To be argued by:
Yoram Silagy
(Time Requested: 15 Minutes)

CASE NO. APL-2023-00156

State of New York
Court of Appeals

In the Matter of the Application of

MARYANN McCABE and
MARYANN McCABE AS EXECUTOR OF
THE ESTATE OF DAVID BURROWS,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

511 WEST 232ND OWNERS CORP.,

Respondent-Respondent.

REPLY BRIEF FOR APPELLANTS

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Supreme Court, Bronx County, Index No. 802172/2022E
Appellate Division, First Department Case No. 2022-05809

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THE RULING OF THE COURT BELOW SHOULD BE REVERSED

A. The Liberal and Expansive Interpretation of the NYC Discrimination Laws as Required by the Laws Passed by the New York City Council in 2005 and 2016 Should Encompass Unmarried Couples as Protected under the Laws Prohibiting Discrimination based on Marital or Partnership Status

"The purpose of this local law is to provide additional guidance for the development of an independent body of jurisprudence for the New York city human rights law that is **maximally protective of civil rights in all circumstances"**. [Emphasis Added]

New York City Local Law No. 35 (2016).

The Cooperative's appellate brief cannot circumvent the fact that under this 2016 law as well as the one passed by the City Council in 2005, maximum protection of civil rights means that the definition of "marital status" and "partnership status" under the NYC Administrative Code must include unmarried couples so as to prohibit discrimination against them. The Cooperative in effect acknowledges violating NYC Administrative Code §8-107(5) by admitting in Page 2 of their brief that the Cooperative required either a marriage certificate or a domestic partnership certificate in order for the shares and proprietary lease to be transferred from Mr. Burrows to the Appellant, under the provision of the proprietary lease that provides for the automatic transfer to a "spouse" without the Cooperative board's consent. In sum, absent a marriage certificate or a domestic partnership certificate, the Cooperative was not allowing the automatic transfer of the shares, thus

discriminating against Appellant based on her "marital status" and "partnership status", treating couples who choose to marry or file as domestic partners differently than romantic or close partners who lived together for years but chose not to marry. Indeed, the Cooperative cannot dispute this fact, because in their letter dated April 23, 2019 (R:75-76) to the Appellant, they demanded a "marriage certificate" or "domestic certificate" or proof that Appellant was Mr. Burrows spouse in order to automatically transfer the shares and lease, and this was only after completely ignoring Appellant's prior request for such a transfer, not bothering to respond for five months until Appellant once again wrote to request the automatic transfer.

To reiterate, The Local Restoration Act of 2005 and Local Law No. 35 (2016), both passed by the New York City Council, expanded and made broader the scope of New York City Discrimination Laws and thus under the "marital status" and "partnership status" provisions, it should be illegal to discriminate against unmarried couples – the Cooperative's brief ignores this fact by largely citing cases decided either before this act was passed or which wrongly ignored the 2005 and 2016 laws.

As noted previously in Appellant's main brief, this Court held in Albunio v. City of New York, 16 NY3d 472, 477-478, 947 NE2d 135, 922 NYS2d 244 (2011), regarding the liberal construction requirement of what constitutes discrimination under NYC Administration Code §8-107 (1)(a):

> In answering this question, we must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the scope of New York City's Human Rights Law," which, the Council found "has 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 NY § 1). The LCRRA, among other things, amended Administrative Code § 8-130 to read: "The provisions of this title [i.e., the New York City Human Rights Law] 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."

New York City Local Law No. 35 (2016) codified this Court's ruling in Albunio (and in doing so notably omitted this Court's prior ruling in Levin) and further reiterated that the New York City Human Rights Law should be liberally construed and expanded to protect parties. Local Law No. 35, entitled "To amend the administrative code of the city of New York, in relation to construction of the New York city human rights law" (also quoted above), states in part:

> Section 1. Legislative findings and intent. Following the passage of local law number 85 for the year 2005, known as the Local Civil Rights Restoration Act, some judicial decisions have correctly understood and analyzed the requirement of section 8-130 of the administrative code of the city of New York that all provisions of the New York city human rights law be liberally and independently construed. The purpose of this local law is to provide additional guidance for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances.
>
> §8-130 Construction. A. 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] *state* civil and human rights laws, including those laws with

> provisions [comparably-worded] *worded comparably* to provisions of this title, have been so construed. *B. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.*
>
> *c. Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title shall include Albunio v. City of New York, 16 N.Y.3d 472 (2011), Bennett v. Health Management Systems, Inc., 92 A.D.3d 29 (1st Dept. 2011), and the majority opinion in Williams v. New York City Housing Authority, 61 A.D.3d 62 (1st Dept. 2009).*

Pursuant to N.Y.C. Admin. Code § 8-107(l)(a), "Marital status" is not defined in the New York City Human Rights Law (NYCHRL).[1] As to statutory construction, the NYCHRL provides that:

> [t]he 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 worded comparably to provisions of this title, have been so construed. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

The New York City Council has instructed that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." N.Y.C.

