PRELIMINARY STATEMENT

This appeal addresses whether transgender individuals will continue to be covered by the New York State and City Human Rights Laws, as they have been for over 25 years. The appeal does not concern the question to which defendants-appellants (collectively the "Estate") have devoted most of their brief on appeal – what restroom is appropriate for transgender individuals to use – an issue that is simply not presented by its motion to dismiss or the ruling below.

Plaintiff-respondent Hispanic AIDS Forum ("HAF") filed an Amended Complaint (the "Complaint") alleging that the Estate evicted HAF from its commercial office space because HAF refused to agree to the Estate's demand that it bar HAF's transgender clientele from using the common areas of the building, including any restroom. The Complaint alleges that the Estate's refusal to renew HAF's lease and its eviction of HAF gives rise to four separate claims of sex and disability discrimination under the New York Human Rights Law ("State HRL") and gender and disability discrimination under the New York City Administrative Code ("City HRL") (collectively, "Human Rights Laws").

The Estate essentially ignored the explicit allegations of the Complaint and based its motion to the court below on its own re-interpretation of the Complaint and of the nature of HAF's causes of action that fit the arguments it preferred to make. In its Brief For Defendants-Appellants ("App. Br."), the Estate persists in this approach, attempting again to characterize the entire case as an improper attack on a landlord's right to maintain single-sex restrooms and require "people to use bathrooms that [are] analogous to their anatomical gender." App. Br. at 2. Of course, as explained *infra*, this Court is actually not faced with that

diversionary issue, which is not raised by the allegations of the Complaint and may not arise at any point in the litigation. Rather, the Estate can only challenge the refusal by the court below to dismiss the Complaint based on its finding that the Human Rights Laws apply to HAF, and that HAF had stated a cause of action.

Defendants-appellants' improper attempt to divert this Court's attention to other irrelevant issues should be disregarded, and the lower court's order should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Were transgendered persons protected by the New York State Human Rights Law, N.Y. Exec. Law §§ 296 *et. seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code, § 8-107 *et. seq.* in 2000, when the Estate refused to renew HAF's lease?

The trial court answered this question "yes."

2. Does the Complaint state a claim under New York State Human Rights Law, N.Y. Exec. Law §§ 296 *et. seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code, § 8-107 *et. seq.*?

The trial court answered this question "yes" with respect to gender discrimination, and "no," with leave to replead, with respect to disability discrimination.

COUNTERSTATEMENT OF FACTS

The Complaint

The Complaint in this action alleges the following facts: HAF is New York City's only Latino-run HIV/AIDS organization offering treatment education and innovative prevention services to the City's Latino population. Compl. ¶ 4

(R27).[1] HAF operates a number of community-based offices in New York City neighborhoods with large Latino populations, including, from 1991 until 2000, in defendants' Bruson Building in Jackson Heights, the Queens neighborhood with the highest incidence of AIDS among Latinos. Compl. ¶¶6-10 (R28-29). In November 1999, HAF responded to the increasing number of transgender Latinos seeking help by adding a new support group to the services it provided for such clients, which resulted in additional transgender clients coming to the HAF office. Compl. ¶¶ 14-15, 17 (R30).

Shortly thereafter, HAF agreed to renew its lease for one of the two spaces it was then renting. In April-May 2000, the Estate drafted and sent HAF a new lease, and accepted the signed renewal lease and HAF's supplemental security deposit and insurance documents. Compl. ¶¶ 18-20 (R30-31). In May-June 2000, however, rather than counter-sign and return the new lease, the Estate informed HAF that it had received complaints from other tenants about "men who think they're women using the women's bathrooms" and "women who think they're men using the men's bathrooms." Compl. ¶¶20-21 (R31). Defendants-appellants complained about "'the type of clientele' coming in and out of the building and using the bathrooms," that HAF clients who were "men dressed as women [were] coming into the building and using the bathrooms," and informed HAF that the building wanted to get rid of "all these Queens." Compl. ¶¶23-24 (R32).

The landlord's agent ultimately informed HAF that the Estate "would not renew HAF's lease unless HAF agreed that transgender clients would not be permitted to use [either] the bathrooms," Compl. ¶24 (R32), or even "common

[1] References to the Record on Appeal will be referred to as "R__".

areas in the building, including the main entrance," Compl. ¶2 (R27). That is, the Estate decided to respond to concerns raised prior to its agreement to renew HAF's lease, which were apparently sparked by transgender individuals' use of gender-identity-appropriate restrooms, by summarily demanding that all of HAF's transgender clients be *banned* from *any* use of *all* common areas of the building and *all* restrooms. Compl. ¶¶2, 23-4 (R27, 32).

HAF repeatedly attempted to find a way to address the Estate's concerns and to respond to its draconian demand that HAF agree not to allow its transgender clients in the building anymore. However, before such negotiations were given any chance, defendants simply evicted plaintiff. HAF then filed suit alleging sex and disability discrimination arising out of defendants' refusal to lease space to HAF because of the (i) gender/sex or perceived gender/sex and/or the (ii) disability or perceived disability of its transgender clients. Compl. ¶¶32-45 (R34-38).

In sum, the Complaint alleges that HAF was a long-time tenant in the Bruson Building, that HAF took steps in late 1999 to increase the services it provided to the growing number of transgender Latino clients coming to the HAF office, that other tenants in the building complained about the presence of the transgender individuals in the building and restrooms, and that defendants' response was to insist that HAF exclude its transgender clients not just from gender-identity-appropriate restrooms, but from all restrooms and all common areas in the entire building. When HAF refused to comply with defendants' demands and sought to work out a legal and practical solution to the situation, defendants evicted HAF from the building, refusing to renew the lease because of

(i) the gender/sex or perceived gender/sex and/or (ii) the disability or perceived disability of HAF's transgender clients. Of course, all of these allegations must be accepted as true when evaluating defendants' motion to dismiss.

What It Means to Be Transgender

As numerous courts have recognized, transgender individuals are those who have a strong and persistent cross-gender identification and experience persistent discomfort about their assigned sex. In *Maffei v. Kolaeton Indus., Inc.*, the Court explained that transsexualism is

> a condition where physiologically normal individuals experience discontent being of the sex to which they were born and have a compelling desire to live as persons of the opposite sex. The discomfort is usually accompanied by a desire to utilize hormonal, surgical, and civil procedures to live the sex role opposite to which they were born. They are thus persons whose anatomic sex at birth differs from their psychological sexual identity.

164 Misc. 2d 547, 551, 626 N.Y.S.2d 391, 393 (Sup. Ct., N.Y. Cty. 1995). According to the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) ("DSM – IV"), a listing of mental disorders published by the American Psychiatric Association and universally relied upon by the fields of psychiatry and psychology, transgender people have what is called "gender dysphoria" or "gender identity disorder" ("GID"). There are three components to gender identity disorder: (i) "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex"; (ii) "evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex"; and (iii) "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Doe v. Bell*, 194

Misc.2d 774, 775-76, 754 N.Y.S.2d 846, 848 (Sup. Ct. N.Y. County 2003) (discussing definition in DSM-IV).

As the court noted in *Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 719, 400 N.Y.S.2d 267, 271 (Sup. Ct. N.Y. Cty. 1977), "[m]edical science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual's identification with the other sex or his desire for surgical change." *See also Rentos v. Oce-Office Sys.*, 72 Fair Empl. Prac. Dec. (BNA) 1717, No. 95 Civ. 7908, 1996 WL 737215 at * 6-7 (S.D.N.Y. Dec. 24, 1996) (discussing transsexualism). Recent scientific research suggests that GID is a physiological condition, which originates during fetal development; *Matter of Robert Wright Heilig*, 816 A.2d 68, 71-79 (Md. 2003) (evaluating current medical literature on GID in the context of petitioner's request to the Court for legal recognition of a gender change). "Transsexuals do not alternate between gender roles; rather, they assume a fixed role of attitudes, feelings, fantasies, and choices consonant with those of the opposite sex, all of which clearly date back to early development." *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365, 370 (N.J. App. Div. 2001).

Medical science has prescribed a treatment for gender identity disorder, which is for transgender individuals to live in the gender role matching their gender identity, including dressing and presenting as their psychological sex in all aspects of their lives. *See Bell*, 194 Misc.2d at 776, 754 N.Y.S.2d at 848-49 ("Research has found that forcing youths with GID to dress in conflict with their identity . . . causes significant anxiety, psychological harm, and antisocial behavior."). Indeed, before sex-reassignment surgery is even possible, treatment

norms require that the transgender person live full-time according to his or her gender identity for at least one year. *See* Harry Benjamin International Gender Dysphoria Association, *Standards of Care for Gender Identity Disorders*, §XII (6th ed. 2001) (discussing eligibility requirements for genital surgery) (available at http://www.hbigda.org/socv6.html).

