rejected *Anderson*'s reasoning in *Vangas* (823 F.3d at 183).

The Government criticizes BLP for supposedly failing to "supply any reason to conclude that *Anderson* is wrong." (Gov. Br. 33.) But as BLP explained in its brief—and as the district court explained (A-61–A-64)—*Anderson* is wrong because its "practical substantive consideration" test was created out of whole cloth and has no support in either the text of the HRLs or *Hoffman*. (BLP Br. 16–17.)

The Government also complains that BLP fails to "offer a persuasive defense of its own proposal," but it is unclear what that means. (Gov. Br. 33.)

BLP is not advancing any "proposal" of its own; rather, it is merely advocating for this Court to apply *Hoffman*'s impact test to Syeed's claims.

4. The Government's Theory Violates the Presumption Against Extraterritoriality.

It is bedrock law that a statute is presumed not to apply outside the borders of the enacting jurisdiction absent a clear statement to the contrary. (*Glob. Reinsurance Corp. U.S. Branch v Equitas Ltd.*, 18 NY3d 722, 735 [2012]; McKinney's Cons Law of NY, Book 1, Statutes § 149.) The Government's "impact-on-the-locale" theory would violate that principle by making HRL claims available to nonresident plaintiffs like Syeed who suffer harms outside New York's borders. Such an extraterritorial application requires an "express[]" statement of legislative intent, which is lacking in either statute. (*See S. H. v Diocese of Brooklyn*, 205 AD3d 180, 187 [2d Dep't 2022].) The New York State Legislature plainly knows how to express its intent to reach outside the State's borders. In fact, the NYSHRL includes a provision authorizing New York residents to bring NYSHRL claims for certain wrongs committed outside the State. (*See* Executive Law § 298-a; *see also Hoffman*, 15 NY3d at 292.) The fact that the NYSHRL contains no comparable provision authorizing nonresidents to bring NYSHRL claims for harms suffered outside the State is strong evidence that the Legislature did *not* intend to permit such claims. The Court should therefore reject the

Government's "impact-on-the-locale" theory, which would expand the HRLs' reach to claims brought by out-of-State plaintiffs for injuries suffered-out-of-state.[3]

5. The HRLs' "Liberal Construction" Provision Does Not Support the Government's Theory.

The Government also argues that the HRLs' "liberal construction" provision requires the adoption of its "impact-on-the-locale" theory. (Gov. Br. 26 [citing Executive Law § 300; N.Y.C. Administrative Code § 8-130]; *see also* ADC/NELA Br. 11, 17–20, 23–24, 42–43.) But resort to the "liberal construction" provision is unwarranted because there is no ambiguity in the text of the HRLs, which do not authorize a cause of action based solely on alleged harms to the City or State. (*See* Point I.C.1, *supra*.) Nor is there any ambiguity in the rule handed down by *Hoffman*, which plainly precludes plaintiffs like Syeed from suing under the HRLs. (*See* Point I.A–B, *supra*.) "[I]t is a leap beyond the proper role of the courts to use the liberal construction provision alone in a manner producing a result which finds no other textual source in the [NY]SHRL, and to ignore language carefully chosen

[3] The Government argues that the presumption against the extraterritorial application of laws is inapplicable where the employer's "relevant conduct is closely connected" to the City and State. (Gov. Br. 24–25; *see also* ADC/NELA Br. 28–30.) It is unclear why that matters. The Government's proposed test broadens the class of plaintiffs under the HRLs to include nonresidents who were neither present nor worked in the City or State and who felt the impact of the alleged discrimination outside the City or State. The proposed test is thus an attempt to expand the HRLs' extraterritorial reach to plaintiffs who are located and injured outside New York.

by the Legislature." (*Foley v Mobil Chem. Co.*, 170 Misc.2d 1, 13 [Sup Ct 1996]; *see also Bank of Am., N.A. v Kessler*, 39 NY3d 317, 234 [2023] [the plain text of a statute is the "clearest indicator of legislative intent"].)

