CTQ-2016-00002

Court of Appeals

of the

State of New York

TRATHONY GRIFFIN and MICHAEL GODWIN,

Appellants,

– against –

SIRVA, INC. and ALLIED VAN LINES, INC.,

Respondents.

ON APPEAL FROM THE CERTIFIED QUESTIONS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 15-1307-CV

BRIEF FOR *AMICI CURIAE* THE LEGAL ACTION CENTER, THE COMMUNITY SERVICE SOCIETY OF NEW YORK, NELA/NY (THE NEW YORK AFFILIATE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION), THE BRONX DEFENDERS, THE CENTER FOR COMMUNITY ALTERNATIVES, JUSTLEADERSHIPUSA, THE LEGAL AID SOCIETY, THE LEGAL AID BUREAU OF BUFFALO, LEGAL SERVICES NYC, MFY LEGAL SERVICES, INC., AND YOUTH REPRESENT IN SUPPORT OF APPELLANTS

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COURT OF APPEALS OF THE
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TRATHONY GRIFFIN and MICHAEL GODWIN,

Court of Appeals Index No. CTQ-2016-00002

Plaintiffs-Appellants,

— against —

On Appeal from the Certified Questions by the United States Court of Appeals for the Second Circuit in Docket No. 15-cv-1307

SIRVA, INC. and ALLIED VAN LINES, INC.,

Defendants-Respondents.

———————————————————X

DISCLOSURE STATEMENTS FOR *AMICI CURIAE*

Pursuant to 22 N.Y.C.R.R. § 500.1(f), set forth below are the disclosure statements for proposed *amici curiae* the Legal Action Center, the Community Service Society of New York, NELA/NY (the New York affiliate of the National Employment Lawyers Association), The Bronx Defenders, the Center for Community Alternatives, JustLeadershipUSA, The Legal Aid Society, The Legal Aid Bureau of Buffalo, Legal Services NYC, MFY Legal Services, Inc., and Youth Represent:

The *Legal Action Center* ("LAC") is a non-profit law and policy organization. LAC has no parents, subsidiaries or affiliates.

The *Community Service Society of New York* ("CSS") is a nonprofit organization that has worked on behalf of New Yorkers for more than 170 years. CSS has no parents or subsidiaries. It has two affiliates, the nonprofit organization, "Friends of RSVP," and "Institute for Community Empowerment," a for-profit organization.

National Employment Lawyers Association/New York ("NELA/NY") is the New York affiliate of the National Employment Lawyers Association ("NELA"). NELA/NY has no parents, subsidiaries or affiliates.

The Bronx Defenders ("BxD") is a non-profit provider of holistic public defense and related civil legal services. BxD has no parents, subsidiaries or affiliates.

The *Center for Community Alternatives* ("CCA") is a nonprofit organization. CCA does not have parents, subsidiaries or affiliates.

JustLeadershipUSA ("JLUSA") is a non-profit organization. JLUSA has no parents, subsidiaries or affiliates.

The Legal Aid Society ("the Society") is a not-for-profit legal services organization. The Society has no parents, subsidiaries or affiliates.

The Legal Aid Bureau of Buffalo is a standalone not-for-profit organization. It has no parents, subsidiaries or affiliates.

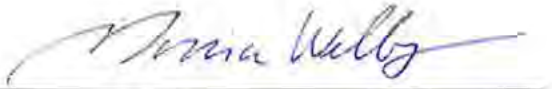
Legal Services NYC, a non-profit legal services provider, has no parents, subsidiaries or affiliates.

MFY Legal Services, Inc. ("MFY"), an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares. MFY does not have subsidiaries or affiliates.

Youth Represent is a non-profit law and policy organization. Youth Represent has no parents, subsidiaries or affiliates.

Dated: New York, New York
February 7, 2017

Respectfully submitted,



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INTERESTS OF *AMICI CURIAE*

Legal Action Center ("LAC") is a non-profit law and policy organization that fights discrimination against, and promotes the privacy rights of, individuals with criminal records, histories of addiction, and/or HIV/AIDS. LAC has helped thousands of New Yorkers with criminal records overcome legal barriers to accessing jobs, housing, and other services. LAC's National H.I.R.E. Network works with policy makers and advocates nationwide to promote employment and other opportunities for individuals with criminal records.

For 175 years the *Community Service Society of New York* ("CSS") has led the fight against poverty in New York City. Addressing root causes of poverty necessarily includes addressing mass imprisonment and the challenges of reentry: CSS litigates on behalf of individuals and groups who suffer labor market discrimination because of their convictions; and CSS's Next Door Project provides direct "rap sheet" related services for more than 700 people per year, in the process tackling conviction-based barriers to employment, housing and civic participation.

NELA/NY is the New York affiliate of the National Employment Lawyers Association ("NELA") the national bar association comprised

exclusively of lawyers representing individual employees dedicated to the vindication of individual employee rights in an environment free from discrimination, harassment, and retaliation. NELA/NY members advance these goals through representation and advocacy, including on behalf of individuals denied employment because of their convictions. NELA/NY has filed numerous amicus briefs in this Court which highlight the legal and practical consequences of legal decisions on the lives of working people.

