

1 SUPREME COURT OF THE STATE OF NEW YORK.
2 COUNTY OF NEW YORK: CIVIL TERM: PART 17

3 ----- X

4 CENTER FOR INDEPENDENCE OF THE DISABLED : INDEX NUMBER:
5 NEW YORK, BROOKLYN CENTER FOR :
6 INDEPENDENCE OF THE DISABLED, HARLEM : 153765/2017E
7 INDEPENDENT LIVING CENTER, SAS, :

8 Plaintiff(s), :

9 - against - :

10 METROPOLITAN TRANSPORTATION AUTHORITY, :
11 VERONIQUE HAKIM, NEW YORK CITY TRANSIT :
12 AUTHORITY, DARRYL C. IRICK and THE CITY :
13 OF NEW YORK :

14 Defendant(s). :

15 ----- X

16 Supreme Court New York
17 60 Centre Street
18 New York, New York 10007
19 June 5, 2019

20 B E F O R E :

21 HONORABLE SHLOMO HAGLER,
22 Justice of the Supreme Court

23 A P P E A R A N C E S :

24 For the Plaintiff(s):

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1 A P P E A R A N C E S: (CONTINUED)

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LA TONIA LEWIS, RPR, CRR
SENIOR COURT REPORTER

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1 THE COURT: Good morning, everyone. We're
2 finally at a point where we can resolve the two motions that
3 are in front of the Court. There are two motions to
4 dismiss, one made by co-defendant MTA, New York City Transit
5 Authority and the other by the City of New York. I have
6 voluminous papers that I've read in this case, there's more
7 on that side as well. I can't fit them all on my desk. I
8 have reviewed this matter intensively and I think the time
9 is now ripe for a determination.

10 So we're going to go into it issue by issue. I
11 thought about the process so that it could be user-friendly
12 for the people that are here as well as productive for the
13 people here in the court. These are legal issues that have
14 to be decided and let's do them seriatim. We'll do so in
15 the following manner: There are four issues to be decided.
16 The first issue will be the statute of limitations. The
17 defendants argue that this case is barred as a result of the
18 applicable statute of limitations. We will get into details
19 in a few moments.

20 The second issue is justiciability. Does the
21 Court have the power to intervene under the circumstances.
22 Defendants argue that the executive branch has exclusive
23 discretion in this area.

24 Third, and probably the most important issue is
25 preemption. There are two types of preemption. One is

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1 field preemption. Field preemption is where the
2 administrative agency occupies the field, the local law
3 would be preempted. And then there's conflict preemption.
4 If there's a conflict between state and local law, then the
5 doctrine of preemption would preclude the local law from
6 being effective.

7 And then finally, a very unique argument by the
8 City of New York only. The City of New York argued that it
9 should not be a defendant here as it is not in control of
10 the New York City Transit Authority.

11 So we will start first with the defendants. I
12 guess we'll deal with the MTA defendants and we'll deal with
13 the City last. I know that the City has made similar
14 arguments; if they want to partake in this argument, they
15 can do so as well.

16 We'll hear short, concise arguments and then I
17 will make a ruling after each of the issues. I will not
18 wait until the end. I will make rulings from the bench on
19 each of the issues before this Court. I believe that
20 justice delayed is justice denied. There have been a year
21 worth of settlement discussions that were productive at the
22 beginning. Unfortunately, it did not conclude in a manner
23 that was amicable in resolving this matter. Therefore, this
24 Court is thrust into these issues and will make decisions
25 quickly.

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1 So, Counsel, let's deal with statute of
2 limitations issue first.

3 MR. KERWIN: James Kerwin from the New York City
4 Transit Authority department of law representing all
5 defendants except for the City of New York. Thank you, your
6 Honor. I will keep the statute of limitations very brief.
7 As we set forth in our papers and in the last argument on
8 this motion, the accrual of the -- there is a certain
9 distinction to be made between an act of discrimination
10 which starts the statute running and the continuing effects
11 of the discriminatory acts which the plaintiffs confused.

12 THE COURT: You have to speak up a little bit
13 because I'm having a hard time hearing you. And I'm sure
14 the audience can't hear you, you have to speak up. There
15 are a lot of people here, speak up. Raise your voice, I
16 won't take it as an insult.

17 MR. KERWIN: Your Honor, I will say I am actually
18 recovering from a cold. I apologize if you are having such
19 a hard time hearing me. I apologize, there is nothing I can
20 do about that.

21 THE COURT: I understand that. But I want to
22 make it clear, the reason I'm doing this is because I want
23 everyone to be prepared, I want the issues to be dealt with
24 openly, transparently, and clearly. I want everyone to have
25 an opportunity to hear the dialogue, the communications, and

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1 discussion. I think it's important in an open government
2 that everyone gets to hear the legal issues and see how
3 justice works.

4 And I understand that you're not feeling well, I
5 just ask you to do your best. I'm not chiding you in
6 anyway, but I want everyone to hear. I want there to be
7 equity.

8 MR. KERWIN: Would you like me to restate what
9 I've already said?

10 THE COURT: Please because I could not hear you.

11 MR. KERWIN: As we said in our papers, your
12 Honor, and as we said at the last oral argument, there's a
13 distinction to be drawn between acts of discrimination and
14 the continuing effect of that discrimination or alleged
15 discrimination. That's the basis on which we make our
16 statute of limitations argument and distinguish the case.
17 We're perfectly content to stand upon the very clear
18 presentation that's been put in the papers and prior oral
19 argument on this particular issue, your Honor.

20 THE COURT: Let me be very specific. On May 16,
21 2019, plaintiffs had sent me a letter which were cc'd to
22 counsel. There was a decision that came down on May 15,
23 2019, in the case of *Hamer, H-A-M-E-R, versus City of*
24 *Trinidad*. The United States Court of Appeals, 10th Circuit,
25 which I believe is in Colorado, made a determination with

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1 regard to issues that the plaintiffs believe should change
2 the focus of the statute of limitations arguments. If you
3 have any comment on the latest pronouncement from the 10th
4 Circuit?

5 MR. KERWIN: No, we don't. The 10th circuit
6 obviously doesn't have jurisdiction over the New York City
7 court. We cite cases from the 9th Circuit from the federal
8 government, which I'm sure your Honor is familiar with and
9 that's all I'll say.