Transitioning from one gender to another can involve many steps and gradations, usually starting with the use of hormones to change the body's secondary sexual characteristics (growth or absence of breasts, growth or absence of facial hair, depth of voice, baldness, growth or absence of body hair, distribution of body fat, etc.). Sex-reassignment surgery can involve augmentation or removal of female breasts, removal of internal reproductive organs, removal of testicles, construction of a vagina, or construction of a phallus. Many transgender individuals (especially those transitioning from female to male) delay genital surgery based on their doctors' recommendation that they wait until certain of the procedures are better developed. Many others have limited or no surgery because of its great expense or because other health issues preclude them from undergoing intensive surgical procedures.[2]

Defendants seek to draw a line between "transgendered" people and "transsexuals," but such a distinction is not meaningful. There are relatively few fully "post-operative transsexual[s]" (App. Br. at 16) if by that term is meant

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[2] This information about the process of transitioning from one gender to another is drawn from the following sources: Harry Benjamin International Gender Dysphoria Association, *Standards of Care*, at §§II, VI - XIII (6th ed. 2001); Gianna E. Israel & Donald E. Tarver, *Transgender Care: Recommended Guidelines, Practical Information & Personal Accounts* 14 (1997); Dr. R. Reid et al., *Transsexualism: The Current Medical Viewpoint* 4.3 (1996); Joshua F. Boverman, M.D. and Anna C. Loomis, M.D., *Cross-Sex Hormone Treatment in Transsexualism*, 68 Primary Psychiatry, vol. 7, no. 6 (June 2000).

individuals who have had all possible surgical interventions to alter their primary and secondary sexual characteristics. At the same time, there are many transgender individuals who, through the use of hormones, live their lives and are accepted completely as either men or women, despite having no genital reconstructive surgery.

Procedural History

HAF's Complaint alleges four claims against defendants-appellants: (1) that they discriminated against HAF in commercial real estate based on the actual or perceived sex of HAF's clients in violation of the State HRL, N.Y. Exec, Law §§ 296(5)(b)(1) and (2) and 297(9); (2) that they discriminated against HAF in commercial real estate and in a place of public accommodations based on the actual or perceived gender of HAF's clients in violation of the City HRL, N.Y. City Admin. Code §§ 8-107(4)(a), 8-107(5)(b) and 8-502; (3) that they discriminated against HAF in commercial real estate based on the actual or perceived disability of HAF's clients in violation of the State HRL; and (4) that they discriminated against HAF in commercial real estate and in a place of public accommodations based on the actual or perceived disability of HAF's clients in violation of the City HRL.

The Estate moved to dismiss the Complaint under CPLR § 3211, contending that it failed to state a cause of action under the Human Rights Laws. The Supreme Court, New York County (Shafer, J.) denied the motion to dismiss plaintiff's sex and gender discrimination claims, holding that discrimination against transgender individuals constituted discrimination based on sex. (R11). Justice Shafer granted defendants' motion to dismiss the disability claims on the

ground that nowhere "within the four corners of the complaint" had plaintiffs identified the specific "diagnosable condition" of HAF's transgender clients that would render them disabled within the meaning of the State and City HRLs. (R12). She did so without prejudice, however, thereby effectively rejecting defendants' assertion that transgender individuals are not covered by the disability provisions of the Human Rights Laws as a matter of law. Indeed, plaintiff has subsequently filed an amended Complaint that alleges that HAF's transgender clients have, or were perceived as having, the diagnosed condition known as gender identity disorder.

POINT I

THE COMPLAINT ALLEGES A TOTAL EXCLUSION OF TRANSGENDER CLIENTS FROM THE BUILDING AND ALL RESTROOMS; THE ISSUE ON APPEAL IS WHETHER THOSE ALLEGATIONS STATE A CAUSE OF ACTION

The Standard on a Motion to Dismiss

As the Court below correctly noted, on "a CPLR §3211 motion to dismiss, the factual allegations of the complaint are deemed true." (R9 (citing *Wall Street Associates v. Brodsky*, 257 A.D.2d 526, 684 N.Y.S.2d 244 (1st Dep't 1999)). In considering such a motion, "the pleading is to be afforded a liberal construction. *See* CPLR §3026. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1994). *See also Residence in Madison Condo v. W.T. Gallagher & Assocs., Inc.*, 271 A.D.2d 209, 706 N.Y.S.2d 325 (1st Dep't 2000) (same).

A court presented with a motion to dismiss should, and need, consider only whether the allegations in the complaint fit into any cognizable legal theory. *See Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428 (2001). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.'" *Weiner v. Lenox Hill Hosp.*, 193 A.D.2d 380, 597 N.Y.S.2d 58 (1st Dep't 1993) quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d at 185-186.[3]

The Allegations Set Forth in the Complaint

Applying the above standard to the facts set forth in the Complaint, the Court must accept as true for purposes of this appeal that HAF, a long-time tenant in defendants-appellants' Bruson Building, was evicted after it instituted new programs in 1999 to service the growing transgender Latino community in Jackson Heights, Queens. In response to what the Estate informed HAF were a few complaints from other tenants in the building, the Estate directed HAF to bar its transgender clients from the building's common areas, including the restrooms servicing HAF's office, and then summarily evicted HAF without engaging in any

[3] It is also black-letter law that "affidavits received [from the moving party in support of] an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading." *Rovello v. Orofino Realty Corp.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 316 (1976). Defendants-appellants submitted the Affirmation of Emmanuel R. Gold on the motion below. Since that affirmation did not address whether HAF had stated a claim in its Complaint, but instead focused on the affirmant's difficulty in understanding the concept of a transgender person, it does not meet the very heavy burden of providing "documentary evidence [that] conclusively establishes a defense to the asserted claims as a matter of law," *Leon*, 84 N.Y.2d at 88, 614 N.Y.S.2d at 974, and should be disregarded.

substantive discussions to resolve the problems posed by this unreasonable and illegal demand.

The Estate rejects black-letter law requiring it to accept those allegations as true, and instead struggles mightily in its submissions to this Court and the court below to bend and recast the facts alleged in the Complaint. In particular, the Estate's central tenet, that the Complaint contains "no allegation that defendants would not allow transgendered individuals in the building, or in its bathrooms . . . . The only allegation is that defendants wanted people to use bathrooms that were analogous to their anatomical gender" (App. Br. 2), is simply not true. The Estate blatantly twists – or simply ignores – the plain language of the allegations actually set forth in the Complaint in order to argue a very different case, one defendants-appellants insist is solely about the use of public restrooms. Unfortunately for defendants-appellants, their gymnastic efforts to ignore the plain language of the Complaint are unavailing.

For example, although HAF plainly alleged in ¶2 of the Complaint that its transgendered clients were prevented "from using common areas in the building, including the main entrance and the bathrooms" (R27), the Estate contends that such allegation somehow doesn't count because it is in the introductory section of the Complaint. *See* App. Br. at 3. The Estate cites no authority that "introductory" material does not count, nor could it, since such a rule would contradict the foundational rule that *all* allegations in a Complaint are to be accepted as true on a motion to dismiss.

Defendants' assertion that the Complaint does not allege that the Estate told HAF to bar its transgender clients from the building and the restrooms is belied by the following allegations in the Complaint:

> 23. Quintero [HAF's lawyer] and Henry [the Estate's property manager] had several conversations in which Henry insisted that HAF agree in writing that its clients *would no longer use the public bathrooms in the building*. Henry told Quintero that the Landlord needed such an agreement because other tenants were complaining about the "type of clientele" *coming in an out of the building and using the bathrooms.* Specifically, Henry complained about "men dressed as women coming into the building and using the bathrooms." When Quintero asked whether Henry was referring to transgender clients, Henry responded, "I don't care what they are. They can't use the wrong restrooms."
>
> 24. Quintero explained that transgendered clients were not using the "wrong" restroom – they were using the appropriate restrooms for their gender identities. Quintero also told Henry that HAF could not legally restrict its transgendered clients' *use of the building entrance, hallways, or bathrooms*. Henry told Quintero that the Landlord would not renew HAF's lease unless HAF agreed that *transgendered clients would not be permitted to use the bathrooms*. In the course of his conversations with Quintero, Henry made several offensive comments and ridiculed HAF's clients, explaining, among other things, that he just needed to *get rid of "all these Queens."*

(R32) (emphasis added). On a motion to dismiss, these allegations cannot be ignored, as the Estate proposes. The Estate's only quibble with ¶24 is that the statement about the building entrance and hallways comes from HAF's attorney rather than from the Estate's agent. On a motion to dismiss, however, HAF is entitled to the inference that the attorney was responding to something said by defendants-appellants' representative, and not making up an imaginary claim. Moreover, HAF plainly alleges in ¶23 and in ¶24 that defendants-appellants' agent

complained about HAF's transgendered clients "coming into the building," and that he needed to get rid of "all these Queens." *Id.*

In this regard, the Estate's attempt to evade the actual words of the pleading and focus only on those allegations regarding restrooms leads it to take completely unsupportable positions. For example, the Estate urges that the allegation in ¶23 that the Estate required HAF's written agreement that "its clients would no longer use the public bathrooms in the building" is proof that HAF's transgender clients were not being barred from use of the building. *See* App. Br. at 12. In fact, that alleged demand actually leads to the inference that the Estate's initial position was to bar *all* HAF clients from *all* public restrooms in the Building. Moreover, the fact that the Estate initially considered a blanket prohibition applied to all HAF clients is hardly a defense to its ultimate discriminatory conduct in refusing to renew the lease and evicting HAF from the building.