In all events, the "liberal construction" provision is relevant only when construing the substantive protections provided by the HRLs, not when determining who is eligible to bring an HRL claim. (A-64 ["[W]hile [courts] must broadly construe types of discrimination against which the statute is meant to protect, . . . state court decisions leave no doubt that courts cannot expand the scope of the persons to whom those protections are afforded, namely, individuals who live and work in New York City and State."].) BLP is unaware of any authority applying "liberal construction" principles to expand the territorial reach of a law. Indeed, every case and snippet of legislative history cited by the Government amici discusses giving a liberal construction to the HRLs' substantive scope, not its geographic reach.

In *Hoffman*, the HRLs featured the same "liberal construction" language that they do today, yet this Court honored the statute's plain text by "expand[ing] those protections to nonresidents who work *in the city*, while concomitantly narrowing the class of nonresident plaintiffs who may invoke [the NYCHRL's] protection" to

individuals working in City. (*Hoffman*, 15 NY3d at 290 [emphasis added].) The Court should take the same approach here.[4]

6. The Government's Supposed "Enforcement Experience" Does Not Support Its Theory.

The Government next contends that City and State agencies have long interpreted the NYCHRL and NYSHRL to cover complainants who allege that a discriminatory action had a negative impact on the City or State. (Gov. Br. 36.) That is pure sophistry. The Government's brief does not cite a single enforcement action by the New York City Commission on Human Rights, let alone an enforcement action predicated on an injury to the City. And none of the enforcement actions and related decisions by the New York State Division of Human Rights so much as mentions the impact of a discriminatory conduct on the State. (*See id.*) Any notion that New York agencies have long accepted the Government's proposed "impact-on-the-locale" theory is therefore fiction.

The cited State enforcement actions are inapposite anyway because they concern either allegations of discrimination in public accommodation or discriminatory advertisements, which are governed and prohibited by a separate

[4] Adoption of the Government's "impact-on-the-locale" theory is not necessary to deter discriminatory conduct because Syeed was protected by, and could have sued under, the District of Columbia's anti-discrimination laws. (*See* DC Code §§ 2-1401–1404.) For unknown reasons, Syeed decided against seeking to vindicate her rights in the District of Columbia.

provision, Executive Law § 296.1(d), not applicable here. (*See, e.g.*, *Lane-Allen v D. Auxilly NYC LLC*, No. 10205884 (DHR 2022) [public accommodation] [cited at Gov. Br. Add. 21–36]; *Liou v Smiles Park Ave. Dental PLLC*, No. 10181267 (DHR 2018) [discriminatory advertisement] [cited at Gov. Br. Add. 61–72].) Indeed, *Lane-Allen*, the sole action cited by the Government that mentions *Hoffman*, expressly deemed "*Hoffman* and its progeny . . . inapposite" to "public accommodation discrimination" cases because "the nature of employment discrimination is different than that of public accommodation discrimination [and] each must be analyzed differently." Gov. Br. Add. 27. If *Lane-Allen* has any relevance to the Question Presented, it is to reaffirm *Hoffman*'s limitations on the class of permitted plaintiffs.

In all events, the Court should not defer to the views of State or City agencies on questions of statutory interpretation. (*See Matter of DeVera*, 32 NY3d 423, 434 [2018] ["Where the question is one of pure statutory interpretation, we need not accord any deference to the agency's determination and can undertake its function of statutory construction." [emendation, quotation marks, and citation omitted]]). Here, the Government asserts that City and State agencies have construed the NYSHRL and NYCHRL to authorize plaintiffs to bring claims if they can allege an injury to the City and State. Even if that were how the agencies

have construed the HRLs (which it is not), the Court should not defer to the agencies on this question of statutory construction.

7. The Government's Theory Is Unworkable.

The Government finally contends that the Court should adopt its "impact-on-the-locale" theory because it is workable. (Gov. Br. 27–30.) Even if that were true, it is hardly a reason to adopt a theory so untethered from the statutory text and so inconsistent with *Hoffman*. (*See* Point I.C.1–C.2, *supra*.)