The Bronx Defenders ("BxD") is a non-profit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. BxD's Civil Action Practice represents thousands of clients each year in a wide range of cases involving so-called "collateral consequences" of criminal justice system involvement, with a priority commitment to employment-related advocacy. BxD is also engaged with these issues on a policy level, and played a role in the development and adoption of the New York City Fair Chance Act.

The *Center for Community Alternatives* ("CCA") is a non-profit community-based organization that for thirty years has promoted re-

integrative justice and a reduced reliance on incarceration through direct services, policy development, and advocacy. Among the many services it provides, CCA assists individuals with convictions who are seeking jobs, occupational licensing, and access to higher education. This work has instilled in CCA staff a keen awareness of the stigma that arises—and all too often endures—from having any level of contact with the criminal justice system.

JustLeadershipUSA ("JLUSA") is a non-profit organization committed to cutting the U.S. correctional population in half by 2030. JLUSA believes that those closest to the problem are closest to the solution, but also furthest from resources and power. Thus, JLUSA elevates the voice and leadership of those who have been directly impacted by the criminal justice system, including in New York, where it is based.

The Legal Aid Society ("the Society") is the oldest and largest provider of legal assistance to low-income individuals in the United States. Its Criminal Defense Practice represents low-income New Yorkers involved in the criminal justice system in some 215,000 trial, appellate, and post-conviction matters annually. The Society's

Employment Law Unit assists the most vulnerable workers and job applicants in New York City, many of whom are subjected to discrimination because of past contact with the criminal justice system.

The Legal Aid Bureau of Buffalo has represented indigent clients throughout Western New York since 1912. Its criminal defense units and civil units work together to provide holistic legal assistance in order to reduce the struggles of persons in poverty as well as alleviate the barriers that arise from criminal convictions. Its Reentry Project works with individuals unable to find or maintain employment as a result of past or pending criminal law charges, providing a wide range of advocacy and legal services to help overcome barriers these charges create.

Legal Services NYC ("LSNYC"), a non-profit legal services provider, is the largest provider of free civil legal services in the country, with almost 500 staff serving over 80,000 low-income New Yorkers annually throughout the five boroughs. LSNYC is dedicated to fighting poverty by providing legal services to help low-income New Yorkers meet basic needs, including for income and economic security. Among other work, LSNYC provides representation to individuals whose criminal records

constitute barriers out of poverty, including low-income individuals who are facing criminal background discrimination in employment.

MFY Legal Services, Inc. ("MFY") envisions a society in which there is equal justice for all. MFY works to achieve this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation, and serve more than 20,000 New Yorkers each year. MFY's Workplace Justice Project provides advice and representation to individuals facing conviction-related, discriminatory barriers to employment and occupational licensing.

Youth Represent is a non-profit organization whose mission is to ensure that young people affected by the criminal or juvenile justice system are afforded every opportunity to reclaim lives of dignity, self-fulfillment, and engagement in their communities. It provides comprehensive legal representation, community support, education, and policy advocacy to ensure youth have access to fundamental elements of a stable and successful life—employment, housing, education, and family resiliency. Youth Represent has strong expertise in the field of criminal

records, which informs its employment discrimination litigation in federal and state courts.

SUMMARY OF ARGUMENT

Amici, all organizations committed to protecting the workplace rights of those with records of conviction, urge this Court to interpret New York Executive Law sections 296(15) and 296(6) broadly and inclusively, consistent with the text and intent of the laws, applicable precedent, and important public policy. Third parties to an employment relationship that impose discriminatory conditions on this relationship can be covered under section 296(15), treated as aiders and abettors under section 296(6), or both. In each case, New York law makes clear that discrimination against persons with convictions is prohibited, whether or not the instigator is the person's direct employer.

New York courts have long recognized the collateral consequences of conviction. *See In re an Atty.*, 86 N.Y. 563, 570 (1881) ("Pardon removes the legal infamy of the crime, * * * but cannot * * * wash out the moral stain." (quoting *Baum v. Clause*, 5 Hill 196, 196 (1843))). In 1976, understanding the significant barriers to employment faced by individuals with convictions, the New York Legislature addressed these barriers by enacting forward-thinking legislation, section 296(15) of New York Executive Law and its Correction Law counterpart (article 23-A), to

protect persons with convictions from discrimination in the workplace for the benefit of society as a whole.

More than forty years later, these laws are more essential than ever. In New York, like the rest of the United States, the number of persons with convictions has grown exponentially due in large part to an era of mass arrest and incarceration. Individuals with convictions find it increasingly hard to obtain and keep employment, especially now that most employers can and do routinely use background checks.