Similarly misguided is the great weight the Estate puts on the length of HAF's tenancy in the Bruson Building under what the Estate contends was a "neutral" restroom policy (restrooms use based on anatomy only) before HAF suddenly accused it of discrimination. *See* App. Br. at 21, 24. This claim completely ignores the allegations in the Complaint that HAF's transgender client population increased in late 1999, and it was only in the months immediately following that increase that the Estate sought to bar the transgender clients from the building and its restrooms. Comp. ¶¶ 15-16 (R30). Prior to the first concerns expressed by other tenants about HAF's transgender clients, there was no restroom policy in place at all and no controversy regarding their presence in the building.

As one might expect, the Estate's purported "Statement of Facts" assiduously ignores every allegation in the Complaint that refers to anything other than restrooms. Such an approach is untenable and must be rejected as misleading and not in keeping with black-letter law that the facts in the complaint must be accepted as true. Defendants-appellants' reason for distorting the Complaint is obvious: they would prefer to be presented with a case about restrooms, and lacking that, they settle for presenting the Court with entirely hypothetical speculation about the encounters women might have with individuals who are "anatomically a man" in public restrooms.

Instead, this Court, like the court below, should focus on the only issue actually presented on this appeal: does the Complaint state causes of action under the Human Rights Laws. Analyzing the sufficiency of the allegations set forth in the Complaint, Justice Shafer held that HAF had stated a cause of action for gender discrimination, but opined that, although the Human Rights Laws also prohibit discrimination based on a person's actual or perceived disability, the Complaint did not specifically allege "the presence or perceived presence in HAF's transgendered clients" of a diagnosable condition such as the one "clinically know as Gender Identity Disorder or gender dysphoria," and dismissed the disability claims without prejudice. (R10-12).

POINT II

BOTH THE STATE AND CITY HUMAN RIGHTS LAWS HAVE LONG PROHIBITED DISCRIMINATION AGAINST TRANSGENDERED INDIVIDUALS AND THOSE WHO ASSOCIATE WITH THEM

Because New York law has long protected transgender people from discrimination, the motion court quite properly refused to dismiss plaintiff's two

claims alleging sex and gender discrimination under the Human Rights Laws. While the court below did dismiss plaintiff's two other claims, which alleged disability discrimination under the Human Rights Laws, it did so without prejudice, thereby rejecting defendants' contention that transgender individuals are not covered by the disability provision in those laws. Defendants' argument on appeal that transgender individuals are not protected by the Human Rights Laws necessarily raises the question of whether plaintiff's disability claims (now replead in an amended complaint) are legally viable as well.

As set forth below, transgender individuals are covered by the sex/gender and the disability protections in Human Rights Laws, and Justice Shafer's refusal to dismiss the sex/gender claims, and her refusal to dismiss the disability claims with prejudice, should be affirmed.

A. The Prohibitions Against Sex and Gender Discrimination in the Human Rights Laws Cover Discrimination Against Transgender People

The court below properly refused to dismiss plaintiff's sex and gender discrimination claims, holding that "transgendered people are protected under the provisions of the State Human Rights Law, including the prohibitions against discrimination on the basis of sex . . . ." (R10). This conclusion is amply supported by prior decisions of New York courts, by similar decisions from other states and countries, and by the reasoning of other sex discrimination cases.

New York State law prohibits discrimination in commercial leasing on the basis of sex:

> It shall be an unlawful discriminatory practice . . . to refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of race, creed, color, national origin, sex, age, disability . . . . of such person or persons . . . .

N.Y. Exec. Law §296(5)(b)(1). The City statute essentially parallels the State law, except that it uses the term "gender" instead of "sex":

> It shall be an unlawful discriminatory practice . . . to refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein because of the actual or perceived race, creed, color, national origin, gender, age, disability, . . . of such person or persons . . . .

N.Y. City Admin. Code §8-107(5)(b)(1). The City law also prohibits discrimination in a place of public accommodations based on actual or perceived gender. N.Y. City Admin. Code §8-107(4)(a).

As with all remedial statutes, the Human Rights laws are to be liberally construed. *See* N.Y. City Admin. Code §8-130 ("the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."); N.Y. Exec. Law §300 (same). Indeed, a broad interpretation of the ban on sex and gender discrimination is appropriate because "the very purpose of the HRL was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised." *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 89, 390 N.Y.S.2d 884 (1976).[4]

New York Case Law. As the lower court noted, New York courts have long recognized that discrimination against transgender individuals constitutes sex and/or gender discrimination covered by State and City law. In *Maffei v. Kolaeton Industry, Inc.*, for example, a person who had transitioned from

[4] See also *Beame v. DeLeon*, 87 N.Y.2d 289, 296, 639 N.Y.S.2d 272, 276 (1995)("The governmental policy against discrimination enjoys the highest statutory priority, based on the legislative findings that discrimination 'threaten[s] the rights and proper privileges of [the City's] inhabitants and menace[s] the institutions and foundation of a free democratic state") (brackets in original).

female to male brought a sexual harassment action against his former employer under the Human Rights Laws alleging that he was subjected to a hostile work environment because he was transgender. 164 Misc. 2d at 548, 626 N.Y.S.2d at 392. The crucial issue as framed by the *Maffei* court was "whether harassment against a transsexual is included within the purview of the aforequoted statutes." *Id.* at 550, 626 N.Y.S.2d at 393. The court considered that as a matter of public policy, the anti-discrimination statutes are remedial provisions "intended to bar all forms of discrimination . . . and to be broadly applied." With these principles in mind, the court concluded that discrimination related to the fact that an individual transitioned from one sex to another violates the City's prohibition against discrimination based on sex. *Id.* at 556, 626 N.Y.S.2d at 396. The court recognized that, while "a person may have both male and female characteristics, society only recognizes two sexes," and consequently "transsexual male[s] . . . may be considered part of a subgroup of men" for purposes of the sex discrimination laws. *Id.*

Similarly, in *Richards v. U.S. Tennis Ass'n*, the Court held that the State HRL's ban on sex discrimination covered discrimination against a transgender individual. In *Richards*, the U.S. Tennis Association insisted that Ms. Richards, a male-to-female transsexual, take a chromosome test to determine her "true" sex before she would be allowed to compete in the women's competition at the U.S. Open. Granting Ms. Richards' preliminary injunction motion, the court ordered that she be allowed to compete as a woman and held that to do otherwise would be sex discrimination prohibited by the State HRL. 93 Misc. 2d at 721-22, 400 N.Y.S. at 272-73. The *Richards* court held that where an individual transitions

from one sex to another, the "unfounded fears and misconceptions of defendants must give way" to the State HRL's prohibition on sex discrimination. 93 Misc. 2d at 722, 400 N.Y.S.2d at 272.

Finally, federal courts have similarly interpreted New York law as covering discrimination against transgender individuals. In *Rentos v. Oce-Office Sys.*, the court denied a motion to dismiss a complaint that alleged sex discrimination and sexual harassment of a "transgendered female" by her employer. Relying on *Richards* and *Maffei*, the federal court concluded that the plaintiff had stated viable claims of sex discrimination under the Human Rights Laws. 1996 WL 737215 at *1, 8-9. And in *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 248 (2d Cir. 2004), three pre-operative transgender women prevailed on their claim that Toys "R" Us discriminated against them because of their sex in violation of the City HRL. *See* 356 F.3d at 248 (describing result in motion court; appeal dealt only with attorneys fees dispute). Notably, not one New York case takes a contrary position.

Defendants attempt to distinguish this well-established caselaw on the ground that these cases deal with transsexual individuals, while HAF's clients are transgender individuals. As discussed above, however, this distinction is not meaningful in terms of either the science of gender identity disorder or the reality of the lives of transgender individuals. In addition, this arbitrary line – apparently drawn between those who have "completed" surgery and those who have not – is not one that the courts have followed. For example, the plaintiff in *Rentos* identified as a "transgendered female" who had "started, but had not completed, the process of changing her sex from male to female at the time of her hiring," yet

the court still concluded that she was covered under both Human Rights Laws. *Rentos*, 1996 WL 737215 at *1. Likewise, while the plaintiff in *Maffei* "underwent sex reassignment surgery to change his sex from female to male," the record was "unclear as to what physical changes [had] taken place, and to what extent the plaintiff [had] completed his metamorphosis from a female to a male . . . ." 164 Misc. 2d at 548, 626 N.Y.S.2d at 391. The lack of clarity about the nature of the surgery Daniel Maffei had undergone did not deprive him of the protection of the Human Rights Laws. The purported distinction between transgendered people and transsexuals played no role in the analysis conducted by these New York courts, and it should play no role here.