10 THE COURT: I've read all the cases.

11 MR. KERWIN: Okay.

12 THE COURT: And any further arguments on the
13 statute of limitations issue?

14 MR. KERWIN: No.

15 THE COURT: Anything else from the City of New
16 York?

17 MR. BOWE: No, your Honor, we did not argue the
18 statute of limitations in our papers.

19 THE COURT: Thank you.

20 Counsel for the plaintiffs.

21 MS. GOODELL: Thank you, your Honor. I think
22 your Honor, has correctly identified the key case that we
23 cited here, the *Hamer* case from Judge Carson on the 10th
24 Circuit. What Judge Carson said is that a public entity,
25 like the MTA, that operates its system that excludes people

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1 with disabilities, like the MTA does with their subway
2 system, violates their rights each and every day until the
3 violation is remedied. That's --

4 That was the Court's reasoning. It is correct
5 that that applied to the federal law, but I would point to
6 Justice Acosta's decision in the *Williams* case which your
7 Honor is familiar with, which we discussed at the last oral
8 argument, at page 73 where Justice Acosta said that the City
9 laws "uniquely remedial provisions are consistent with a
10 rule that -- and I'm paraphrasing here -- does not reward
11 covered entities that discriminate by insulating them from
12 challenges to their unlawful conduct that continues into the
13 limitations period." So at page 73 of the *Williams*
14 decision, Justice Acosta made it very clear that under the
15 New York Human Rights Law, the statute of limitations should
16 be even more generously interpreted that under federal law
17 with the reasoning from the *Hamer* case more than applies
18 here.

19 THE COURT: Okay. Anything else?

20 MS. GOODELL: No, your Honor.

21 THE COURT: Counsel, any reply?

22 MR. KERWIN: We have nothing to add.

23 THE COURT: I believe that the recent
24 pronouncement by the United States Court of Appeals for the
25 10th Circuit is the proper analysis that should be employed

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1 when deciding a statute of limitations issue involving
2 antidiscrimination laws. In this case, the 10th Circuit
3 actually distinguished between two doctrines, the continued
4 violation doctrine versus the repeated violation doctrine.
5 The continuing violation doctrine makes continued unlawful
6 acts a continuation of the statute of limitations. However,
7 it does not permit continuing ill effects, it has to be acts
8 versus effects.

9 And that's essentially the argument that's made
10 by the MTA. They're arguing that at the time of the
11 construction of the transit system, which was beyond the
12 statute of limitations period, that would cut off the
13 discrimination cause of action. However, the 10th Circuit
14 stated otherwise.

15 And I'm going to read a portion of the Circuit
16 Judge Carson's learned decision. "The issue before the 10th
17 Circuit was as follows: Does the public entity violate
18 Title II, and they referred to the Americans with
19 Disabilities Act, which I'll refer to as the ADA. And
20 section 504 of the Rehabilitation Act of 1973, known as RA
21 or section 504 only when initially constructs or creates a
22 non-compliance service program or activity. If so, a single
23 statute of limitations accrues from the day a qualified
24 individual with disabilities first discovers he or she has
25 been injured by the service, program or activity. The

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1 statute of limitations in this scenario would bar any
2 lawsuit brought after the limitations period ends.

3 The 10th Circuit Court states as follows: As we
4 explain below, a public entity repeatedly violates those two
5 statutes -- and I'm referring to the ADA and the
6 Rehabilitation Act of 1973 -- each day that it fails to
7 remedy a non-compliant service program or activity.
8 Accordingly, a qualified individual with disability is
9 excluded from the participation in, deny the benefits of,
10 and subjected to discrimination under the service program or
11 activity each day that she is deterred from utilizing it due
12 to its non-compliance. She stopped suffering a daily injury
13 only when the public entity remedies the non-compliant
14 service program or activity or when she no longer admits an
15 intent to utilize it.

16 The 10th Circuit stated clearly, a public entity
17 does commit "a new violation" each day that it fails to
18 remedy a non-compliant service program activity. The 10th
19 Circuit explained Supreme Court precedent as follows --
20 United States Supreme Court precedent as follows: The
21 statutory effect and the Supreme Court pronouncement makes
22 one thing clear, congress did not design the ADA or the RA
23 so that a public entity could forever prevent a qualified
24 individual with a disability from utilizing a service,
25 program or activity. Yet the City argued for that exact

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1 result.

2 The City contends that because plaintiffs filed a
3 suit more than two years after he first encountered the
4 alleged non-compliant sidewalks and curb cuts, the statute
5 of limitations forever bars him from forcing the city to
6 live up to it's affirmative duty and correct those barriers.
7 The proposition simply cannot fit within the language,
8 structure, and purpose of the ADA and the RA. The 10th
9 Circuit concluded as follows:

10 Accordingly, each time a qualified individual
11 with a disability encounters or actually becomes aware of a
12 non-compliant service, program or activity and is thereby
13 deterred from utilizing that service, program or activity,
14 he or she suffers discrimination and a cognizable injury.
15 As I mentioned earlier, the 10th Circuit made a distinction
16 between the continued repeated violation and the continued
17 violation doctrine and stated the following summary of how
18 those two doctrines work. A defendant, therefore, cannot
19 brandish the statute of limitations in its usual manner as a
20 shield that fully protects he, she, or it from suit. But
21 the defendant can wield the statute of limitations as a
22 sword that chops off damages arising before the limitations
23 comes into play.

24 Now, how does this 10th Circuit decision have
25 relevance to the New York City Human Rights Law? Well,

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1 let's examine, New York City Human Rights Law. The New York
2 City Human Rights Law provides full and equal enjoyment on
3 equal terms and conditions as to New York City
4 Administrative Code Section 8107, section four, subparagraph
5 A. The construction of the New York City rights mandates
6 the following: They are to be construed independently from
7 similar or identical provisions of New York State or federal
8 statutes. And that is the Restoration Act.

9 And counsel just mentioned *Williams versus*
10 *New York Housing Authority, 61 A.D. 3rd 62 First Department,*
11 *2009.* The New York City Human Rights Law expressly requires
12 an independent liberal construction analysis of all
13 circumstances even where state and federal civil rights law
14 have comparative language. If you look at the ADA and the
15 RA, they are less liberal than the most liberal construction
16 that the Restoration Act requires this Court to provide to
17 situations under New York City Human Rights Law.

18 If there can be a violation under the ADA/RA,
19 there is certainly one on the liberal construction of the
20 New York City Human Rights Law. Each day that there is a
21 violation is a cognizable injury and is a new accrual of
22 that statute of limitations. Therefore, this Court denies
23 the first branch of the motion seeking to dismiss this
24 complaint based upon statute of limitations.