New York law clearly prohibits employers from discriminating against persons with convictions. This case addresses discrimination by third parties to the employment relationship. Here, a third party (Allied Van Lines, Inc. ("Allied"), the national moving company) required, via its contract with its local moving company agent (Astro Moving and Storage Co., Inc. ("Astro")), that persons with certain convictions be automatically and permanently barred from their moving jobs in contravention of New York law. Soon after the commercial background check company (HireRight) reported that Griffin and Godwin did not meet company (Sirva, Allied's holding company) standards, Astro terminated both men. The Second Circuit assumed *arguendo* that Astro had terminated them

because of their criminal convictions. *See Griffin v. Sirva*, 835 F.3d 283, 285 n.2 (2d Cir. 2016).[1]

With the continuing growth of non-traditional, "new economy" employment structures – which often involve a third party in the employment relationship – this is an increasingly common fact pattern, especially for persons with convictions. Research shows that such persons are disproportionately less likely to find work with a traditional employer and more likely to seek it in an environment where, as here, a third party bans the employment of persons with convictions.

Third party employment structures are on the rise. Staffing and temporary agencies are increasingly common players in the employment relationship. These employers are frequently found to implement discriminatory criminal record policies – like "no conviction record" or "no felony" bans – of their third party clients. Professional Employer Organizations (PEOs) are another increasingly common employment structure used by small businesses to avoid the burdens (and some of the responsibilities) of direct employment.[2] According to data maintained by

[1] *Amici* will refer throughout to Allied, intending it to be inclusive of Sirva.

[2] "A professional employer organization enables its client—a work site employer—to outsource its payroll and human resources responsibilities, including the payment

the New York State Department of Labor, more than 240 PEOs have registered or gained exemption from registration in compliance with the New York Professional Employer Act, Labor Law Section 915 *et seq*.[3]

Absent exceptions not applicable here, New York law expressly prohibits automatic bans on employment of persons with convictions, requiring instead an individualized assessment before an employment decision is made. N.Y. Exec. Law § 296(15); N.Y. Correct. Law §§ 752-753. This case presents an opportunity to confirm that section 296(15)'s automatic ban prohibition applies equally to controlling third parties: those whose policies and practices impact the employment relationship, like Allied here.

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of wages and employment taxes. The PEO also may assume other employee-related matters, such as provision of benefits and compliance with federal and state labor laws and regulations." *Tri-State Empl. Servs. v. Mountbatten Sur. Co.*, 99 N.Y.2d 476, 481 (2003) (internal citations omitted). New York's Professional Employer Act, Labor Law § 922, specifies that both the PEO and its client are "considered the employer" in a number of instances, but there is no mention of the Human Rights Law or the Correction Law.

[3] https://www.labor.ny.gov/workerprotection/laborstandards/employer/peo.shtm (last visited Jan. 31, 2017). PEOs must register, *see* N.Y. Lab. Law § 919(1), but they are, upon request, exempt if domiciled outside New York, registered in another state with similar requirements, do not maintain an office in New York, and have no more than twenty-five worksite employees in New York, *see id.* § 919(5).

For important reasons, New York law has long protected the workplace rights of persons with convictions, and has long forbidden the automatic denial of employment to such persons. *Amici* urge this court to interpret sections 296(15) and 296(6) broadly and inclusively, to ensure compliance by third parties in the employment relationship, when, as here, they act in derogation of these important laws.

ARGUMENT

I. Section 296(15) Should Be Read Broadly: Liability Is Not Limited to an Aggrieved Party's "Employer"; Alternatively, "Employer" Includes Third Party Entities that Impose Discriminatory Rules, Policies and Practices on the Aggrieved Party's Direct Employer

Corporations like Allied, which impose unlawful workplace policies on direct employers such as Astro, are liable under section 296(15). These "controlling third parties" cannot escape liability for instituting rules and requirements imposing unlawful "automatic bans" on the employment of persons with convictions. Section 296(15)'s purpose, text and interpretation require coverage for controlling third parties like Allied here, and others like them – even if they (and others like them) are not the direct "employer." Alternatively, section 296(15)'s purpose, text, and interpretation require an inclusive definition of "employer," to cover Allied here – and others like them.

An inclusive reading of section 296(15) is crucial to protect the growing population of persons with convictions seeking employment. Since the enactment of section 296(15), the number of individuals with convictions, nationally, has skyrocketed, due in large part to decades of mass arrest and incarceration policies primarily targeting communities

of color. *See* The Sentencing Project, *Criminal Justice Facts*, http://www.sentencingproject.org/criminal-justice-facts/ (last visited Jan. 31, 2017) (highlighting 500% increase in incarceration over the past 40 years). Currently about one in three adults – approximately 70 million individuals – has a criminal record in the United States. Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, Wall St. J., Aug. 7, 2015. Over 11 million people cycle through our country's jails each year and more than 600,000 people return home from state and federal prison each year. Federal Interagency Reentry Council, *National Reentry Week Fact Sheet* 1 (2016), https://csgjusticecenter.org/wp-content/uploads/2016/04/FIRC-Fact-Sheet_4.25.16_CSG.pdf.

The racial disparity is profound. In 2012, Black men were six times more likely to be imprisoned than white men, and Hispanic men were 2.5 times as likely to be imprisoned as white men. E. Ann Carson & Daniela Golinelli, DOJ Bureau of Justice Statistics, *Prisoners in 2012* at 25 (2014), https://www.bjs.gov/content/pub/pdf/p12tar9112.pdf.