Other States and Countries Agree. The conclusion of New York courts that the sex and gender provisions of the Human Rights Laws ban discrimination against transgender individuals is consistent with conclusions of other state courts interpreting similar statutes. For example, the ban on sex discrimination in the New Jersey Law Against Discrimination covers discrimination against transgender people. *See Enriquez*, 777 A.2d at 373 (a private employer's refusal to renew a contract with a doctor who had transitioned from male to female stated claim of sex discrimination). Likewise, the prohibition against sex discrimination in Massachusetts law includes discrimination against transgender individuals. *See, e.g.*, *Lie v. Sky Publ. Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002) (discrimination against transgender individual is sex discrimination); *Millett v. Lutco, Inc.*, No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm'n Against Discrimination, Oct. 10, 2001) (Full Commission) (same); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct.

11, 2000) (same), *aff'd Doe v. Brockton Sch. Committee*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

Tribunals in Europe and Canada have reached the same conclusion. For example, the European Court of Justice ("ECJ") has held that discrimination against a transgender person who transitioned in the workplace was discrimination on the basis of sex. In *P v. S and Cornwall County Council*, 1996 E.C.R. I-2143, the ECJ concluded that discrimination against a transgender person "is based, essentially if not exclusively, on the sex of the person concerned," and therefore comes within the scope of sex discrimination laws. *Id.* at ¶21. *See also Plaintiff v. Maison des Jeunes and C.T. and A.T.*, File No. 500-53-00078-970 (District of Montreal Human Rights Tribunal July 2, 1998)[5] (concluding that discrimination against a transgendered person is a form of sex discrimination).

Anti-Transgender Discrimination Is Intrinsically Based on Sex. Recognizing that discrimination against transgender individuals is a kind of sex discrimination, as all of the cases listed above do, makes sense because uncertainty about the sexual characteristics of a transgender person is what sparks the discrimination in the first place. Transgender people suffer discrimination precisely because they depart from stereotypes about how men and women should look and act; they are treated as men who are too feminine or women who are too masculine. Such discrimination is intrinsically motivated by sex-based considerations and is logically a kind of sex discrimination.

It has long been true that legal bans on sex discrimination cover situations where people are treated differently because they do not conform to

[5] Available at http://www.lawsite.ca/IAWJ/QHRT/ML.htm.

stereotypes associated with being male or female. So, for example, when Ann Hopkins was denied partnership in an accounting firm because some partners believed she needed to "walk more femininely, wear make-up, have her hair styled, and wear jewelry," the United States Supreme Court held that she had been discriminated against because of her sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Ms. Hopkins was penalized because she deviated from stereotypical notions of how a woman behaves – she failed to dress and present herself as others thought a woman should – and the Court held that such punishment constituted sex discrimination. In just the same way, transgender individuals depart from stereotypes about what it means to be masculine or feminine – they generally do not dress and present themselves according to the stereotypes associated with their chromosonal sex, but instead depart from those stereotypes. Just as it was sex discrimination to punish Ms. Hopkins for not conforming to stereotypes associated with her biological sex, it is sex discrimination to penalize transgender individuals because they do not follow stereotypes linked to their chromosonal sex.[6]

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[6] Many courts have followed the analysis in *Price Waterhouse* and concluded that the sex discrimination laws protect transgender people under a sex stereotyping theory. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (transgender prisoner protected from discrimination under Gender Motivated Violence Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a bank that refused to serve a biological male because he was dressed in "traditionally feminine attire" has a claim for sex discrimination under Equal Credit Opportunity Act); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(Sc), 2003 WL 22757935 (W.D.N.Y. Sep 26, 2003) (transgender woman who was fired after transitioning M-to-F stated claim of sex discrimination under a sex stereotyping theory); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 at *4-5 (N.D. Ohio Nov 9, 2001) (transgender woman who was fired can sue for sex discrimination under a sex stereotyping theory).

Courts have emphasized just this parallel in numerous decisions. For example, in *Maffei*, the court reasoned that harassment of a transgender woman, like "comments based on the secondary sexual characteristics" of any person, was sex discrimination – thereby recognizing that harassment of transgender people is, at its core, based on the person's sex. 164 Misc. 2d at 556, 626 N.Y.S.2d at 396. Another tribunal explained the connection this way: "When a transgendered person suffers from an adverse employment decision, it is generally because an employer objects to the fact that she is 'really' a man, or that she used to be a man. What the employer is objecting to is the fact that the employee no longer exhibits the stereotypical characteristics and behaviors of the sex the employer considers his or her employee to be." *Millett,* 2001 WL 1602800 at *4.

Common sense. Judicial recognition that discrimination against someone who has transitioned from one sex to another is sex discrimination comports both with common sense and with the way the law treats other kinds of discrimination. It is beyond dispute that discrimination against both Catholics and Muslims is religious discrimination, and no one would question that discriminating against someone because she changed her religion from Catholic to Muslim is still religious discrimination. In the same way, discriminating against someone because he or she transitioned from one gender to another is a form of sex discrimination, not something different and apart.

Accordingly, because discrimination against transgender people is a form of sex discrimination, HAF's allegation that defendants-appellants refused to renew HAF's lease because of its association with transgender clients (R27), plainly states a cause of action for sex and gender discrimination under the Human

Rights Laws. The lower court's refusal to dismiss the sex and gender discrimination claims should be affirmed.

B. The Prohibitions Against Disability Discrimination in the Human Rights Laws Cover Transgender People

The Estate argued in its motion to dismiss that transgender individuals are not covered by the disability provisions of the Human Rights Laws, and that the disability claims in the Complaint should be dismissed with prejudice. The lower court did, in fact, dismiss plaintiffs' disability claims, but did so without prejudice to HAF's right to replead them to allege the "presence or perceived presence" of GID, a pointedly limited ruling that effectively rejected defendants' argument. Defendants have renewed this argument on appeal by asserting that the Complaint must be dismissed in its entirety. (App. Br. at 25). Indeed, the very "questions presented" posed by defendants ask "whether transgendered persons were, as a matter of law, protected" under the Human Rights Laws when defendants evicted HAF. (App. Br. at 5). Because transgender people are covered by the disability provisions of the Human Rights Laws, Justice Shafer's refusal to dismiss the disability claims with prejudice should be affirmed. The Human Rights Laws ban discrimination in commercial leasing based upon a person's disability or perceived disability. N.Y. Exec. Law §§296(5)(b)(1) and 292(21); N.Y. City Admin. Code §8-107(5)(b)(1). The City HRL also bans discrimination in public accommodations against individuals with a disability or those who are perceived that way. N.Y. City Admin. Code §8-107(4)(a). The Human Rights Laws define "disability" in exceedingly broad terms. Under the Executive Law, the term "disability" is defined to include "(a) a physical, mental or medical impairment

resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . or (c) a condition regarded by others as such an impairment." N.Y. Exec. Law §292(21). The City HRL's definition of disability, set forth in §8-107(1)(a), is even broader than that under State law, as it includes a physical, medical, mental or psychological impairment "of any system of the body," and on its face does not require an impairment to bodily function or even a medical diagnosis. N.Y. City Admin. Code §8-102(16)(b)(1).

Consistent with the plain terms of the statutes, the Human Rights Laws have been interpreted broadly to protect any medically diagnosable condition. *See, e.g., State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985) ("Fairly read, the [State HRL] covers a range of conditions varying in degree from those involving a loss of a bodily function to those which are merely diagnosable medical anomalies . . ."; condition need not impair a person's ability to perform particular activities). *See also Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155-56 (2d Cir. 1998) ("an individual can be disabled under the [State HRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit the individual's normal activities") (citations omitted).[7]

[7] The definition of the term "disability" in the Human Rights Laws are therefore much broader than the definitions found in federal law. Only individuals with a physical or mental impairment that " "substantial limits" a "major life activity" are considered disabled under the federal disability laws. *See* 42 U.S.C. §12102(2)(A). In addition, both federal disability discrimination statutes, the Americans with Disabilities Act and the Rehabilitation Act,

Transgender people have a diagnosable condition known clinically as Gender Identity Disorder ("GID") or gender dysphoria. As noted above, GID is recognized as a mental disorder in the DSM-IV, the generally accepted medical catalog of mental disorders authored by the American Psychiatric Association, and the accepted medical treatment for people with GID is to live and present according to their gender identity. As people with a medically diagnosable condition, transgender individuals are people with a disability for purposes of both the Human Rights Laws.