25 Let's move on to the second issue,

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1 justiciability.

2 Counsel.

3 MR. KERWIN: Thank you, your Honor. The
4 justiciability doctrine turns on whether under separation of
5 powers between the judicial, legislative, and executive
6 branches within the State of New York. We believe that
7 these issues have been well-presented in papers and prior
8 arguments on this motion. As your Honor makes very clear
9 what its views are, we have nothing else to add unless you
10 have any questions.

11 THE COURT: I have no questions.

12 Counsel, opposition to the branch of the motion
13 seeking dismissal based on justiciability.

14 MS. GOODELL: Thank you, your Honor. We also
15 agreed that we presented a lot in our papers, which we will
16 be happy to discuss any specific issues. With respect to
17 justiciability, the MTA makes two arguments. One is kind of
18 generally about separation of powers and one is about Public
19 Authorities Law 1266, paragraph eight. And I wasn't sure if
20 your Honor would like me to address the Public Authorities
21 Law or just in general.

22 THE COURT: I'm allowing you to address anything
23 you believe is significant. I will make a ruling after we
24 have concluded this argument.

25 MS. GOODELL: At the last oral argument, last

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1 March, your Honor challenged us to come up with a decision
2 which a Court had ordered the Transit System to follow the
3 Human Rights Law. And I would point to the 1983 decision
4 from this court from Justice Rosenberger. This was issuing
5 a preliminary injunction against the MTA, in *Eastern*
6 *Paralyzed Veterans Association versus MTA*, Case Number
7 1813679. So what Justice Rosenberger did was to issue a
8 preliminary injunction because the MTA was, even back in
9 1983, renovating stations without making them accessible.
10 That was the decision that ultimately led to the legislation
11 that the MTA is trying to rely on here, Transportation Law
12 15-b.

13 But it certainly indicates that this Court has
14 the power to legislate an area of civil rights generally.
15 With respect to Section 1266(a), we would point out -- and I
16 think page three of the MTA's update later of May 13th
17 actually highlighted this fairly well. The MTA has been
18 making the argument that they are not subject that they are
19 exempt from the New York City Human Rights Law for decades.
20 Ever since the *Levy* case was decided in 1995, they've tried
21 to argue that the 2000 amendment makes some kind of a
22 difference. No court has ever accepted that law, every
23 court has always said that courts have the power to hold the
24 MTA accountable for violations of civil rights under the New
25 York City Human Rights Law.

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1 THE COURT: Counsel, reply?

2 MR. KERWIN: I think the first thing I will say
3 is that this argument that we've just heard isn't a
4 justiciability argument at all. This is an argument about
5 preemption, which I'm happy to go into now if the Court
6 would like or I can --

7 THE COURT: No, I don't want to address
8 preemption at this time. I would just stick to the issues
9 that I stated will be decided. We will do that next.

10 MR. KERWIN: I have nothing to add on
11 justiciability, your Honor.

12 THE COURT: Thank you. So justiciability brings
13 up a public policy issue. Does the Court have the
14 discretion, the authority to intervene when there is
15 discrimination in the City of New York; clearly, it does.
16 Just because MTA has authority over transportation issue
17 does not insulate them from the strong-arm of the New York
18 City Human Rights Law. If we were to substitute another
19 category of individuals that are applicable to the New York
20 City Human Rights, let's say a minority group, would there
21 be an argument that this Court cannot remedy such
22 discrimination.

23 Does it matter if the word if the protected
24 category persons disability is a category that is protected
25 under our liberally constructed New York City Human Rights

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1 Law, it shouldn't matter. There are many cases where the
2 Courts have imposed a remedial plan, where the ugly breed of
3 discrimination that surfaces.

4 The Courts may and shall enforce the New York
5 City Human Rights Law. That does not mean that that
6 remedial plan will include tomorrow a full accessibility of
7 the transit system. That remedial plan is subject to
8 further discussion, expert testimony if necessary, and a
9 final determination at a later time. The very fact that the
10 court is called upon to remedy a wrong, an alleged
11 discriminatory act gives the Court subject-matter
12 jurisdiction to act in a manner that is appropriate under
13 the circumstances.

14 The third branch of government is the judiciary.
15 The Courts have every right to step in when discrimination
16 occurs. This Court will not mandate and control parts of
17 the MTA, that's just not going to happen. That's not even
18 being asked for by the plaintiffs. They're asking for a
19 remedial plan and that remedial plan will be dealt with at a
20 later time. Therefore, this Court denies the branch of the
21 defendant's motion to dismiss the complaint based upon
22 justiciability. Let's move on.

23 MR. KERWIN: Your Honor, if I may.

24 THE COURT: Yes.

25 MR. KERWIN: I would like to just correct one

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1 thing being, I believe. That there might be some
2 misapprehension about the nature of the MTA's justiciability
3 argument, which I heard in the presentation just now. We
4 never made the argument that as a matter of justiciability
5 because we are a government agency that means it's not a
6 justiciable case. That's not the argument.

7 THE COURT: What is your argument?

8 MR. KERWIN: To be very clear, there is a
9 difference -- what we're talking about with any defendant
10 are what the remedies are that are sought by the plaintiffs
11 in a case and whether they are causing judicial or
12 executive. If they are, the case is not justiciable, I'm
13 not expecting you to change your ruling. But I want to make
14 clear on the public record --

15 THE COURT: To be clear, I actually included both
16 aspects of it. I talked at the very conclusion of my
17 argument about a remedial plan. You may be correct, at a
18 certain point it may veer into the unknown. It's not the
19 intention of the Court to invade the executive functions of
20 the MTA. I'm not asking you spend billions of dollars. I'm
21 not asking you do anything at this point.

22 In other words, it is premature for you to state
23 that this Court's remedial plan will somehow interfere with
24 the functioning of the MTA or will step on the shoes of the
25 government's actors in this case so that they cannot fulfill

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1 their responsibilities. I have concluded my arguments.

2 Let's move on.

3 Now we will deal with the third issue, preemption
4 which is probably the most important issue. And I've spent
5 the most time on it. It's quite frankly a very complicated
6 legal issue. As I mentioned, there are two types of
7 preemption arguments. One is field preemption that I won't
8 explain again. And the second one is conflict preemption.
9 I'll allow the attorneys to explain it better to the
10 audience. And I guess you can Google it later if you don't
11 understand it completely.