Although the Government purports to propose a test that turns on whether a discriminatory act has an impact on the City or State, the "test" is really a *per se* rule that any plaintiff can sue under the HRLs if they can allege that they might have moved to or worked in New York but for a discriminatory decision. And if they cannot, they may still invoke the HRLs' protections if "there is some other basis for finding a substantial impact on New York." (Gov. Br. 27.) A test this vague, limitless, and over-inclusive can hardly be characterized as workable. The predictable result will be a flood of litigation in state court and complaints before state agencies brought by out-of-State residents who have nothing more than a hypothetical connection to New York. There is zero indication in the statutes that the legislators who enacted and amended the NYCHRL and NYSHRL intended such an undesirable consequence.

The better test comes from *Hoffman*, which considers whether a discriminatory decision had an impact *on the plaintiff* in New York. (15 NY3d at 290.) This Court has explained that the *Hoffman* test comports with the plain text of the HRLs and "is relatively simple for courts to apply and litigants to follow [and] leads to predictable results." (*Id.* at 291.) Although the Government highlights certain plaintiffs who will not be able to sue under the *Hoffman* test, "every line drawn by a legislature leaves out some that might well have been included." (*Montgomery v Daniels*, 38 NY2d 41, 64 [1975] [emendations omitted]; *People v Galindo*, 38 NY3d 199, 206 [2022] ["[T]he legislature is free to decide which issues to address, and [courts] are not free to ignore legislation because some may believe the legislature has not gone far enough." [citations omitted]].) And the Government's novel test engages in just as much line-drawing. In any event, line-drawing is "a legislative, not a judicial, function." (*Montgomery*, 38 NY2d at 64.) Neither the State Legislature nor the City Council amended the HRLs following *Hoffman*. The Court should defer to the legislatures and their tacit approval of the *Hoffman* rule.[5]

[5] The Government amici's contention that under *Hoffman*'s impact test, "a New York employer that wished to maintain an all-male or all-white workforce could readily evade the HRLs by interviewing and hiring only out-of-state candidates who fit the employer's discriminatory criteria" borders on absurd. (Gov. Br. 28.) If a Black New York City resident applied for a job at that hypothetical employer and was not selected for an interview solely because of where she resides, she

8. This Case Is a Poor Vehicle in Which to Test the Government's Theory.

This case is not an appropriate vehicle in which to consider the Government's novel "impact-on-the-locale" theory because Syeed has not alleged the existence of a discriminatory decision that had any impact on New York. Her complaint refers to a United Nations reporter position allegedly based in New York, but it does not allege that Syeed applied for the position. (*See* A-22–A-23.) Instead, it merely alleges that she "inquired" about the job (and does not allege that she made those inquiries of anyone in New York and appears not to have). (*Id.*) Syeed also alleges that she applied for a position as an editor at Bloomberg New Economy in New York, but she does not allege that the position was filled, let alone by a less-qualified male candidate. (A-22.) There is no reason for the Court to decide in this case whether the Government's novel "impact-on-the-locale" theory satisfies *Hoffman*— or make other broad pronouncements setting the rules for every conceivable case involving a nonresident plaintiff—when Syeed has not

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could unquestionably pursue claims under the HRLs against the employer. (*See, e.g.*, N.Y.C. Administrative Code § 8-107(1)(a)(1)–(2).)

alleged any impact on New York from a discriminatory decision taken with respect to a job located in New York.[6]

II. THERE IS NO COMPELLING JUSTIFICATION TO OVERTURN *HOFFMAN*.

Unlike the parties and the Government amici, the ADC/NELA amici ask the Court to overrule *Hoffman*. (ADC/NELA Br. 8–35.) Their position should be rejected out of hand because it is improper for an amicus to inject new issues into an appeal. *Lezette*, 35 NY2d at 282 ["[A]n Amicus has no status to present new issues in a case."]; *Application of City of Buffalo*, 57 AD2d 47, 49 [4th Dep't 1977] ["Because the amici have no standing to present new issues in the case, we do not consider their argument on this point." [citation omitted]].) "The principal function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration," but "an amicus curiae has no formal status to raise new issues in a case." (82 NY Jur 2d, Parties § 313.)