New York's statistics are similar. Approximately seven million people had a New York Record of Arrest and Prosecution (RAP Sheet) in 2013.[4] An estimated 2.3 million individuals have a criminal conviction on their record in New York.[5] Furthermore, according to a study conducted in New York City in 2004, a criminal record reduces the likelihood of a callback or job offer by nearly 50%, and the effect for Black job applicants with a record is about twice as large as for white applicants with a record.[6]

Section 296(15) was enacted explicitly to shield persons with convictions from employment discrimination on that basis. Robust enforcement of this law is more necessary than ever, as persons with

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[4] Legal Action Center, *The Problem of RAP Sheet Errors: An Analysis By the Legal Action Center* 2 (2013), https://lac.org/wp-content/uploads/2014/07/LAC_rap_sheet_report_final_2013.pdf.

[5] Press Release, Office of Governor Andrew Cuomo, Governor Cuomo Announces First in the Nation Regulation to Prohibit Insurance Companies from Denying Coverage to Businesses Seeking to Hire Formerly Incarcerated New Yorkers (Dec. 21, 2016), https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-regulation-prohibit-insurance-companies-denying-coverage.

[6] Devah Pager *et al.*, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals of Am. Acad. Pol. & Soc. Sci., 195, 199 (2009). Past incarceration also reduces subsequent annual wages by 40 percent. The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

convictions face growing obstacles to getting and keeping a job. Even with the legal protections that exist, individuals with convictions face rampant discrimination. Many companies unlawfully deny employment to individuals with convictions in a host of different ways, including via explicit blanket discriminatory company policies, contractual arrangements, and staffing companies' imposition of discriminatory criteria on behalf of other entities. Internet job sites (such as Craigslist) include listings setting forth flat ban policies (e.g., "no felony convictions") and background check companies apply discriminatory matrices at the request of employers.[7] *See* Michelle Natividad Rodriguez

[7] New York's Attorney General has investigated and taken legal action against third party consumer reporting agencies that apply matrices at the direction of their employer clients, in contravention of section 296(15) and article 23-A. *See, e.g., In re Choicepoint Workplace Solutions, Inc.*, NYS Office of Attorney General ("OAG"), AOD No. 09-165, at 6-9 (Dec. 2009) (Assurance of Discontinuance with commercial background check company for numerous violations of law, including provision of pre-screening services for a client company that automatically disqualified applicants with criminal records), https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/ChoicePoint%20AOD.pdf.

In 2013 and 2014, the Attorney General entered into agreements with Sterling Infosystems, First Advantage, General Information Services, Inc., and HireRight – four of the nation's largest background check companies. "The agencies agree[d] not to issue automatic rejection letters triggered by a conviction on behalf of employers to ensure that employers conduct the required case-by-case, individualized assessments of job candidates." Press Release, OAG, A.G. Schneiderman Announces Agreements with Background Check Agencies to End Illegal Hiring

& Maurice Emsellem, NELP, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* 5-18 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

The growing number of persons with convictions – the intended beneficiaries of this law – seek the protection of this Court, and a ruling that will safeguard them regardless of whether the source of the discriminatory action is their direct employer, or a controlling third party, such as Allied in this case.

A. Section 296(15) Liability is not Limited to an Aggrieved Party's Employer

When section 296(15) and its Correction Law companion (article 23-A) were enacted in 1976,[8] both the Legislature and Governor Hugh Carey recognized that they were essential to "reverse the long history of employment discrimination against" individuals with convictions and to "remove many of the barriers facing [such individuals] in obtaining

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Practices (Mar. 14, 2014), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreements-background-check-agencies-end-illegal-hiring.

[8] The Legislature added the negligent hiring provision, and its use of the term "employer," to section 296(15) in 2008. *See* Act of Sept. 4, 2008, ch. 534, § 1, 2008 N.Y. Laws 4029.

employment." Division of Budget Recommendation on Bill, Bill Jacket, ch. 931, L. 1976; Memorandum in Support, Bill Jacket, ch. 931, L. 1976 (legislative sponsors Senator Ralph J. Marino & Assemblyman Stanley Fink). As Governor Carey forthrightly stated: "A fair opportunity for a job" is "a matter of basic human fairness." The significant cost of prosecuting and incarcerating individuals "is largely wasted if upon the individual's return to society his willingness to assume a law-abiding and productive role is frustrated by *senseless discrimination*." Governor's Approval Memorandum, Bill Jacket, ch. 931, L. 1976 (emphasis added).

This Court has heeded and validated this legislative history. In *Acosta v. New York City Department of Education*, 16 N.Y.3d 309, 314, 320 (2011), this Court endorsed Governor Carey's statement, noting that "barring discrimination against those who have paid their debt to society and facilitating their efforts to obtain gainful employment benefits the community as a whole," and noting further the law's connection to the "general purposes" of section 1.05 of Penal Law, which include, "the rehabilitation of those convicted" and "the promotion of their successful and productive reentry and reintegration into society."