12 But nonetheless, we're going to do the arguments.
13 This is really for legal arguments, not necessarily designed
14 for laypersons. So I'm trying my best to break it down to
15 the simple common denominators so that it is clear and it is
16 understandable. But I need to do so within a short period
17 because everyone here is waiting for a decision. So,
18 Counsel for defendant, let's argue preemption.

19 MR. KERWIN: Plaintiffs in this case, has a made
20 a strategic decision to bring this lawsuit solely under a
21 local law of the City of New York. They're well aware that
22 there are federal and state laws which goes to
23 discrimination generally and to disability rights in
24 particular. They have several lawsuits outside of this one
25 which you're aware. What our motion is about is very

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1 specific, your Honor, it is whether they can continue to
2 maintain this lawsuit in its face in light of the fact that
3 the state legislature in New York has made very clear, on a
4 number of different occasions, the decisions about how best
5 to prioritize competing interest and how to develop the
6 subway system over decades of time, involve everybody in the
7 state, and are not subject to local control. That's what
8 this motion is about and that's what I'm here to discuss.

9 The first and most obvious way that this case is
10 preempted has to do with New York State Transportation Law
11 15-b. Let's take a step back and talk about what that is.
12 As the plaintiffs have just pointed out, this was actually
13 wrapped up in the settlement of a lawsuit. And it was
14 explicitly designed by the New York State legislature as a
15 compromise between advocating for persons with disabilities
16 who wanted a fully accessible subway system versus the state
17 legislature who has to balance other interests including the
18 fact that there just isn't enough money to do that and also,
19 for example, repair the ceilings that were falling down in
20 many stations at the time.

21 The compromise -- and it's very explicit. There
22 is no question about it that this is a compromised
23 legislation, it's there in the legislative history, it's
24 there in the way that the statute itself is written as a
25 comprehensive field preempting statute, it's there in

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1 subsection seven of the law, which is a preempting
2 provision. All these things are there. This one of the
3 clearest cases of preemption that I think I've ever seen.

4 Given that, imagine this scenario, your Honor,
5 the State of New York makes this grand compromise. It says,
6 we can't actually afford to make the entire system
7 accessible with what we believe would be the right policy
8 would be an integrated system of buses, Paratransit and a
9 partially accessible subway system, you can disagree with
10 that. It doesn't matter the policy, that's not my point.
11 The point is imagine that the State has just made that
12 compromise, the ink is drying on Transportation Law 15-b and
13 a couple weeks later, the City of New York says, well, thank
14 you very much, but we don't think that goes far enough.
15 We'd like to pass a law that says we'd like 20 more stations
16 to be made accessible. We don't want it tomorrow, we would
17 like to have a study done. We want a remedial plan over a
18 reasonable period of time.

19 I don't think that anybody with a straight face
20 could say that act by the City of New York would not be
21 preempted by Transportation Law 15-b. It's that
22 straightforward, that's the reason why this lawsuit must be
23 dismissed. It doesn't make any difference if the City of
24 New York, in my hypothetical scenario, were to say we're
25 passing this law because we believe it's discrimination not

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1 to have this law in the books. The question here isn't what
2 the city intends, it's what the City of New York intended.
3 That's the question on preemption. And we submit that this
4 is an extremely clear case.

5 Plaintiffs have never grappled with any of this,
6 they keep just changing the subject and saying because the
7 New York -- we're suing under a law that's labeled the New
8 York City Human Rights Law. We don't have to deal with any
9 intent of New York State Legislature because one of the ways
10 they put this is the New York State legislature does not
11 preempt the field of human rights. That is obviously true,
12 but it's trivial but true and not relevant to this motion,
13 your Honor. What matters is what did the State of New York
14 intend, it intended to make a compromise. It very
15 explicitly said we have considered what the plaintiffs in
16 this case are asking for and we considered the opposing
17 views that are important and we come out to a compromise.

18 And what the cases say that we've cited including
19 the *Alston* case which we've cited in our most recent letter
20 is when you're deciding what the intent of the state
21 legislature is, you don't just look to the labels that are
22 put on the things by the plaintiffs or by the City of New
23 York, you look to the reality of the underlying transaction.
24 In this case, the reality is that the City would absolutely
25 be preempted in its attempt to do this. The plaintiffs are

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1 preempted in their attempts to do the same thing and that's
2 about as clear as it can possibly get.

3 THE COURT: Are you referring to legislative
4 intent when you talk about the rationale of the
5 Transportation Law 15-b or are you just looking to the
6 wording or both?

7 MR. KERWIN: I'm looking to both, your Honor.
8 This is a very unusual case in that we have legislature that
9 clearly states what the intent was and in particular in a
10 way that's relevant to this litigation. The intent of the
11 New York State Legislature that rests in the material is to
12 make a compromise. And it even says in the legislative
13 material that this legislation was grown out of a lawsuit
14 from Disability Advocates about the accessibility of the
15 system.

16 They, of course, the plaintiffs they want a fully
17 accessible system, that's the point. That's the intent of
18 the legislature with what's to look at those, the forces in
19 society pushing in that direction. But there are
20 countervailing interests, your Honor. And, again, I'm not
21 saying reasonable minds can't differ about whether the
22 legislature got the balance right. But the legislature
23 struck a balance, no question about it at all. And the
24 legislature would not have said, we've gone through this
25 very difficult effort to strike a balance as painstaking as

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1 is, but, hey, don't listen to us, the City of New York can
2 come on and strike a completely different balance. That's
3 what the plaintiffs have never grappled with and that's the
4 reason why this case must be dismissed.

5 THE COURT: Does the plain words of the
6 Transportation Law or Public Authorities Law state that only
7 100 stations shall be accessible?

8 MR. KERWIN: Well, I haven't talked about the
9 Public Authorities Law yet, I can go there if you would
10 like.

11 THE COURT: Let's deal with the Transportation
12 Law. I think that the Transportation Law 15-b is actually
13 the better of the two statutory constructs that you have
14 cited that would support a possible preemption argument.
15 I'm not so sure if the Public Authorities Law, which is more
16 general, would go that far. And I'm not making the ruling
17 now, I'm just playing devil's advocate. And I'm just
18 analyzing the law. Are you saying that the plain wording of
19 the Transportation Law 15-b limits the accessibility of key
20 stations of 100 subways?