[1] Similarly, the term "partnership status" is also not defined in the Code. The Cooperative's attempt to limit this category to partners who only have registered with a New York City Registry Department is not supported by any law. The Cooperative refers to the definition of "domestic partners" in the NYC Administrative Code in support of such assertion, but this has no relevance because the Code's discrimination ban refers to "partnership status", not "domestic partners" and does not require any such registration to be included within this category that bars discrimination.

Local Law 85 (the "Restoration Act") § 1 (2005); see also Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013) (instructing district courts to "constru[e] the NYCHRL's provisions 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible'") (quoting Albunio, 16 N.Y.3d at 477-78).

The Court in Morse v. Fidessa Corp., 165 A.D.3d 61, 84 N.Y.S.3d 50 (1st Dept. 2018) first describes the pre-Restoration Act case law on this point, as set out by this Court in Levin v. Yeshiva University, 96 N.Y.2d 484, 754 N.E.2d 1099, 730 N.Y.S.2d 15 (2001):

> Before the passage of the Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law 85 (2005) (the "Restoration Act"), the Court of Appeals had resolved the above-stated question - without recourse to liberal construction analysis - by holding that "a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship - or absence thereof - with another person." Levin, 96 N.Y.2d at 490 [a housing discrimination case]. In Levin, the "disqualifying relationship" was one that was not a "legally recognized, family relationship[]." Id. at 490-491. Thus, if a housing provider refused to rent to an unmarried person, regardless of whether the unmarried person was living with another person, its conduct would be actionable. However, if the housing provider treated an unmarried couple disadvantageously, that would not be actionable because the disadvantageous treatment would not be based on the couple's marital status but on the disqualifying relationship (not being a "legally recognized, family relationship[]).
>
> Levin's holding was derived from Matter of Manhattan Pizza Hut v. New York State Human Rights Appeal Bd., 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980), an employment discrimination case brought under the New York State Human Rights Law, not the

> [NYCHRL]. Manhattan Pizza Hut ruled that the "plain and ordinary meaning of 'marital status' is the social condition **[*13] enjoyed** by an individual by reason of his or her having participated or failed to participate in a marriage." 51 N. Y.2d at 511. That is, "when one is queried about one's 'marital status,' the usual and complete answer would be expected to be a choice among 'married,' 'single,' etc., but would not be expected to include an identification of one's present or former spouse and certainly not the spouse's occupation." Id. at 511-12.

Id. at 64 (citation formatting altered; emphasis in original).

The Morse court then explains that the Restoration Act and subsequent City Council legislation passed in 2016 require courts to alter their construction of the NYCHRL:

> The Restoration Act changed the judicial landscape with respect to the [NYCHRL]. A more recent enactment, N.Y.C. Local Law 35 (2016), went even further. That law amended Administrative Code § 8-130 ("Construction") "to provide additional guidance for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances." Local Law 35 § 1.
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> In the March 8, 2016 report of the Committee on Civil Rights that accompanied Local Law 35 (the Committee Report), the Council set forth its concerns:
>
> > Over at least the last 25 years, the Council has sought to protect the [NYCHRL] from being narrowly construed by courts, particularly through major legislation adopted in 1991 and 2005. These actions have expressed a very specific vision: a Human Rights Law designed as a law enforcement tool with no tolerance for discrimination in public life. The 2005 Restoration Act provided that the [NYCHRL] is to be interpreted liberally and independently of similar federal and state provisions to fulfill the "uniquely broad and remedial" purposes of the law. The Act amended the [NYCHRL's] liberal construction provision, Administrative Code § 8-130, to accomplish this goal. Some courts have recognized and followed