Similarly, in *Bonacorsa v. Van Lindt*, this Court endorsed the broad legislative purpose of article 23-A as "an attempt to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment." 71 N.Y.2d 605, 611 (1988). This Court acknowledged studies establishing that "bias against employing or licensing ex-offenders" was "widespread" and "particularly unfair and counterproductive." *Id.* Noting the "great difficulty" persons with convictions faced in seeking post-conviction employment, this Court found that this "not only resulted in personal frustration but also injured society as a whole by contributing to a high rate of recidivism." *Id.* This Court understood article 23-A "to remove this obstacle to employment by imposing an obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society's interest in assuring performance by reliable and trustworthy persons," and described the statute's "broad general rule" barring "den[ial] of employment or a license to an applicant solely based on status as an ex-offender." *Id.*[9]

[9] *Bonacorsa* describes article 23-A as applicable to "employers and licensing agencies" but its applicability to third parties such as defendants here was not before this Court.

While workplaces now reflect multiple variations on the traditional "employer-employee" structure, the purpose and text of section 296(15) remain urgent and unchanged. Limiting section 296(15)'s requirements to direct "employers" would thwart the statute's plain language and its purpose.

Section 296(15) by its terms applies broadly, to "*any person, agency, bureau, corporation or association*, *including the state and any political subdivision thereof*." N.Y. Exec. Law § 296(15) (emphasis added). This language is general and inclusive. For example, "[a]ny person . . ." obviously includes non-employers. And it is intentional: elsewhere, the New York State Human Rights Law ("NYSHRL") specifically covers *only* employers. *E.g.*, N.Y. Exec. Law § 296(1)(g); *id.* § 296(10)(a).

Accordingly, the District Court below erred in concluding that *only* direct employers can "deny any . . . employment" under section 296(15). That is simply not the case for *amici's* clients. Individuals with convictions are routinely denied employment (whether it be a job or job assignment) based on the discriminatory practices of third parties, like Allied. Had the Legislature intended section 296(15) to cover only employers and licensing agencies, it would have used that language

specifically, as it has done elsewhere *See*, *e.g.*, N.Y. Exec. Law § 296(1)(a) ("For an employer or licensing agency"); *id.* § 296(3-a)(a) (same); *see also id.* § 296(3)(a) ("employer, licensing agency, employment agency or labor organization").

Reading section 296(15) as limited to "employers" also cuts squarely against this Court's duty to construe the NYSHRL "liberally for the accomplishment of the purposes thereof." N.Y. Exec. Law § 300. It also runs contrary to this Court's injunction to construe human rights laws comprehensively, because "antidiscrimination edicts all too commonly are circumvented unless they are comprehensive in their application." *Sanders v. Winship*, 57 N.Y.2d 391, 395 (1982).

Section 300 requires that article 23-A not be read to narrow the scope of section 296(15). Nothing in article 23-A requires limitation of section 296(15) to "employers." Article 23-A in places does make specific references to "employers" but this does not mandate an "employers only" reading of section 296(15).

An "employers-only" reading would treat section 296(15)'s "any person . . . ." as if it meant the same thing as "employer" under article 23-A. This makes no sense. Both terms appeared in the same legislation,

see Act of July 27, 1976, ch. 931, §§ 5, 6. To give "employer" and "any person" the same meaning contravenes the canon that different words in the same legislation must be read to have different meanings. *See Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975). An "employers only" reading of section 296(15) would contravene its plain language, its explicit legislative intent, and applicable law.

B. "Employer" Includes Third Party Entities that Impose Unlawful Discriminatory Rules, Policies and Practices on the Aggrieved Party's Direct Employer[10]

Even if section 296(15) is read to apply only to employers, "employer" must be construed broadly and inclusively to include controlling third party entities such as Allied. Practically speaking, "employer" means something far different in 2017 than was understood just a decade ago. More and more workers find themselves in workplace environments where their nominal "employer" is not only the entity for which they work directly. *See* U.S. Government Accountability Office, *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, 4

[10] *Amici* do not suggest this as the exclusive applicable construction of the term "employer" under Section 296(15). In these circumstances, it is a proper construction of "employer."

(2015) (estimating contingent workers comprised 40.4 percent of employed workers in 2010), http://www.gao.gov/assets/670/669766.pdf. They may be employed via a PEO, or a temporary staffing company. Or, as here, their direct employer may be an agent of a third party which, by contract, imposes employer-like work rules and requirements from afar.[11]

In the contemporary workplace environment, New York's anti-discrimination laws should be enforced not only against direct employers, but also those third parties who, like Allied, can impose discriminatory requirements on the direct employer. Accordingly, if a third party entity imposes a discriminatory requirement on the direct employer, then that third party entity should also count as an "employer" for purposes of section 296(15). To show why, we provide this Court with some examples of how persons with convictions frequently encounter discrimination, including restrictions promulgated by third parties. This Court should make clear that such discrimination is contrary to law.

[11] Accordingly, *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 543-44 (1984), which defined "employer" under the NYSHRL (in the context of considering whether an individual could be an "employer") to require an "ownership interest" or the power to hire and fire, should be read broadly and inclusively, in accord with this Court's duty to construe section 296(15) "liberally for the accomplishment of the purposes thereof." N.Y. Exec. Law § 300.