21 MR. KERWIN: No, your Honor. I can read the
22 statute to you, you can see the word only is not in the
23 statute. But that's not relevant to the question. There is
24 no question that the State of New York didn't tie the hands
25 of the MTA and the Transit Authority to say, you must stop

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Proceedings

1 at a hundred stations, that would be crazy. There is no --

2 THE COURT: That would be what?

3 MR. KERWIN: Let's --

4 THE COURT: Did you say crazy? I thought I heard
5 that.

6 MR. KERWIN: That certainly isn't the law.

7 THE COURT: I did hear him right.

8 MR. KERWIN: Maybe that's not too strong of a
9 word.

10 THE COURT: I like that word.

11 MR. KERWIN: There are no public interest groups
12 out there that would say -- any interest in society that
13 would say we are going to limit your ability to make things
14 accessible. If for some reason over the course of the last
15 30 years, the circumstances had changed, I don't know there
16 were windfalls and there was the ability to do quite a bit
17 more. Why would the legislature say you can't do that?
18 That's a completely different question than asking whether a
19 local government can impose a legal obligation, that's
20 what's the issue is here. It's not relevant why the statute
21 says there's a limit of 100 key stations, that's not a
22 reasonable argument.

23 THE COURT: Let's go to legislative intent. The
24 part of legislative intent that you provided the Court was
25 actually missing several pages. And I don't see anything in

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1 the legislative intent except for what you just stated which
2 is the plain words of the section that there will be
3 initially a lower amount of stations. Eventually it was
4 amended to be a hundred stations. That's it.

5 MR. KERWIN: We have cited in several places in
6 our papers and in our arguments the specific legislative
7 issues. We actually didn't submit this, the City did and
8 the affirmation is marked below. I will read a few things
9 from the legislative history that was submitted to the
10 Court.

11 THE COURT: Just cite the page because you didn't
12 submit all of the legislative history. And actually, you
13 didn't do it, it was the City, correct. And I did not see
14 several pages. I went on e-file and I didn't see it there
15 as well, you're missing several pages of legislative
16 history. Not you, it's the City of New York, you're right.

17 MR. KERWIN: I'm sure the City did not omit pages
18 from the legislature with intent.

19 THE COURT: I'm just letting you know that
20 there's a gap of at least five of the pages are missing of
21 the legislative history. You can look at it if you want.

22 MR. KERWIN: Let's talk about what's been there
23 that we've cited numerous times for the Court. There's a
24 center report, budget report on bills. The page numbering
25 is unclear on this. It doesn't have bates numbers, I can

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1 tell you it's page three of the center report. It says
2 arguments and support, the bill would move the current
3 injunction one by the handicap community which has prevented
4 the Transit Authority from advancing its station
5 rehabilitation program.

6 Cursorily, it also says, the bill represents a
7 reasonable compromise between the handicap community which
8 had originally sought full access to the subway system and
9 the authority which had opposed virtually any new
10 construction to achieve handicap accessibility. The next
11 paragraph of the key station concept in conjunction with the
12 lift bus program and the Paratransit system, should provide
13 an effective public transportation system for the handicap.
14 But alternatively at substantially less cost than would be
15 incurred under an full access alternative.

16 Here is some other information from the
17 legislative history which is extremely clear, page two of a
18 letter from Robert Bowler, counsel of the State of New York
19 Office of Advocate for the Disabled. This proposal is the
20 product of several years of difficult negotiations involving
21 the governor, a legislature, Metropolitan Transit Authority,
22 the Eastern Paralyzed Veterans Association and other
23 organized entities and individuals representing the interest
24 of persons with disabilities throughout the state.

25 Continuing on, there are some excerpts from the transcripts

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1 of argument as the New York State Legislature. This
2 presumably is the part that your Honor is saying there are
3 pages "missing from". I actually don't know the process by
4 which this legislative history was compiled or companies out
5 there that do these services. And I don't know how they
6 select the pages for inclusion, but this is what it is.

7 THE COURT: It's very simple. Every bill that
8 has legislative history that's attached you can ask for it;
9 every library, at least law library has it. It's actually
10 part of the legislative act, you can get it.

11 MR. KERWIN: This is what you get.

12 THE COURT: I looked it up myself on other cases.

13 MR. KERWIN: When you ask for the that history I
14 believe for this bill, this is what you can get. The City
15 can explain.

16 THE COURT: I'm just saying there is gaps. I
17 can't read the entirety of the argument without losing the
18 arguments because there are pages missing. I'm not saying
19 the City intentionally omitted it, it probably wasn't there
20 or it's not available. I just don't know the answer to that
21 question. And I'm not casting aspersions that there is
22 something intentional or willful that's going on here, it's
23 quite the opposite.

24 MR. KERWIN: So to continue, I will cite again,
25 to some information that I've previously cited to the Court,

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1 page 746 of that transcript, Senator Orenstein, who is the
2 principal responsible for the measure. I would like to say
3 that this bill, in my opinion, is the legislature and the
4 government acting at its best. I think that it's a classic
5 case of a spirit of compromise between the needs of the
6 general public and the needs of the most needy and
7 defenseless in our society.

8 THE COURT: I read that.

9 MR. KERWIN: Skipping ahead to page 751 of the
10 same transcript. On one matter of substance -- this
11 continues with Senator Orenstein -- I would like to say
12 this: The system that is being created in this bill, is a
13 two-part system; one addresses the mainstream, the issues of
14 the subway system in the City of New York and the selected
15 number of key stations will be constructed so as to provide
16 direct access to the subway system by the disabled and the
17 frail, and elderly. This would be at a cost of \$150 million
18 over a period of time of eight years.

19 Keys to the subway stations would be the most
20 innovative part of the proposal and probably a historic part
21 of this proposal. As far as many, as the United States
22 states is concerned and that is a Paratransit system which
23 will be directly assisting the disabled, and frail, and
24 elderly in order on a borough by borough basis to get to the
25 key stations that we are seeking to accommodate to their

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1 needs so that they can have access to the system. The
2 Paratransit system saves perhaps hundreds of millions of
3 dollars which otherwise would have been expended pursuant to
4 law at this time in order to make all the stations of the
5 system available.

6 THE COURT: Okay. I read that. That was not
7 missing. Let me just propose a hypothetical to you. You
8 argued that if the Transportation Law provides for a hundred
9 key stations, the State for all intents and purposes occupy
10 the field. And it should preempt the New York City Human
11 Rights Law. Let me give you a hypothetical that would go
12 the other way. You talked about hypotheticals about the
13 lawsuit. Let me give you another hypothetical, which is not
14 serious and should not be taken that I'm advocating for
15 this, it's quite the opposite.