Numerous courts have recognized the medical nature of being transgender. Most recently, Justice Gans of the New York Supreme Court explicitly recognized that transgender people have a disability under the State HRL. *See Bell*, 754 N.Y.S.2d at 851. In *Bell*, the Court found that the plaintiff's disorder had been clinically diagnosed as GID "using the medically accepted standards set forth in the DSM-IV" and that "[n]o more is required for [plaintiff] to be protected under the State Human Rights Law." *Id.* In an earlier discovery decision in this very case, Justice Shafer acknowledged the definition of GID in the DSM-IV. *Hispanic AIDS Forum v. Estate of Bruno*, 195 Misc. 2d 366, 367 n.1, 759 N.Y.S.2d 291, 292 n.1 (Sup. Ct. N.Y. Cty. 2003); *see also* R7.

Similarly, in *Arroyo v. N.Y. City Health and Hosp. Corp.*, No. EM01120-04-89-DE, 1994 WL 932424 (A.L.J., N.Y. City Comm'n on Human Rights Mar. 11, 1994), *aff'd*, No. EM1120-04-12-89-DE, 1994 WL 932425 (N.Y. City Comm'n on Human Rights May 25, 1994), the City Human Rights

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specifically exclude transsexuals from their coverage. See 42 U.S.C. §12211(b)(1); 29 U.S.C. §705(20)(F)(i). Neither the State nor the City HRL contains any such exclusion.

Commission held that a male-to-female transsexual who wore feminine attire but had not had any surgery was "disabled" for purposes of the City HRL. Finally, the courts in *Richards*, *Maffei*, and *Rentos* have all recognized that being transgender or transsexual is a medically diagnosable and treatable condition. *Rentos*, 1996 WL 737215 at *6-7; *Maffei*, 164 Misc. 2d at 551-552, 626 N.Y.S.2d at 393-94; *Richards*, 93 Misc. 2d at 718-19, 400 N.Y.S.2d at 270-71.

Courts in other states with similarly expansive disability statutes (*i.e.*, statutes that do not require that a disability restrict any major life activities) have held that GID or gender dysphoria qualify as a "disability" under their statutes. *See, e.g.*, *Enriquez*, 777 A.2d at 376 ("gender dysphoria is a recognized mental or psychological disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap under" New Jersey's Law Against Discrimination). Even states with more restrictive disability statutes have recognized gender dysphoria as a disability. *See, e.g.*, *Jette v. Honey Farms Mini Market*, No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (Full Commission) (holding that transgender individuals can make out a claim of disability discrimination); *Doe v. Yunits*, No. 00-1060A, 2001 WL 664947 at *5 (Mass. Super. Ct. 2001) (holding that a transgender student had stated a viable disability discrimination claim under state law); *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882 at *11 (Fla. Div. Admin. Hrgs. 1991) (holding that a person with gender dysphoria is covered by the disability provisions of the Florida Human Rights Act, as well as its prohibition against discrimination based on perceived disability).

HAF need not allege facts showing that some or all of its transgender clients have been diagnosed with GID; the Estate's actions, as alleged in the Complaint, constitute disability discrimination whether HAF's transgender clients actually have GID or were *perceived* or *regarded* as being transgender by defendants. The City HRL makes clear that in the context of discrimination in commercial leasing, as in other discrimination cases, it is the landlord's *perception* that is relevant to the issue of discrimination, and not the actual status of the victim:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessor. . . . to refuse to sell, rent, lease . . . commercial space . . . because of the *actual or perceived* . . . sex . . . [or] disability . . . of such person or persons.

N.Y. City Admin. Code §8-107 (emphasis added). The State HRL also bans discrimination based on a perceived disability. *See* N.Y. Exec. Law §292(2).

In *Romei v. Shell Oil Co.* the court held that the plaintiff could maintain a claim for discrimination on the basis of disability where his former employer regarded him to be suffering from AIDS, despite the fact that plaintiff failed to allege that he was in fact suffering from this disability:

> it is . . . not necessary that [plaintiff] allege that he actually has a "disability" within the meaning of Executive Law 292.21(c) in order to state a cause of action [for discrimination] . . . . It is sufficient that he allege that he was regarded by the defendants as having a disability.

1991 WL 692884 (N.Y. Sup. Ct., N.Y. Cty. Feb. 14, 1991); *see also Grullon v. South Bronx Overall Econ. Dev. Corp.*, 185 Misc. 2d 645, 712 N.Y.S.2d 911 (Civ. Ct. N.Y. Cty. 2000) (holding it was sufficient that the plaintiff submitted evidence "from which the jury could infer and conclude that defendant 'regarded' or

'perceived' plaintiff as suffering from alcoholism"); *Doe v. Roe*, 160 A.D.2d 255, 256, 553 N.Y.S.2d 364, 365 (1st Dep't 1990) ("We note that the definition of disability in the Human Rights Law . . . is broad enough to embrace persons who . . . contend they are not disabled but whom the potential employer perceived (wrongfully) to be disabled.").

Thus the allegations in the Complaint that defendants discriminated against HAF because of its clients' actual or perceived disability – their transgender status – are sufficient to maintain its disability claim. (R30, 31, 36, 37). Because transgender individuals are individuals with a disability recognized by the Human Rights Laws, the court below properly refused to dismiss the Complaint with prejudice. That refusal should be affirmed.

C. Discrimination Against HAF Because of its Association with Transgender People Is Covered by the Human Rights Laws

As the motion court recognized (R11), and the Estate does not appear to dispute, HAF can claim the protection of the Human Rights Laws based on its allegation that it was evicted from its offices because of its association with transgender individuals. This Court has recognized that a commercial tenant has a claim under the Human Rights Laws where the landlord refuses to lease space to the tenant because of the identity of the tenant's clientele.

In *Bernstein v. 1995 Associates*, 185 A.D.2d 160, 586 N.Y.S.2d 115 (1st Dep't 1992), for example, the plaintiff alleged that a commercial landlord discriminated against women, ethnic minorities and the disabled by refusing to grant the plaintiff a lease because of the nature of his medical practice, which provided abortion services and treatment for AIDS patients. This Court held that,

regardless of whether the landlord intended to target women, minorities, or the disabled, the alleged conduct constituted unlawful discrimination against the plaintiff. *Id.* at 160, 586 N.Y.S.2d at 117. Similarly, in *Matter of Barton v. New York City Comm'n On Human Rights*, 140 Misc. 2d 554, 531 N.Y.S.2d 979 (Sup. Ct. N.Y. Cty. 1988), the court rejected defendants' argument that a dentist who treated AIDS patients did not have standing to bring a claim of disability discrimination under the City HRL because he was not himself handicapped, holding that "a person who sought to make his services available to a needy and discriminated against class and who was thwarted in those efforts has standing to complain." *Id.* at 561, 531 N.Y.S.2d at 983. The court relied on the United States Supreme Court holding in *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205 (1972), that whites can bring an action claiming that non-whites were discriminated against in obtaining housing rentals on the theory that the whites were injured by not enjoying the benefit of integrated housing.

Numerous other cases have allowed claims by plaintiffs who were personally injured by virtue of their association with a protected class. *See, e.g.*, *Dunn v. Fishbein*, 123 A.D.2d 659, 507 N.Y.S.2d 29 (2d Dep't 1986) (Caucasian person may maintain a discrimination claim where he alleged that he was denied an apartment because his roommate was African-American); *Axelrod v. 400 Owners Corp.*, 189 Misc. 2d 461, 465, 733 N.Y.S.2d 587, 591 (Sup. Ct. N.Y. Cty. 2001) (New York discrimination case law has "allowed claims by persons who were not themselves members of the protected class but who were personally affected, albeit indirectly, by virtue of the alleged discrimination.").

Here, HAF's association with transgender individuals, and the allegation that defendants evicted HAF because of that association, are all that is needed to claim the protection of the Human Rights Laws.

POINT III

ACTUAL OR ATTEMPTED AMENDMENTS TO THE HUMAN RIGHTS LAWS ARE NOT RELEVANT HERE

Defendants assert that the Human Rights Laws did not cover discrimination against transgender individuals at the time defendants evicted HAF from its office space in 2000. Defendants' argument simply ignores the fact that, since as early as 1977, every New York court to have addressed this question has uniformly held that transgender people are covered.

Faced with that obstacle, defendants next assert that subsequent changes, or attempted changes, to the Human Rights Laws suggest that those courts were wrong. Defendants' arguments must fail for two simple reasons: First, the 2002 amendments to the City HRL, which added express coverage for "gender identity" to that law, were done as a clarification of existing coverage, rather than as an expansion. Second, the failed attempt to amend the State HRL to include "gender identity," like most such unsuccessful attempts, has no clear meaning, and indeed is more consistent with an understanding that transgender people were already covered than with the proposition that such coverage was to be removed.