Discrimination by controlling third parties particularly affects persons with convictions, who often find themselves on the fringes of the labor market, with fewer employment options. Third party/indirect employment may be all that is available to them. Individuals with felony convictions "have by far the highest likelihood of employment through a temporary staffing company (as opposed to through an employer who is the end-user of their labor)."[12] "Hyper-incarceration has thus not only fueled contingent employment but also . . . exacerbated workers' vulnerability to utterly degraded and degrading working conditions that are experienced as a kind of extended incarceration."[13]

Even though both article 23-A and section 296(15) have been on the books for more than forty years, direct employers often do not perform

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[12] Gretchen Purser, *"Still Doin' Time": Clamoring for Work in the Day Labor Industry*, 15 J. Lab. Soc'y 397, 408 (2012) (relying on study finding that temporary help services firms certify a higher percentage – 25 percent – of individuals with felony convictions among their Work Opportunity Tax Credit workers in comparison to non-temporary help services firms – 7 percent); Jamie Peck & Nik Theodore, *Carceral Chicago: Making the Ex-offender Employability Crisis*, 32.2 Int'l J. Urb. & Regional Res. 251, 267-68 (2008), http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2427.2008.00785.x/epdf (noting temporary employment via temporary help services firms as a primary point of entry for individuals with convictions).

[13] Purser, *supra*, at 408; Emine Fidan Elcioglu, *Producing Precarity: The Temporary Staffing Agency in the Labor Market*, 33 Qualitative Soc. 117, 126-30 (2010) (formerly incarcerated individuals are not considered "good" temporary workers, but instead part of a peripheral, second class group of temporary workers).

the statutorily required individualized analysis when evaluating prospective employees with convictions. In recent years, New York's Attorney General has settled an "automatic ban" case against Party City, a retail store with 49 stores across the state, after investigation revealed Party City did not advance individuals beyond part-time seasonal work based solely on felony convictions).[14] It has settled a case with Bed Bath & Beyond, a retailer with 62 stores in New York, because the company automatically disqualified individuals with felony convictions from employment.[15] And it has settled a case with RadioShack, because among other violations of law, the company automatically rejected applicants who responded "yes" to the criminal question on a job application.[16]

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[14] Press Release, OAG, A.G. Schneiderman Announces Agreement with Party City to End Discrimination in Hiring Based on Criminal Records (Oct. 2, 2014), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-party-city-end-discrimination-hiring-based.

[15] Press Release, OAG, A.G. Schneiderman Announces Settlement with Major Retailer to End Ban on Hiring Applicants (Apr. 22, 2014) http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-major-retailer-end-ban-hiring-applicants-criminal.

[16] *In the Matter of the Investigation of Andrew M. Cuomo, AOG, of RadioShack Corporation, Assurance of Discontinuance*, AOD No. 09-148, at 5 (2009), https://www.reentry.net/ny/library/attachment.162702.

Direct employers clearly violate these laws with equanimity. So do controlling third parties. Individuals with convictions are often denied employment opportunities by entities that may not be deemed the job candidate's "direct employer." It is common for a Client Company to contract with a Contractor Company for labor – as did Allied, with Astro, in the instant case – and to instruct the Contractor Company (by contract, verbally, or otherwise) to bar individuals with some or all types of criminal convictions from working at the Client Company's site or on its jobs.[17] Such instructions can range from a flat ban on people with *any criminal* convictions, to a ban on people with certain convictions (e.g., felonies, types of convictions) or convictions incurred within a specific timeframe (which, when combined with other factors, form a "matrix" like the one used in this case). All of these directives are in clear contravention of section 296(15) and article 23-A.

[17] For example, several workers on an Apple construction site in California suddenly lost jobs with Apple's contractor due to Apple's flat felony criteria barring workers from working on site. Wendy Lee, *Apple Takes Heat for Barring Felons from Construction Work*, SFGate, Apr. 7, 2015, http://www.sfgate.com/business/article/Apple-takes-heat-for-barring-former-felons-from-6182436.php. Apple ultimately lifted the restriction after the union took action. Claire Zillman, *Apple Backpedals on Policy Against Hiring Felons to Build Headquarters*, Fortune, Apr. 10, 2015, http://fortune.com/2015/04/10/apple-rescinds-felons-policy-headquarters/.

However, not all persons injured by a violation of section 296(15) are able to benefit from New York Attorney General's important work. *Amici*'s clients include many who have lost employment due to the "automatic ban" policies of controlling third parties. Here are some examples:

- Employee A, with a 10-year old drug-related felony, for many years worked for Courier Company, which outsourced its services to other companies by contract. Employee A was outsourced to a real estate company. The real estate company ended its contract with the Courier Company, and Courier Company needed to re-assign Employee A. At first, Courier Company intended to place Employee A in a dispatch management position with a fashion company. But after learning about Employee A's conviction record, Courier Company decided not to make placement because of the fashion company's criminal record exclusions. Employee was placed in a lower position in Courier Company and, soon thereafter, terminated.

- Applicant B applied for a job with Cleaning Company, which provided cleaning services for businesses. He was hired by Cleaning Company to work at Retail Company. After a background check revealed felony convictions, Cleaning Company terminated Applicant B, stating that Retail Company did not want "felons" working at its locations. Neither Cleaning Company nor Retail Company made any assessment of the article 23-A factors.