16 I'm giving you a very bizarre -- you talked about
17 crazy, a crazy situation, which will probably be illegal.
18 Suppose this hypothetical: The State amends the
19 Transportation Law to charge people with wheelchairs more
20 money to enter accessible train stations than parents with
21 carriages or individuals with bicycles, assume no legitimate
22 reason for the price disparity between disabled persons and
23 others with carriages and bikes. The State occupied the
24 field in order have people with wheelchairs pay more.

25 They'll argue that the law says you pay more and

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1 you occupied the field just because you're the State. So
2 the question is does the State have the right to preempt an
3 antidiscrimination law.

4 MR. KERWIN: Your Honor, if I'm understanding
5 your hypothetical correctly and I agree that that's a
6 ridiculous situation.

7 THE COURT: It's ridiculous and anyone who does
8 that would be found to be in violation discrimination laws.
9 I picked a ridiculous argument to show where this slippery
10 slope can go if you take that argument to the fullest extent
11 of the law.

12 MR. KERWIN: Well, any argument is ridiculous if
13 you propose a ridiculous scenario. I'm not sure what value
14 that has.

15 THE COURT: That would be a preemption argument.
16 The State Transportation Law says a hundred key stations and
17 it would hypothetically state that wheelchairs would be
18 charged more, they occupy the field and people with
19 carriages would not pay more.

20 MR. KERWIN: Your Honor, if your question is
21 whether the City of New York in response to that state law,
22 let's assume, in a counterfactual world, that the state
23 could do that. Of course it can't because after a supreme
24 --

25 THE COURT: I agree it cannot.

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1 MR. KERWIN: If the state did do that and had a
2 law that said any, let's say it set the fares for any member
3 of the City of New York at \$20.

4 THE COURT: Correct.

5 MR. KERWIN: We'll just pick some people at
6 random, obviously the City would not have power to override
7 that law.

8 THE COURT: What did you say?

9 MR. KERWIN: Of course it would not.

10 THE COURT: The City would not have?

11 MR. KERWIN: No.

12 THE COURT: If you discriminate against a
13 discrete class, the City would not have the power to.

14 MR. KERWIN: No.

15 THE COURT: Okay. Wow.

16 MR. KERWIN: Your Honor, state law --

17 THE COURT: No, let me just tell you why that's
18 wrong.

19 MR. KERWIN: Okay.

20 THE COURT: Because in the area of
21 discrimination, the State has stated clearly that they have
22 concurrent jurisdiction. You cannot discriminate against a
23 member of a discrete class because the State itself said
24 it's not going to preempt its concurrent jurisdiction over
25 discrimination laws. I'll cite the case law for you. I'll

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1 give you the case. It's a Court of Appeals case, *New York*
2 *State Club Association versus The City of New York* 69 *New*
3 *York* 2nd 211.

4 And I'll quote, "The City possesses broad home
5 rule power and the state concededly has not preempted to
6 hearing antidiscrimination. That the field has not been
7 preempted must mean that the legislature will permit the
8 City consistent with both the letter and the spirit of state
9 Human Rights Law to regulate certain areas.

10 And I'll go even further than that. Also, the
11 plaintiffs acknowledge on this appeal that the State has not
12 preempted the field of this legislation by enacting the
13 human rights provision of this executive law. So there is
14 concurrent jurisdiction in antidiscrimination cases and
15 that's from the Court of Appeals.

16 MR. KERWIN: If I may, your Honor?

17 THE COURT: Yes.

18 MR. KERWIN: So this is a case that the
19 plaintiffs cited in their brief and we responded to this.
20 That we do not make the argument that the state has
21 preempted the field of discrimination. That is not --

22 What has the state found, that's the question
23 that your Honor should be focusing on. And what did the
24 state do with Transportation Law 15-b. They didn't
25 discriminate against people with disabilities, they came to

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1 a compromise on a very broad societal question on things
2 that affect lots of different people. It does not preempt
3 anything except for policies at the state level which would
4 conflict with -- I'm sorry -- at the city level which would
5 conflict with what the state was trying to accomplish. As I
6 think is very clear, the state was trying to accomplish a
7 compromise. So we don't make an argument that, generally
8 speaking, the area of human rights has been preempted by the
9 state, we made that very clear.

10 THE COURT: I agree with that. I'm glad you said
11 that because it wasn't clear from the papers. But I wanted
12 you to say it in open public, because there is no preemption
13 in the area of antidiscrimination. And the State has
14 clearly stated that it has not preempted antidiscrimination
15 laws. I don't think anyone is arguing that Transportation
16 Law 15-b is a discrimination law. If anything, it somehow
17 furthers the cause of providing people with disabilities
18 accessibility to our transportation system. I agree with
19 that. I don't think that has been argued.

20 And then you have to go to the case of *Vatore*
21 *versus Commissioner of Consumer Affairs of the City of New*
22 *York, 383 New York 2nd 645, Court of Appeals 1994.* It talks
23 about if the actual state law furthers the purpose of the
24 local law there is no preemption. So you just admitted that
25 the state law furthers the cause of the antidiscrimination

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1 laws, it actually helps.

2 MR. KERWIN: I'm sorry, your Honor. I did not
3 admit anything of the sort.

4 THE COURT: You just stated there was no
5 preemption in New York City Human Rights Law versus the New
6 York State Human Rights Law and we already stated that the
7 Transportation Law is a law that actually furthers the
8 purpose of individuals with disabilities. Is that correct?

9 MR. KERWIN: So the New York City Human Rights
10 Law, as the plaintiffs want to apply it, conflicts with the
11 purposes of Transportation Law 15-b.

12 THE COURT: How does that work?

13 MR. KERWIN: That's our view.

14 THE COURT: Tell me what's the process?

15 MR. KERWIN: Because the state legislature was
16 seeking a compromise between the interest of persons with
17 disabilities and the -- the proffer of a fully accessible
18 system and other important priorities in society. This is
19 our argument.

20 If you'd like me to restate it, I can.

21 THE COURT: Let's just go a little deeper because
22 you said there's a conflict. The Transportation Law 15-b
23 states there shall be a hundred key stations, correct? It
24 doesn't say, less, it doesn't say more, it says what it
25 says.