[6] The Government repeatedly mischaracterizes this case as involving "claims against a prospective employer." (*E.g.*, Gov. Br. 1, 15.) That is false because Syeed alleges only that she was passed over for a promotion by her then-current employer, BLP, for whom she worked in Washington D.C. If Syeed felt the impact of BLP's alleged actions anywhere, it was in Washington D.C., where she lived and worked, and where she could have elected to pursue a remedy against the company under D.C. law. She chose not to do so. (*See* note 4, *supra*.)

Even if the issue were properly presented, there is no "compelling justification" for the "drastic step" of overruling *Hoffman*. (*Grady v Chenango Valley Cent. Sch. Dist.*, 40 NY3d 89, 96 [2023].) The doctrine of stare decisis "rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes." (*People v Bing*, 76 NY2d 331, 338 [1990].) "Stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (*State v Donald DD.*, 24 NY3d 174, 187 [2014] [citation omitted].) ADC/NELA have provided no compelling justification for departing from stare decisis and overturning *Hoffman*.

A. *Hoffman* Was Not Legislatively Overturned.

The ADC/NELA amici are wrong that the New York City Council overturned *Hoffman* legislatively. (ADC/NELA Br. 8–12.) Nothing in the legislative history so much as mentions *Hoffman* or suggests any intent to overrule *Hoffman*. The absence of any mention of *Hoffman* is striking given that the legislative history expressly discusses other cases interpreting the HRLs. (*See* ADC/NELA App. 14, 23–26.)

ADC/NELA contend that the "City Council has been active" in amending the NYCHRL since *Hoffman*. (ADC/NELA Br. 13.) Assuming that is true, it cuts against their position. The fact that the City Council has recently amended the NYCHRL without seeking to overturn *Hoffman* militates strongly in favor of stare decisis and *against* overturning *Hoffman*. (*See Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488, 497 [2017] [a legislature's failure to legislatively overturn a court decision "carries more weight where the legislature has amended the statute after the judicial interpretation"].)

ADC/NELA's discussion of *Williams v N.Y.C. Housing Authority* (61 AD3d 62 [1st Dep't 2009]) completely misses the point. ADC/NELA Br. 13. *Williams* overturned *McGrath v Toys "R" Us, Inc.* (3 NY3d 421 [2004]) which had held that the NYCHRL covers only the same types of sexual harassment as the federal anti-discrimination laws. (*Williams*, 61 AD3d at 73–74.) The *Williams* court noted that the City Council amended the NYCHRL after *McGrath* explicitly to clarify that the NYCHRL's *substantive* protections are broader than those of the federal civil-rights statutes. (*Id.*) That legislative amendment expressly addressed and undercut *McGrath*'s rationale, which is why *McGrath* was no longer good law. (*Id.*) There has been no comparable amendment addressing the geographic scope of the NYCHRL or the rationale underlying *Hoffman*, however, so there is no basis for this Court to discard *Hoffman*.

The weakness of the ADC/NELA's position is underscored by their reliance on legislative history from the New York City Council stating that "*some* judicial decisions" have not followed the NYCHRL's "liberal construction" policy. (ADC/NELA Br. 14–15 [quoting legislative history].) The City Council never remotely suggested that *Hoffman* is one of the rogue judicial decisions that failed to give the NYCHRL a liberal construction. ADC/NELA are effectively arguing that by vaguely criticizing "some judicial decisions," the City Council intended to overturn every NYCHRL decision that ever went against a plaintiff. That sweeping position is not supported by the legislative history and is completely illogical because "no legislation pursues its purpose at all costs." (*Rodriguez v United States*, 480 US 522, 525–26 [1987] [per curiam].) The City Council has taken measured steps specifically to overturn judicial decisions limiting the substantive scope of the NYCHRL, but it has expressed no disagreement with *Hoffman* or the common-sense geographic limitations discussed in that decision. The City Council's decision not to amend the NYCHRL to overturn *Hoffman* strongly militates in favor of stare decisis.[7]

[7] ADC/NELA's citation to legislative history discussing the "liberal construction" provision does not show a legislative intent to overturn *Hoffman*, either. (*E.g.*, ADC/NELA Br. 15–16; *see also* Point I.C.5, *supra*.) The "liberal construction" language was already part of the HRLs when this Court decided *Hoffman*.