- Applicant C wanted a job with Successor Company. Applicant C had several years of comparable work experience on the same contract with Predecessor Company. Applicant C interviewed for the job with Successor Company through a

> temporary staffing company, and Applicant C was offered the job, contingent on a background check. After the background check showed Applicant C's criminal convictions, the temporary staffing company rescinded the offer because Successor Company found Applicant C ineligible based solely on applicant's criminal convictions. Neither Successor Company nor the temporary staffing company made any assessment of the article 23-A factors.

Experience thus sadly shows that a narrow definition of "employer" is not sufficient to ensure that persons with convictions are in fact protected by section 296(15) and the Correction Law. Commonly, third parties impose unlawful policies on the "direct" employer, thus functioning as the "employer" by dictating the discriminatory criteria. When they do, they should be held accountable for their actions.

II. Allied Violated Section 296(6) Because It Required Its Contractors to Obey a Discriminatory Policy

Allied violated Executive Law section 296(6) by imposing a "no hire with conviction record" rule on Astro and its other New York contractors. Section 296(6) declares it illegal "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." N.Y. Exec. Law § 296(6). "[A]ny person" in section 296(6) includes non-employers. *See*, *e.g.*, *Nat'l Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416, 421-22 (1974) ("*NOW*") (newspaper publisher); 1976 N.Y. Atty. Gen. Rep. & Op. 69, 70 (issuer of letter of credit).

Astro's presumed violation of section 296(15), by applying Allied's rule,[18] means that Allied did "compel or coerce" Astro to violate section 296(15). Allied, by contract, required Astro to obey its discriminatory no-hire rule. The contract provision authorizes Allied to "compel or coerce" its New York contractors to obey that clause. For this reason, the

[18] The third certified question asks this Court to assume *arguendo* that Astro violated section 296(15). *See Griffin*, 835 F.3d at 294 ("Does Section 296(6) . . . apply to § 296(15) such that an out-of-state principal corporation that requires its New York State agent to *discriminate in employment on the basis of a criminal conviction* may be held liable for *the employer's violation of* § 296(15)?") (emphasis added).

contract clause alone supplies the requisite compulsion or coercion for a section 296(6) violation.

Moreover, even if Astro did not violate section 296(15),[19] Allied still violated section 296(6), because it imposed a policy that, by its terms, required its New York contractors to violate section 296(15). This comports with how this Court read section 296(6) in *NOW*, and with section 296(6)'s explicit text covering those who "attempt" to aid or coerce another to violate 15, as well as with this Court's duty to construe section 296(6) "liberally for the accomplishment of the purposes thereof." N.Y. Exec. Law § 300.

A. This Court Reads Section 296(6) Broadly

This Court read section 296(6) broadly in *NOW*, 34 N.Y.2d 416 (1974). In *NOW*, this Court reversed the dismissal of a complaint that Gannett, a newspaper publisher, "aided and abetted" sex discrimination in violation of section 296(6) by "designat[ing] separate want and column listings as 'Help Wanted—Male' and/or 'Help Wanted—Female'." *Id.* at

[19] *See* Jury Verdict Sheet at 5 (answering "No" for both plaintiffs to Question 16: "Have Plaintiffs proven by a preponderance of the evidence that Defendant [Astro] unlawfully terminated [plaintiffs'] employment because of their prior criminal conviction?"), *Griffin v. Astro Moving & Storage*, No. 14-cv-01844 Dkt No. 70 (E.D.N.Y., filed Nov. 21, 2014). The jury was not asked whether Astro terminated plaintiffs because of Allied's criminal-conviction policy.

421-22. In so doing, this Court rejected the view of the Appellate Division below that, for section 296(6) liability to attach, Gannett had to have intended or known whether sex discrimination by one of its advertisers would or did occur as a result. *See Nat'l Org. for Women v. Gannett*, 40 A.D.2d 107, 116-17 (4th Dep't 1972) (complaint properly dismissed because section 296(6) "requires . . . knowledgeable and intentional participation in the unlawful conduct charged," but Gannett's "maintenance of separate columns of help wanted advertisements designated by sex does not, standing alone, establish such participation").

Instead, this Court held, Gannett "aided and abetted sex discrimination," and thereby violated section 296(6), simply by publishing "want ads under separate sex designations." *NOW*, 34 N.Y.2d at 421. To be sure, Gannett was not an article 15 "employer" or "employment agency" and, in any event, could not be "held culpable for directly perpetuating discrimination due to sex solely because of the manner in which it label[led] its want ads." *Id.* Nonetheless, by designating sex-segregated advertisement columns, Gannett "reinforce[d] the very discriminatory practices which the Federal and State antidiscrimination laws were meant to eliminate," *i.e.*, illegal sex

discrimination in pay and hiring, and thus violated section 296(6). *Id*. at 422; *see id.* at 421 ("The discrimination against women permeates the salary structure with the result that jobs listed in the 'female' column are much lower paying than those listed in the 'male' column.") (citation omitted); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387-88 (1973) ("[A]n advertiser whose want-ad appears in the 'Jobs—Male Interest' column is likely to discriminate against women in his hiring decisions.").