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1 If you look at the New York City Human Rights
2 Law, which is the local law, it says you should not
3 discriminate based upon public accommodations and I'm just
4 summarizing. So how is that a conflict? How does 15-b
5 conflict with you shouldn't discriminate against disabled
6 individuals in public accommodations? And we all know that
7 the transportation system is a public accommodation. The
8 MTA is a public entity that was susceptible to the wide
9 breadth of the New York City Human Rights Law.

10 MR. KERWIN: So I can explain it again that the
11 state policy was a compromise -- to the extent the
12 plaintiffs want to utilize the New York City Human Rights
13 Law to require, for example, the same thing that I started
14 my argument with. If the City of New York, as the ink is
15 drying on Transportation Law 15-b says, we want another
16 station made accessible, they pick a statement, for example,
17 over a reasonable period of time; that would obviously
18 conflict with Transportation Law 15-b because it was meant
19 as a compromise.

20 THE COURT: That's not true.

21 MR. KERWIN: And it's also part of the field --

22 THE COURT: It's not true. Where does it say
23 that you can't have more than a hundred stations. The New
24 York City Human Rights Law doesn't say that you should have
25 another station, it just says that you can't discriminate

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1 against individuals with disabilities under public
2 accommodation. Where does it say one more station, where is
3 the conflict in the reading of the statutes?

4 MR. KERWIN: I think the mistake that's being
5 made, your Honor, is that it doesn't have to be a facial
6 conflict on the actual text of the law. The plaintiffs in
7 this case are seeking --

8 THE COURT: Are you arguing a facial direct
9 conflict on the wording of the statute?

10 MR. KERWIN: No.

11 THE COURT: Okay. Good. That's fine. So what
12 are you arguing, the purpose behind it; what's the conflict?

13 MR. KERWIN: Between what the plaintiffs are
14 seeking to accomplish in this lawsuit if the -- if --

15 This is just to help you understand this, your
16 Honor, if the City of New York were to pass a law that said,
17 put an elevator in station Y, would that be in conflict with
18 Transportation Law 15-b, of course it would. That's --

19 THE COURT: I'm not commenting on that, that is
20 not before me. And, quite frankly, that may come before me,
21 so I'm not going to comment. I don't know the answer to
22 that question and I choose not to address it because it's
23 not before the Court.

24 Okay. Any other arguments because we're getting
25 a little late. I think I've spent 15, 20 minutes on this

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1 argument. Do you want to add anything to the equation?

2 MR. KERWIN: No, your Honor.

3 THE COURT: Okay. Counsel, in opposition?

4 MS. GOODELL: Thank you, your Honor. I think
5 that we read it exactly -- that the defendants really
6 misapprehend the nature of this case and the nature of this
7 motion. They're saying, leave us alone. We can exercise
8 our discretion, that would be fine. They've had 35 years
9 since 1984 to exercise their discretion, the result is a
10 subway system that, according to the complainant, whose
11 allegations must be taken as true at this point excludes
12 hundreds of thousands of people. And, as your Honor said,
13 violates their rights under the New York City Human Rights
14 Law each and every day.

15 *The New York State Club Association* cases, your
16 Honor, pointed out is directly on point in showing that
17 there is no preemption here because the City is free to go
18 beyond the mandates of the state law. The notion that a
19 compromise that was made in 1984 because a Court made a
20 ruling and the MTA had to sit down, that compromise was made
21 in 1984, but the notion that there is anything in the law,
22 either its words or its intent that meant to freeze in time
23 that 1984 compromise is completely unsupported. We have
24 nothing further unless your Honor has questions.

25 THE COURT: Anything in reply?

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1 MR. KERWIN: No, your Honor.

2 THE COURT: Let's do a little bit of education
3 before we get into the ruling on this preemption argument.
4 We all know that the New York City Human Rights Law under
5 Restoration Act deserves liberal interpretation. I won't
6 belabor the point. It is the intent and purpose of the
7 statute to provide protections for disabled persons in the
8 area of public accommodations. There is no argument to that
9 point. It is simply uncontroverted that the State has not
10 preempted the area of antidiscrimination. For all intents
11 and purposes, the city and state have concurrent
12 jurisdiction in the area of antidiscrimination. And that's
13 from a Court of Appeals case I cited earlier, *New York State*
14 *Club Association versus City of New York*, 69 New York 2nd,
15 page 211, a 1987-case.

16 Now, let's go into the standard. The case that I
17 believe that is the most on point is *Patrolman's Benevolent*
18 *Association of the City of New York Inc. versus City of New*
19 *York*, 142 A.D. 3rd 53. It is a First Department case in
20 2016. The reason I chose this case is because it involved a
21 local law prohibiting discriminatory policing which was not
22 preempted by the criminal procedure law. We all know the
23 history of racial profiling.

24 The State of New York enacted Local Law Number 71
25 to combat the racial ethnic profiling. It amended the law

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1 provide a private right of action, the PBA and others
2 commenced lawsuits to strike down the local law. The
3 Appellate Division found it was not preempted by the state
4 law that the -- the criminal procedure law. In that
5 decision, the Appellate Division, First Department, where we
6 are actually located and is the mandatory authority over
7 this case, cited the case law with regard to when a local
8 law was preempted.

9 In order to have field preemption, the two laws
10 must occupy the same field. In the PBA case, the Appellate
11 Division found that the two laws -- and that would be the
12 Local Law 71 -- the law prohibiting discriminatory policing
13 and the CPL, criminal procedure law, which requires probable
14 cause when you can stop and frisk an individual, did not
15 occupy different legislative fields.

16 The Local Law 71 was an antidiscrimination law,
17 it wasn't part of the New York City Human Rights Law, but it
18 could have been. In this case, what are the two different
19 fields; one, the local law is an antidiscrimination law
20 similar to Local Law 71 while it does not combat
21 discriminatory policing, it does combat discrimination and
22 public accommodations for disabled individuals. What is the
23 state law, the Transportation Law 15-b and the all Public
24 Authorities Law, essentially, transportation and possibly
25 accessibility. They are two different fields, no exceptions

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1 are required to be stated. They're two different fields.
2 Discrimination law and Transportation Law are two different
3 fields.

4 Now, let's move on to conflict preemption. There
5 has to be a direct conflict between the local law and the
6 state law, there simply is none. There is nothing, as we
7 heard, in the Transportation Law 15-b or the Public
8 Authorities Law which requires the MTA and their
9 subsidiaries to provide transportation services that would
10 conflict with the New York City Human Rights Law which
11 combats discrimination, there is simply nothing there. The
12 argument that there is a conflict because the State provided
13 a hundred stations does not exist. As plaintiff says, a
14 hundred stations is the floor and not the ceiling. There is
15 simply no conflict between the Transportation Law and New
16 York City Human Rights Law.