> this vision, but others have not, and many areas of the law remain as they were before the 2005 Restoration Act because they have not been scrutinized to determine whether they are consistent with the uniquely broad requirements of the [NYCHRL]. Comm. Rept. of the Govt. Affairs Div., Comm. on Civ. Rights at 8 (Mar. 8, 2016) (emphasis added).
>
> The amendment included ratification of three decisions under the [NYCHRL]: Albunio v. City of New York, 16 N.Y.3d 472, 947 N.E.2d 135, 922 N.Y.S.2d 244 (2011); Bennett v. Health Mgt. Sys., 92 A.D.3d 29, 936 N.Y.S.2d 112 (1st Dept. 2011); and Williams v. N.Y.C. Housing Auth., 61 A.D.3d 62, 872 N.Y.S.2d 27(1st Dept 2009). See N.Y.C. Admin. Code § 8-130(c). Each of the cases was described as having "correctly understood and analyzed the liberal construction requirement" of the [NYCHRL], and as having "developed legal doctrines accordingly that reflect the broad and remedial purposes" of the [NYCHRL]. Id. To ignore or deviate from any of the Committee Report cases would be to flout the Council's intent as to the [NYCHRL].
> ....
>
> Thus, [pursuant to the Restoration Act and Local Law 35,] courts must play a highly active role in the development of the [NYCHRL] by interpreting all cases in a manner consistent with the goal of providing unparalleled strength in deterring and remedying discrimination. As the Court of Appeals ruled in Albunio, 16 N.Y.3d 472, one of the Committee Report cases, all the provisions of the [NYCHRL] must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." 16 NY3d at 477-78.

Id. at 64-65, 67 (footnote omitted; citation formatting altered; emphases in Morse).

The Morse court goes on to conclude that the Restoration Act and Local Law 35 abrogate Levin:

> Our task in construing the term "marital status" is guided by the above-stated history. Levin . . . relied in part on an interpretation of the New York State Human Rights Law and failed to engage in liberal construction analysis, let alone the enhanced liberal construction

> analysis intended by the comprehensive 1991 amendments to the [NYCHRL], N.Y.C. Local Law 39 (1991) (which were only brought to life in 2005, with the passage of the Restoration Act). Thus, Levin's interpretation of "marital status" cannot be sustained.
>
> Indeed, Levin was cited in connection with the passage of the Restoration Act as illustrative of the cases that had "'either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore[d] the text of specific provisions of the law, or both.'" Williams, 61 A.D.3d at 67 (quoting from transcript of Council debate). With the passage of the Restoration Act, Levin "'and others like it will no longer hinder the vindication of our civil rights.'" Id. (quoting from debate transcript).
>
> Plainly, the Council rejected the "plain and ordinary" meaning of "marital status" as set forth in Manhattan Pizza Hut (51 NY2d at 511-512), and consequently the distinction between marital status as such and marital status as a "disqualifying relationship." "Marital status" may refer to whether an individual is married or not married. It may also refer to whether two individuals are married to each other or not married to each other. In the instant case, it refers to the latter: the marital status of two people in relation to each other.

Id. at 67-68 (citation formatting altered; internal alterations of quotations omitted).

In sum, the Cooperative's argument that it is permitted to treat spouses differently then unmarried couples in its lease provisions regarding the automatic transfer of shares upon a shareholder's death is clearly not correct pursuant to the analysis as set forth above.

The Cooperative points to the Appellate Division ruling in Matter of Cadalzo v. Russ, 195 A.D.3d 463 (1st Dept. 2021) as reinforcing this Court's ruling in Levin v. Yeshiva University, 96 NY2d 484 (2001). But that case is not only not controlling over this Court, but inapplicable since it involved specific rules regarding succession

in NYCHA housing and in that case, and the tenant seeking succession rights had no relationship (other than a roommate) with the tenant of record. And given those facts, the Court did not address the impact on the of the 2005 and 2016 laws passed by the New York Council laws on the Levin ruling.

B. The Undisputed Evidence Proved that Appellant and Mr. Burrows were an Unmarried Couple

The Cooperative disputes the fact that Appellant and Mr. Burrows were long term romantic partners for 27 continuous years, that they lived together in the Unit for 13 years through the date of Mr. Burrows death, and that Appellant has continued to live in the Unit since Mr. Burrows death.[2] They have not submitted one shred of evidence to refute these facts. They claim that the documents submitted in support of these facts were either created after Mr. Burrows death or are self-serving. This is simply not true. Documents like Mr. Burrows Will that left Appellant the cooperative Unit (R: 29-43), and his Health Care Proxy (R: 230-232), were created before his death. And the obituaries of Appellant's mother and father, who passed away respectively on November 7, 2017 and May 19, 2007 – before Mr. Burrow's death - both refer to Mr. Burrows in the obituary as Appellant's life companion (R:

[2] The Cooperative points to the fact that Appellant owns the shares for the next-door unit, E51. This is not an apartment suitable for her residence, and it is a matter of public record that her son has lived there for years until forced to move recently due to the Cooperative's commencement of a summary proceeding. See 511 West 232nd Owners Corp. v. Maryanne McCabe and Gabriel McCabe, L&T# 320755/22.