A. The Amendment to the City HRL Expressly Stated That It Was a Clarification, Rather Than an Expansion, of the Law

Defendants' assertion that the 2002 addition of "gender identity" to the City HRL means that transgender people were not covered before that time

cannot be squared either with prior caselaw or with the language and legislative history of the amendment itself. As set forth above, New York courts have interpreted the Human Rights Laws as protecting transgender people since at least 1977, and case law specifically addressing this issue under the City HRL dates from 1995. When the City Council added explicit coverage for gender identity to the City HRL in 2002,[8] it was quite aware that the City HRL had already been held to protect transgender people.[9] Accordingly, the legislation stated that it was simply "clarif[ying]" the scope of the statute's coverage, *see* N.Y. City Local Law No. 3 Int. 24 (2002), which under existing case law, already included transgender people.

The City Council amended the City HRL to ensure express protection for transgender people, despite the fact they were already covered, because doing so would serve a number of important social and legislative functions. As the legislative history of the amendment reveals, these functions included:

(1) reaffirming for employers, landlords, and providers of public accommodations, in the clearest possible language, that discrimination

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8 *See* N.Y. City Local Law No. 3 Int. 24 (2002) (redefining the term "gender" to "include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth").

9 In debating the addition of "gender identity" to the City HRL, the City Council discussed the fact that transgender people were already covered by the law. *See* Tr. of Mins. of Comm. on Gen. Welfare of the City Council of the City of New York, dated May 4, 2001, at 17-18 (considering Executive Memorandum from Martha Mann Alfaro, Deputy Chief, Division of Legal Counsel of the City of New York, dated March 1, 2001 (R74-77) (hereafter, "Alfaro Memo")). The Alfaro Memo explains that transgender persons were already "protected under provisions of our local law which address discrimination based on actual or perceived gender and disability." (R74).

against transgender people is illegal, *see* Tr. of Mins. of Comm. on Gen. Welfare of the City Council of the City of N.Y., dated April 23, 2002, at 15 (hereafter "2002 City Council Tr."); Tr. of Mins. of Comm. on Gen. Welfare of the City Council of the City of New York, dated May 4, 2001. at 15-16 (hereafter "2001 City Council Tr.") ("[P]rofessionals [in private companies] often times depend on the words of the City statute for their guidance, as do the lawyers that advise them."), *id.* at 16 ("Most employers really want to do the right thing and not discriminate, and the problem was and is that they do not know what is covered by the law.");

(2) giving clear notice to ordinary citizens and transgender people themselves that they are entitled to full protection of the law, *see* 2002 City Council Tr. at 15, *id.* at 33 ("In the absence of such explicit protections, there exists no real compulsion for people for one of the City's most marginalized communities to believe that they should engage the system, that they will receive confident, respectful and appropriate responses to complaints."), 2001 City Council Tr. at 16-17 ("Because the law does not clearly state that it covers all persons with diverse gender identities, many persons do not realize that they have rights against employment, housing and public accommodations discrimination.");

(3) making it easier for lawyers who practice discrimination law but are not familiar with this area to realize that transgender individuals are covered, *see id.* at 17 ("Keep in mind that some of the attorneys practicing discrimination law have little experience in how the statute might be interpreted by those in the know at the Human Rights Commission or the City Law Department.

The fact that the law may cover persons of diverse gender identities should not be a secret shared strictly among regular practitioners before the Commission.");

(4) constituting a directive to the Human Rights Commission and other City agencies, including the police department, that they must affirmatively seek to protect the rights of transgender individuals, *see* 2002 City Council Tr. at 15; and

(5) representing an official legislative statement by the City Government "that the lives, rights and experiences of [transgender people] have the same value as those belonging to any other group in New York City," *id.* at 32; *see also id.* at 44 ("by passing the legislation, the City Council will be expressing a public judgment of what is right").

For all of these reasons, the Council clarified the City HRL's existing coverage of transgender individuals, and for all of these reasons, that amendment did nothing to remove such coverage retroactively for any discrimination occurring beforehand. Defendants' argument is simply without merit.

B. The Failure to Amend SONDA Does Not Indicate Legislative Disapproval of Covering Transgender People Under the State HRL; Indeed, It Is Entirely Consistent with Such Coverage

Defendants' other argument that the legislature has somehow implicitly reversed the existing court decisions is equally without merit. Defendants point to the fact that, in December 2002, Senator Tom Duane offered an amendment that would have added "gender identity" to the Sexual Orientation Non-Discrimination Act ("SONDA"), and note that the amendment did not pass.[10]

[10] SONDA, which passed in December 2002 and became effective in January 2003, added "sexual orientation" to the State HRL. "Sexual orientation" was defined as "heterosexuality,

But the fact that the legislature chose not to amend SONDA to cover transgender people does not mean that the State HRL did not already do so. Indeed the failure of the amendment to pass is most logically explained by the reality that transgender people were already covered under the State HRL, rather than by positing that the legislature thought that defeating the amendment to SONDA would somehow tacitly overturn the existing caselaw regarding transgender individuals under the State HRL.

The legislature's failure to amend SONDA to include gender identity indicates that it did not want to include that provision in that bill. But it does not indicate why. The legislature could very well have decided to reject the proposed addition because it was not needed, since transgender individuals are already covered by other parts of the State HRL, and the legislature is presumed to know the state of the law when it enacts legislation. *See, e.g.*, N.Y. Stat. Law §191 (McKinney's 2004) (Comment to statute states that the "Legislature will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation"); *Thomas v. Bethlehem Steel Corp.*, 95 A.D.2d 118, 120, 466 N.Y.S.2d 808, 810 (3d Dep't 1983) (the Legislature is "presumed to be aware of the law existing at the time and does not act in a vacuum").

Defendants' contention that the rejection of the amendment means the legislature intended that the State HRL would no longer cover transgender people is wholly implausible. If the legislature had intended to exclude transgender individuals from the State HRL, it could have done so explicitly. *See, e.g.*,

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homosexuality, bisexuality or asexuality, whether actual or perceived." N.Y. Exec. Law §292(27).

Coughlin v. Regan, 85 A.D.2d 762, 455 N.Y.S.2d 272, 274 (3d Dep't 1981) (court "may assume that the Legislature knew how to draft a bill to effectuate [its] objectives"). Indeed, the United States Congress has specifically excluded transgendered individuals from various federal protections, *see, e.g.*, 42 U.S.C. §12211(b)(1) (excluding "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from coverage under the Americans with Disabilities Act); 29 U.S.C. §705(20)(F)(i) (same exclusion under federal Rehabilitation Act), and the state legislature could have done the same had it so desired. The fact that it did not do so means that the legislature, knowing full well that the courts had interpreted the terms "sex" and "disability" in the State HRL to cover transgender individuals, decided not to alter those aspects of the statute.

The legislature's decision not to add specific protection for gender identity in SONDA (because it was not necessary) is quite different from affirmatively repealing or revising the civil rights protections that transgender individuals have enjoyed under state law for 25 years. *See* N.Y. Stat. Law §193 (McKinney's 2004) (Comment to statute provides that, "Where an amendment leaves portions of the original act unchanged, such portions are continued in effect, with the same meaning and effect as they had before the amendment. . . . The existing law is not presumed to be changed further than is necessarily implied from the language used in the amendatory act."); *Cuthbert S. v. Linda S.*, 161 Misc. 2d 372, 613 N.Y.S.2d 801 (Fam. Ct., Kings County 1994) ("If the intent of the legislature was to preclude the type of relief provided for in [a line of] cases, it

could have made specific provisions for such preclusion."). In short, the proposed amendment to SONDA is irrelevant to the issues before the Court.

POINT IV

THE COMPLAINT ADDRESSES DEFENDANTS-APPELLANTS' VIOLATION OF THE STATE AND CITY HUMAN RIGHTS LAWS, NOT WHETHER RESTROOM USAGE IS DETERMINED BY CHROMOSONES; BUT EVEN IF THE COMPLAINT HAD RAISED THE ISSUE OF RESTROOMS, IT WOULD STATE CAUSES OF ACTION UNDER THE HUMAN RIGHTS LAWS

Because the Complaint here is based on the Estate's eviction of HAF to prohibit its transgender clients from the use of the entire building, including restrooms, the Court is not faced with the issue that is central to the Estate's brief on appeal: what restroom may or may not be "appropriate" or "reasonable" for a transgender person to use, and under what circumstances. The various hypothetical restroom confrontations the Estate imagines in its brief are conspicuously absent from the Complaint, and are thus not before the Court on this appeal. It is evident that the Estate is attempting to substitute the specter of an uncomfortable restroom encounter, and perhaps stir "unfounded fears and misconceptions," *Richards*, 93 Misc. 2d at 722, 400 N.Y.S.2d at 272, in the place of making a coherent argument that transgender persons are somehow not covered by the Human Rights Laws.