In so ruling, the *NOW* court read section 296(6) broadly: Gannett's sex-separated job listings "reinforce[d]" illegal sex discrimination in pay and hiring, even though the plaintiff had not alleged that Gannett (1) intended that result; (2) knew or should have known that its conduct would lead to that result; or (3) knew of some employer that would or did violate article 15 as a result. Thus, *NOW* holds that such allegations are not elements of a section 296(6) claim.

NOW applies in full force to this case. By contractually requiring its New York subcontractors to act contrary to section 296(15), with its "conviction record hiring ban," Allied's contract clause "reinforces the very discriminatory practices" that New York law aims to eliminate, *i.e.*,

employment discrimination against persons with convictions. Like Gannett, Allied is liable an aider and abettor for violating section 296(6) of the NYSHRL, regardless of whether any particular individual suffered discrimination as a result.[20]

B. Section 296(6)'s "Attempt" Clause Further Confirms that Section 296(6) Applies Even without Proof of a Specific Article 15 Violation

By reading section 296(6) to hold Gannett liable, absent any allegations that Gannett had caused article-15 sex discrimination in any particular case, *NOW* accords with section 296(6)'s "attempt" clause: Section 296(6) declares it illegal "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, *or to attempt to do so*." N.Y. Exec. Law § 296(6) (emphasis added).[21]

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[20] Violations of section 296(6) are easier to prove when, as here, a person imposes a general policy that requires what article 15 forbids, as opposed to when a person takes ad hoc actions toward specific individuals. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004), is inapposite. There, this Court concluded that because Forrest "failed to raise a triable issue of material fact that she was either retaliated against or discriminated against because of her race," it was proper to dismiss "her claims that defendants aided and abetted each other in any discrimination or retaliation." *Id.* at 314. The alleged "aiders and abettors" in *Forrest*, however, were individuals, not, as here, a third party contractually requiring the direct employer to obey a policy that, by its terms, plainly requires what article 15 forbids. In addition, *Forrest* never referred to *NOW* and never reached the issue of liability under section 296(6)'s "attempt" clause, *see infra* at Part II.B.

[21] Section 296(6) is not unique in this regard: many civil statutes ban both an act as well as the "attempt" to commit that act, e.g., N.Y. Tax Law § 484(a)(2)-(4), or

Accordingly, because of its "attempt" clause, section 296(6) can apply even if no article 15 violation is proven. Otherwise, its "attempt" clause is completely superfluous, contrary to the rule that "meaning and effect should be given to every word of a statute." *Leader v. Maroney, Ponzini, & Spencer*, 97 N.Y.2d 95, 104 (2001).

Section 296(6)'s legislative history confirms this reading. The Legislature enacted section 296(6)'s predecessor in 1945 as part of the first comprehensive legislation in the United States to address employment discrimination in the private sector. *See* Act of March 12, 1954, ch. 118, 1945 N.Y. Laws 461 (enacting, *inter alia*, N.Y. Exec. Law § 131(5), making it an unlawful employment practice "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this article, or attempt to do so"). As explained in its legislative history:

> The language of Subdivision 5 is designed to bring within the orbit of the bill all persons, no matter what their status, who aid or abet any of the forbidden practices of discrimination or who attempt to do so; and also to furnish protection to all persons, whether employers, labor organizations or employment agencies, who find

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denote an actor by what it typically does or "attempts" to do, e.g., N.Y. Gen. Bus. Law § 171(2) ("employment agency"); N.Y. Exec. Law § 292(14) ("real estate broker").

> themselves subjected from any source to compulsion or coercion to adopt any forbidden employment practices. Thus, other employees who coerce *or attempt to coerce* an employer into unlawful employment practices are themselves guilty of acts rendered unlawful by this bill.

Report of the New York State Temporary Commission Against Discrimination, Legis. Doc. No. 6, at 31 (1945) (emphasis added).

This legislative history, previously relied upon by this Court, *see Board of Educ. v. Carter*, 14 N.Y.2d 138, 147 (1964), confirms that section 296(6) covers anyone who *attempts to aid or coerce* someone else to violate article 15, regardless of whether that violation occurs. It also confirms that section 296(6)'s attempt clause refers back to "any person"; and that "any person" covers *anyone* ("whether an employer or an employee or not") who helps or coerces someone else to commit an article-15-forbidden act. [22]

[22] This legislative history settles the section 296(6) "attempt" clause issue this Court expressly avoided in *Jews for Jesus v. Jewish Community Relations Council*, 79 N.Y.2d 227, 233 (1992), by finding instead insufficient proof that the defendants had attempted to cause anyone to violate article 15. *See id.* ("[d]efendants did not provide, attempt or offer to provide assistance to those who *could have* denied access to plaintiffs" in violation of Exec. Law §§ 296(2)(a) and 296(13)) (emphasis added). Here, by contrast, based on the record at summary judgment, a reasonable jury could easily find that Allied's "no hire" contract clause constituted an "attempt" to cause its New York subcontractors, including Astro, to violate Executive Law § 296(15).

CONCLUSION

For the foregoing reasons, this Court should answer "no" to the first certified question and "yes" to the second and third certified questions.

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NEW YORK STATE COURT OF APPEALS
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