138, 144). Lastly, Appellant's law firm wrote two letters to the Cooperative's attorney, before Mr. Burrows passed away, asking that Appellant be added to the shares to due their long-term romantic relationship and their long-term residency in the Unit [see letters dated July 6, 2018, and December 14, 2018 (R: 70, 71-74)].

C. Policy Considerations Favor the Inclusion of Unmarried Couples as Protected Under the NYC Discrimination Laws

The Cooperative's brief makes the absurd argument that it is not possible to reconcile the terms of the Cooperative's proprietary lease allowing automatic transfer of shares to a spouse with a liberal interpretation of the law forbidding discrimination based on "marital status" or "domestic partnership", as such an interpretation "would be indistinguishable from mere roommates, which would undermine virtually every cooperative proprietary lease in New York." (see Cooperative Brief, p. 22). In fact, it is a simple and easy process to distinguish mere roommates from couples who have a more serious relationship, as Appellant showed here with the extensive documentation of her relationship with Mr. Burrows. Mr. Burrows bestowing of the shares to the Cooperative to Appellant in his Will, his designation of Appellant as his health care proxy, and the obituaries of family members written before his death referring to Appellant as his life companion clearly show it is easy to differentiate between a roommate and a romantic partner/domestic couple. Indeed, Courts in New York State make such a distinction all the time when

considering whether a person who is not a spouse who is seeking succession rights to a rent stabilized or rent controlled apartment has a "financial and emotional" interdependence with the tenant of record. In that event, if the person satisfies that standard, they succeed to the apartment. And if they are just a roommate, they do not gain succession rights.

The policy considerations favoring Appellant are highlighted by the Cooperative's claim in their Appellate Division brief that consent by its board for such a transfer is not required for a spouse because of the Cooperative's intent to afford a spouse "unique considerations". However, nowhere did they state what these "unique considerations" are – but one can surmise they are due to the close relationship between a shareholder who passes away and their spouse, and the long-term residence of the spouse in the Unit. These same considerations would apply to long term couples such as Appellant and Mr. Burrows – all the more of a reason why the bar against discrimination based on "marital status" and "partnership status" should apply here.[3]

[3] The Cooperative's conduct is also barred by paragraph 50 of the Proprietary Lease, which prohibits them from discriminating based on sex or "other ground proscribe[d] by law when exercising any right reserved to it in this lease" (R: 64). The Cooperative, in enforcing paragraph 16(b) of the proprietary lease, failed to do so by violating the federal, state and city discrimination laws discussed here and in Appellant's prior brief.

CONCLUSION

In sum, and as detailed in Appellant's main brief, couples protection is encompassed in the NYC discrimination laws and thus encompasses Appellant in the case at bar – this is consistent with the 2016 New York City Council directive in Local Law No. 35 "for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances." The Cooperative's cited cases are not on point since they were either decided before the 2005 and 2016 acts passed by the New York City Council or do not address discrimination against unmarried couples. Thus, the Cooperative's refusal to extend the right to transfer of the shares and proprietary of a unit from a shareholder who passes away to their spouse under paragraph 16(b) of the proprietary lease - to a couple such as Mr. Burrows and Appellant and without requiring the consent of the board - is clearly discriminatory under the laws discussed here and in Appellant's main brief.

For all these reasons, Appellant requests that the Cooperative's decisions to refuse to transfer the Cooperative Shares and Proprietary Lease for the Unit to Appellant Maryann McCabe and the rejection of her application (which the Cooperative wrongfully required her to submit) and its termination of her tenancy be reversed, annulled and vacated; that the ruling of the Court below be reversed; that the Cooperative be ordered to issue new Cooperative Shares and transfer the

Proprietary Lease for the Unit into the name of the Appellant Maryann McCabe; and that Appellant be awarded legal fees pursuant to paragraph 28 of the Proprietary Lease (R: 55) and RPL §234, and the Court award to Appellant any other relief that is just and proper.

Dated: New York, New York
January 18, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR Section 500.13(c)(1) the foregoing brief was prepared on a computer using Microsoft Word.

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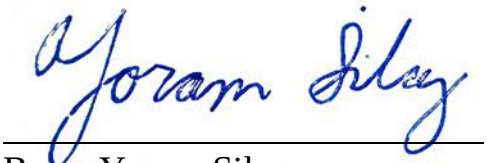

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