B. *Hoffman* Was Correctly Decided.

The ADC/NELA amici next contend that *Hoffman* is "not entitled to precedential weight" because it supposedly misconstrued the HRLs. (ADC/NELA Br. 11.) A mere disagreement with a prior decision is not a compelling reason for overcoming stare decisis, however. (*See, e.g.*, *People v Garcia*, 38 NY3d 1137, 1140 [2022, Wilson, J., dissenting] ["Wrong though I believe [the prior decision] to be, my duty is to follow it."].) And in any event, *Hoffman* was decided correctly. (*See* Point I.A–C, *supra*.) Notably, neither the State of New York nor the City of New York contend that *Hoffman* misconstrued the HRLs.

C. ADC/NELA's Policy Arguments Are Misguided and Not a Compelling Justification for Overruling *Hoffman*.

In a final thrust, the ADC/NELA amici contend that *Hoffman* should be overruled because (in their opinion) it is bad policy. (*See, e.g.*, ADC/NELA Br. 34–35 [describing *Hoffman* as "breathtakingly destructive," among other pejoratives].) Needless to say, policy arguments cannot overcome *Hoffman*'s construction of the HRLs' plain text. (*See, e.g.*, *People v Badji*, 36 NY3d 393, 398–99 [2021].) And a policy complaint is not a compelling circumstance that would justify the drastic step of overturning settled precedent.

In any event, this Court has already rejected ADC/NELA's policy argument. As the Court previously explained, the alternative to *Hoffman*'s "impact" test proposed by amici—which would allow a plaintiff to bring an HRL claim as long

as a discriminatory decision was made in New York (ADC/NELA Br. 31–32)—"is impractical, would lead to inconsistent and arbitrary results, and expands NYCHRL protections to nonresidents who have, at most, tangential contacts with the city." (*Hoffman*, 15 NY3d at 291.) "[T]he success or failure of an NYCHRL claim should not be solely dependent on something as arbitrary as where the termination decision was made." (*Id.*) The Court went on to explain that the "impact" test is workable, predictable, and properly cabins HRL claims to the people the law was intended to protect. (*Id.*)

The Court should therefore reject ADC/NELA's request to jettison *Hoffman* and replace it with their proposed "non-trivial nexus" test, which has no footing in the statutory text and would expand the geographic reach of the HRLs well beyond their intended scope. By their express terms, the HRLs establish a cause of action for "inhabitants" of, or "persons in," the City or State. (Executive Law § 290(2)(3); N.Y.C. Administrative Code §§ 8-101; *Hoffman*, 15 N.Y.3d at 291; *see also* Point I.C.1, *supra*.) ADC/NELA's proposed "non-trivial nexus" test would dramatically expand the class of plaintiffs eligible to bring claims under the HRLs to include those who are neither New York residents nor present or working in New York, as long as they can allege that a discriminatory decision was made in New York. If the New York City Council or the New York State Legislature

intended to grant a cause of action to nonresidents with such tangential connections to New York, they would have amended the HRLs after *Hoffman* to say so.[8]

CONCLUSION

For the foregoing reasons and those identified in BLP's merits brief, the Court should answer the certified question in the negative.

Dated: January 25, 2024

New York, New York

Respectfully submitted,

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[8] ADC/NELA are wrong when they argue (at page 32 of their brief) that *Williams* adopted the "non-trivial nexus" test. The word "nexus" does not appear anywhere in the decision. Instead, the *Williams* plaintiff satisfied *Hoffman*'s "impact" test because she worked in New York City. (61 AD3d at 64.)

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On January 25, 2024

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Sworn to before me on
January 25, 2024

Mariana Braylovskiy

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