Even if the allegations in the Complaint were different, however, the decision of the court below should still be affirmed. The Human Rights Laws protect transgender individuals against discrimination based on gender and actual or perceived disability, and they do so even under the most complex and difficult circumstances. Reasonable people have addressed and reached responsible

resolutions of far more sensitive issues than the question of which restroom a transgender individual should be permitted to use. Stripped of the baggage and innuendo in which the Estate seeks to shroud it, the issue of gender-identity-appropriate restroom usage is, in reality, quite prosaic.

Discrimination Based on Disability

Assuming for present purposes only that this lawsuit actually alleged that the Estate prohibited HAF's clients from using gender-identity-appropriate restrooms, the Complaint clearly states a cognizable cause of action for discrimination based upon an actual or perceived disability. As set forth in more detail below, the Estate has a legal obligation under the Human Rights Laws to accommodate HAF's transgender clients' disabilities or perceived disabilities, and its conduct as alleged in the Complaint falls woefully short of meeting that requirement.

The Human Rights Laws require a landlord reasonably to accommodate the disabilities of its tenants, as part of the statutes' general prohibition against disability discrimination. For example, the City HRL provides that "any person prohibited by the provisions of this section from discriminating on the basis of disability," such as landlords leasing commercial real estate, *see* N.Y. City Admin. Code §8-107(5)(b), "shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." N.Y. City Admin. Code §8-107(15)(a). The State HRL similarly prohibits disability discrimination and requires reasonable accommodation by commercial landlords. S*ee* N.Y. Exec. Law §296(5)(b).

As Justice Gans explained in *Bell*,

> [t]he State Human Rights Law, of course, is not simply a prohibition on discriminatory actions taken because of a person's disability. Quite the contrary, the State Human Rights Law, like federal disability discrimination statutes, requires covered entities to provide to persons with disabilities reasonable accommodations not offered to other persons in order to ensure that persons with disabilities enjoy equality of opportunity.

194 Misc. 2d at 780, 754 N.Y.S.2d at 851; *cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("The [Americans with Disabilities] Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.") (emphasis in original).

The State HRL only defines the term "reasonable accommodation" in the employment context, but that definition is logically exportable to the context of commercial real estate and public accommodations. As defined in the statute, "reasonable accommodation" means "actions taken which permit an employee, prospective employee, or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . .; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which the action is requested." N.Y. Exec. Law §292(21-e). The City HRL similarly provides that "[t]he term 'reasonable accommodation' means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." N.Y. City Admin. Code §8-102(18).

Obviously, whether an accommodation is "reasonable" or an "undue hardship" varies depending on the circumstances of the individual case. New York courts have held, for example, that under the state disability law, a landlord is required to make an exception to a "no-pet" clause in a lease for a disabled tenant who needed to keep a pet because of his disability. *See Ocean Gate Assocs. Starrett Sys., Inc. v. Dopico*, 109 Misc. 2d 774, 441 N.Y.S.2d 34 (Civil Ct. Kings County 1981). The *Dopico* court held that under the disability law, the no-pet clause (a generally applicable regulation) had "to bow upon proof of a specific, particularized need . . . which . . . arises out of the handicap." *Id.* at 775, 441 N.Y.S.2d at 34. Thus, *Dopico* makes clear that even when a defendant adopts a "neutral" or generally applicable rule, the fact of general applicability alone does not insulate the defendant from a disability discrimination claim. Rather, where feasible, the generally applicable rule must bow to the particularized needs of the disabled individuals.

At a minimum, defendants-appellants should have entered into a dialogue with HAF in order to determine whether an accommodation of HAF's transgendered clients was necessary and what accommodation would be reasonable. The federal Americans with Disabilities Act, which serves as a guide to the interpretation of the far broader Human Rights Laws,[11] explicitly recognizes

[11] The duty of the employer or landlord to engage in a dialogue about the possibility of an accommodation also obtains under the Human Rights Laws, which are explicitly more expansive than federal law and have been interpreted to be more protective of civil rights than the federal non-discrimination laws. *See, e.g., Burger v. Litton Indus., Inc.*, No. 91 Civ. 0918, 1996 WL 421449 at *19 (S.D.N.Y. Apr. 25, 1996) ("the 'legislative history' of the NYCHRL makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws"); *Maffei*, 164 Misc. 2d at 555, 626 N.Y.S.2d at 396 ("Our New York City law is intended to bar all forms of discrimination in the workplace and to be broadly applied."); *Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 86 n.1, 390 N.Y.S.2d 884 (1976) (noting

such a requirement. *See, e.g., Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1137-39 (9th Cir. 2001) (employers are required to engage in a "dialogue" with their employees to determine what an appropriate accommodation may be given the particular circumstances); *Dvorak v. Mostardi Platt Associates, Inc.*, 289 F.3d 479, 485 (7th Cir. 2002) (the accommodation process is "interactive," under which both parties must put forth "serious efforts"); *Cleveland v. Prairie State Coll.*, 208 F. Supp. 2d 967, 978 (N.D. Ill. 2002) ("The function of the ADA is to force an employer to have an ongoing dialogue with a disabled employee that enables the employer to both 'accommodate' the employer's policies and job requirements and yet meet the needs of a 'qualified individual.'").

Instead, as set forth in the Complaint, defendants-appellants not only failed to accommodate HAF's clients' disabilities, but failed even to give HAF the opportunity to propose reasonable alternatives that would have accommodated the needs of their clients with disabilities. Had HAF been given such an opportunity, it could have suggested a number of different solutions to the conflict, any of which, HAF submits, would have been reasonable. *See Bell*, 194 Misc. 2d at 785-87, 754 N.Y.S.2d at 855-56 (directing NYC Children's Services Administration to permit transgender youth to wear feminine attire as reasonable accommodation for GID disability). For example, HAF might have proposed any or all of the following: (1) the designation of a single-person restroom facility in the building for use by those who object to sharing a bathroom with transgender people; (2)

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that, in interpreting the state disability law, the court is not bound by more restrictive U.S. Supreme Court decisions interpreting the ADA); *id.* at 88 ("[T]he very purpose of the [state] HRL was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised.").

notifying the other tenants in the building of the hours and/or days of the week when HAF's transgender clientele would be in the building and would likely use the restrooms; (3) that the tenants in the building be educated about the nature of transgenderism and the fact that the transgender women using the bathroom are truly self-identified women and not voyeuristic men (this could include a dialogue allowing the other tenants to express their concerns about having transgender women in the bathroom which could then be directly addressed); (4) the reconstruction of the existing restroom facilities on HAF's floor in the building into a series of single-person facilities; (5) a system whereby whenever the bathroom is in use, an "occupied" sign is placed upon the door so that others may choose to wait until the bathroom is vacant. In determining what accommodation would be reasonable, the reasonableness of defendants' position that transgender individuals should not use gender-identity-appropriate restrooms, or indeed should use no restrooms at all, would also have to be considered.

Had the Estate explored these or other possible solutions with HAF, the parties likely could have found a mutually acceptable resolution that would have brought it into compliance with the Human Rights Laws without undue burden. One thing is certain: the Estate's failure to engage in any such exploration or to attempt negotiation at all and its decision to summarily evict HAF instead cannot possibly constitute a reasonable accommodation under either the City or State disability laws. Moreover, even if defendants-appellants had merely attempted to condition HAF's continued tenancy on its prohibiting transgender clients from using gender-identity-appropriate restrooms, rather than insisting on barring all transgender persons from the entire building, their total failure to

explore alternative solutions to the conflict would still constitute illegal disability discrimination. And because it was uncontroverted on the motion below that the Estate refused to entertain proposals for any accommodations whatsoever, neither this nor the motion court would ever be faced with the question of what accommodation would have been reasonable.

Discrimination Based on Gender or Sex

Had the Estate chosen to bar HAF's transgender clients only from using gender-identity-appropriate restrooms, as opposed to barring them from using any restrooms or common areas of the building, the Complaint would still state a cause of action for gender and sex discrimination. Barring transgender people from using restrooms appropriate to their gender identity is also a form of sex discrimination because the exclusion is based on one criterion: the individual's biological sex.

Allowing transgender individuals to use gender-identity-appropriate restrooms, of course, would not mean that landlords could not segregate restroom usage by sex – there would still be men's rooms and women's rooms – but individuals would select which room to use based on their gender identity. While such a regime may raise questions in the minds of some, it is neither unusual nor threatening to individual privacy or security. For example, many cities and private companies have adopted just such a restroom use policy without incident. *See Amicus Curiae* Brief submitted by the Harry Benjamin International Gender Dysphoria Association (discussing municipalities and companies such as Lucent that have adopted gender-identity-appropriate restroom policies). Indeed, landlords or employers who follow such a policy do not subject themselves to any

risk of liability. For example, a school district in Minnesota appropriately allowed a transgender woman to use the women's room in her workplace. When another employee sued the school, arguing that its restroom usage policy inflicted sexual harassment on her and discriminated against her based on her religion, her complaint was summarily dismissed, and the dismissal was affirmed on appeal. *See Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001); *aff'd Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002).

Individual privacy would not be invaded by such a restroom use policy, since people do not see each others' genitals in the restroom. Men and women undress only within the privacy of a stall, not in front of other people in the common areas of the restroom. Even men using the urinal do not expose their genitals to each other, and transgender men will either use the urinal, just like other men, or will use a stall and therefore be invisible to others. A moment's reflection serves to reveal the absurdity of the Estate's horror at the possibility of a transgender woman's entering a stall in a women's restroom: in reality, whether in the ladies' room at the Metropolitan Opera House, Lincoln Center, or a Broadway show, no-one enters another woman's stall to examine her genitals. *See* App. Br. at 13.

Security concerns over use of gender-identity-appropriate restrooms are simply misplaced. Transgender people use restrooms appropriate to their gender identity as part of the treatment for their condition; they live their lives, 24 hours a day, in the gender with which they identify. Because using a men's or women's room is a core part of what it means to be a man or woman in our society,

it is also a core part of their prescribed treatment. They are neither voyeurs nor predators. Transgender persons do not enter restrooms to ogle, intrude, or assault, and these problems are no more common among transgender individuals than among the general population. Indeed, recognizing a discrimination claim for transgender individuals wrongfully denied access to gender-identity-appropriate restrooms would not prevent an employer or landlord from dealing severely with inappropriate or threatening behavior in a restroom. Because there are no allegations in this case (even from defendants, who repeatedly cite to matters beyond the record on appeal) that HAF's transgender clients engaged in any voyeuristic or threatening behavior in the Bruson Building restrooms, such concerns are wholly misplaced here.

Moreover, the alternative to such a solution is unacceptable. Defendants propose requiring a transgender woman to use the men's room, but consider a typical transgender woman – she has breasts, a female hair style, wears a dress or a skirt, women's shoes, and make-up. Forcing her to use the men's room, as defendants propose, would surely create more discomfort to other users of the building than would allowing her to use the women's room.

Another consideration raised by defendants' proposed rule is just how the gender of restroom users would be policed or determined. Right now, no one checks a person's gender at the restroom door. Under defendants' proposal, would everyone have to present identification at the entrance? What about the many

transgender individuals who have changed the gender marker on their drivers' licenses or birth certificates? Perhaps defendants propose that someone check the genitalia of all restroom users, a proposal that would of course raise insuperable privacy concerns. Based on its complaint about "men dressed as women coming into the building and using the bathrooms," Compl. ¶ 23 (R32), the Estate would likely propose a "we know it when we see it" rule, even though that would leave many individuals at the whim of the prejudices and preconceptions of a particular landlord or employer. For example, if a masculine-appearing woman, dressed in a decidedly androgynous manner with a buzz cut, approaches the women's room, is she to be barred because she appears too masculine? Could she gain entrance by showing identification, or must she allow a strip search? Even a strip search would likely be meaningless in many cases, since transgender women are often visually indistinguishable from biological women, even to doctors.[12] Allowing restroom users to select the appropriate restroom based on their gender identity, while still policing the restrooms for inappropriate conduct by any user, avoids all of the intrusive and discriminatory consequences of defendants' proposed rule.

That the Estate is uncomfortable with the notion of transgender persons using the public restrooms in its building cannot make it permissible for it

[12] Even doctors face significant difficulty distinguishing between them. *See, e.g.*, Harry Benjamin, M.D., *The Transsexual Phenomenon*, ch. 7 (1997), available at http://www.symposion.com/ijt/benjamin/chap_07.htm.

to challenge the gender and examine the genitalia (or require birth certificates or doctors' letters) to determine the biological sex of persons who wish to use a restroom, particularly if such an inquiry is only triggered because a prospective patron does not look sufficiently masculine or feminine. Such an approach might ultimately result in a post-operative transsexual's being required to use the restroom appropriate to his or her birth gender, rather than one in keeping with his or her present anatomy, a result that not even defendants-appellants would require.

The Estate's Arguments to the Contrary are Unavailing

In the course of defending a restroom use policy that is not at issue on this appeal, the Estate relies on several cases to support its contention that imposing a blanket policy of matching genitalia to restroom would pass muster, presumably on the theory that if a facially neutral policy is applied equally to everyone, there is no discrimination. Thus, in *McCoy v. City of New York*, 131 F. Supp. 2d 363 (E.D.N.Y. 2001), a City Parks Department rule excluding all employees, regardless of race, from using a specific restroom was found not to discriminate against some African-American employees on the basis of race. Similarly, in *Siegel v. Blair Hall, Inc.*, 207 A.D.2d 539, 615 N.Y.S. 2d 937 (2d Dep't 1994), a landlord's decision to install electric locks on the front door of an apartment building, which was done for safety reasons and necessarily affected all of the building's occupants, did not discriminate against Jewish tenants because of their religion, which forbade them from operating the locks on holy days. And, in *In re Richard Bruno*, 212 A.D. 2d 314, 628 N.Y.S.2d 971 (2d Dep't 1995), a

commercial landlord's decision to ban all religious symbolism from its rented commercial spaces was not religious discrimination because it applied to all religious symbols, irrespective of the religious belief of the prospective tenant.

These cases are not controlling here for three reasons. First, the Complaint does not allege that any "facially neutral" policy was ever instituted by the Estate. Although the Estate writes in its brief that it "allegedly required that its tenants and their clients use bathrooms in the common area that matched those person's anatomical sex" (App. Br. at 21), it does so without citation, because the Complaint is devoid of any such allegation. Indeed, the only policy ever articulated in the Complaint was the Estate's proposal that HAF agree to prohibit all of its clients from every restroom in the Bruson Building. Compl. ¶23 (R32). Accordingly, the Estate is proposing that the Court consider a factual situation that never existed in connection with a line of cases that is, as explained below, not relevant.

Second, such a policy would not be applied equally to everyone because it would inevitably be based on appearance rather than anatomy. Masculine women and feminine men, regardless of whether they are transgender, would end up being excluded from the appropriate restrooms based simply on the landlord's preconceptions and stereotypes about what men and women should look like. Such a rule would treat such persons differently because of their sex because it would police and penalize departures from stereotypes associated with biological sex. In contrast, the restroom use rule in *McCoy* treated all Parks Department employees the same, regardless of race, the door locks in *Blair Hall* applied to all

tenants regardless of religion, and the ban on religious symbolism in *Bruno* applied to all religious symbols.

Third, even if the Estate's hypothetical restroom-use policy did apply "equally" to everyone, it would still be unlawful sex discrimination because the lines it draws are inherently based on sex. The "equal application" doctrine has long been rejected as sophistry in contexts such as this one. For example, in *Loving v. Virginia*, 388 U.S. 1 (1967), the United States Supreme Court rejected the same "equal application" argument advanced by the Estate here. Virginia argued that its law prohibiting interracial marriage did not discriminate on the basis of race because the prohibition applied "equally" to whites and non-whites – both whites and non-whites were prohibited from intermarrying and would suffer the same criminal penalties if they did. Nevertheless, the Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8. To establish that the classification was based on race, it was unnecessary to show that whites and non-whites were treated differently; it was enough that the classification was defined in terms of the race of the members of a couple. *Id.* at 11; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (rejecting equal application rule in similar context).

The rejection of the equal application rule is not limited to the context of racial classifications. For example, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court struck down a policy conditioning spousal benefits on dependency for servicewomen but not for servicemen. The classification created

no disparity between men and women because, although servicewomen were disadvantaged vis-à-vis servicemen, the husbands of servicewomen were also disadvantaged vis-à-vis the wives of servicemen. The Court nevertheless held that the classification impermissibly discriminated based on sex. *Id.* at 688; *see also Califano v. Goldfarb*, 430 U.S. 199 (1977). In short, to establish that a classification is based on sex, it is not necessary to show that men as a class and women as a class are treated differently; it is enough that the classification is defined in terms of sex, as it is here.

Finally, the Estate's hypothetical restroom use policy would also be disability discrimination because it affects people with disabilities differently than it affects others by ignoring the landlord's obligation to provide reasonable accommodation. *See supra* at. 37-42. Similarly, even a restroom-use policy that did in fact apply uniformly to everyone would have to bend if necessary to accommodate the needs of a person with a disability, such as transgender individuals, or violate the Human Rights Laws.

CONCLUSION

For the reasons stated above, the Court should affirm the order of the lower court refusing to dismiss HAF's sex and gender claims, and refusing to dismiss HAF's disability claims with prejudice.

Dated: New York, New York
April 21, 2004

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CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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EDWARD HERNSTADT

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New York Supreme Court
Appellate Division—First Department

HISPANIC AIDS FORUM,

Plaintiff-Respondent,

– against –

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10,

Defendants-Appellants.

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