17 Let's move on to another case which I found
18 compelling, *Vatore versus Commissioner of Consumer Affairs*
19 *of the City of New York, 83 New York 2nd 645*; Court of
20 Appeals case from 1994. There are three propositions that
21 we can learn from *Vatore* case. And the *Vatore* case involved
22 citing tobacco products in vending machines in public places
23 other than taverns. They tried to regulate tobacco products
24 in certain areas. I won't really get too much into the
25 facts, it's not really relevant. I just want to give you an

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1 overall gist of what it was about.

2 In this decision the Court of Appeals stated
3 there has to be a legislative declaration accompanying the
4 law which must contain an expression for uniform statewide
5 control in the case of Vatore of the tobacco products, the
6 same must be true for transportation accessibility. There
7 has been no uniform statewide control of transportation
8 accessibility. The best that we can hope for was the
9 compromise. They didn't state anywhere within the
10 Transportation Law 15-b that they're preempting the need for
11 more accessibility. In fact, the goal was the opposite.
12 The goal was to provide a remedy for disabled individuals.

13 Let's continue with the discussion. The second
14 concept is that the local law would only further the State's
15 policy interest, the same holds true here. The New York
16 City Human Rights Law would only further the ambit of
17 Transportation Law 15-b. To add more would provide more
18 solace, would provide a legal remedy, would further the
19 cause of the Public Authorities Law, which is to transport
20 not only individuals that are able-bodied, but those that
21 are disabled as well. The more accessible stations would
22 only further the cause, it would not detract.

23 And lastly, there was limited preemption of the
24 state building laws and no general preemption effect on the
25 New York City Human Rights Law. The Transportation Law 15-b

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1 provides for preemption in a specific area, building
2 construction because we all know that it may take time to
3 get a certificate of occupancy, to get permits, and go
4 through the Byzantine requirements of providing paperwork
5 and the like to maneuver through the New York City
6 Department of Buildings. So they realized that in order to
7 expedite the effects of the Transportation Law 15-b, they
8 preempted building laws so that the MTA could quickly and
9 probably more reasonably priced obtain accessibility in a
10 expedited and a reasonable cost, it did not preempt any
11 other area. They knew that it could preempt the New York
12 City Human Rights Law, but it did not. The State did not
13 preempt any other law.

14 Quite frankly, the reason the State did not do so
15 because it did so intentionally. It knew and did not want
16 to preempt the New York City Human Rights Law because it
17 furthers the cause. There can never be a situation where
18 there is discrimination and you can have a state law that
19 would preempt it. You cannot discriminate, there is no
20 license by the MTA, by any other agency to discriminate
21 against any individual by race, minority, ethnicity or
22 disability. There is no case that ever found there was
23 preemption of the New York City Human Rights Law in the area
24 of antidiscrimination.

25 And I cite to the various cases that came down

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1 throughout the years and they are as follows: *Kang versus*
2 *New York City Transit Authority, 55 A.D. 3rd 720 Second*
3 *Department 2008*, there is no preemption in employment
4 discrimination.

5 *Levy versus The City Commission on Human Rights,*
6 *85 New York 2nd 740, Court of Appeals, 1995*, similar
7 holding, employment discrimination.

8 *Huerta, H-U-E-R-T-A, versus New York City Transit*
9 *Authority, 290 A.D. 2nd 33 First Department 2001*, escalator
10 safety maintenance was not preempted.

11 *Bumpes, B-U-M-P-E-S, versus New York City Transit*
12 *Authority, 66 A.D. 3rd 26 Second Department 2009*, negligent
13 training of employee. New York City Transit Authority
14 employee uttered discriminatory epithets under the New York
15 City Human Rights Law against passenger was not preempted.

16 *And Echevarria, E-C-H-E-V-A-R-R-I-A, versus New*
17 *York City Transit Authority, 45 A.D. 3rd 492 First*
18 *Department 2007*, maintenance of exterior landing does not
19 interfere with government function.

20 *Terranova, T-E-R-R-A-N-O-V-A, versus New York*
21 *City Transit Authority, 49 A.D. 3rd, page ten, Second*
22 *Department 2007*, ejector pump room at bus depot which was
23 not devoted to transit purposes did not exempt the Transit
24 Authority from liability for failure to maintain such a
25 facility in compliance with that administrative code.

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1 I can go on and on. There are many more. The
2 thrusts of the decision is simple, there has never been a
3 decision from any court that I know of that has preempted
4 the New York City Human Rights Law in the area of
5 transportation issues. It simply cannot be because the
6 State has clearly enunciated that the antidiscrimination
7 laws are both within the ambit of both the State and the
8 City of New York. They both have concurrent jurisdiction.
9 Therefore, this Court denies the branch of the motion to
10 dismiss the complaint based upon preemption.

11 Last argument, the City of New York claims that
12 it should be dismissed from this case. We're running late,
13 I am not going to explain. I will allow counsel to do so.

14 MR. BOWE: Very briefly, your Honor, I would rely
15 on the papers submitted by the City as well as the prior
16 oral argument in March. Essentially, the various parts of
17 the argument boils down to -- with respect to why the City
18 is not a proper defendant here. There are no allegations
19 made in the complaint that alleged that the City either
20 acted in some way that caused -- that was a proximate cause
21 of an injury to any plaintiff or that the City failed to act
22 in some way available. Some failure to act that the City
23 was obligated to otherwise perform that proximately caused
24 any injury to any plaintiff in the complaint. Therefore,
25 the plaintiffs fail to state a complaint against the City

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1 and the City of New York should be dismissed as a defendant.
2 Thank you, your Honor.

3 THE COURT: Opposition, please.

4 MS. GOODELL: Thank you, your Honor. As we
5 stated at the last oral argument, the City's argument is
6 incorrect and was ruled incorrect by the Court of Appeals in
7 1997 in the Coleman case. We cited that at oral argument
8 last time and in our update letter. What that case said is
9 that when a statute says, as a New York City Human Rights
10 Law says here, that the owner is liable, the statutes means
11 what is says, you don't look to these questions and
12 proximate causation in control.

13 THE COURT: Who is the owner of the New York City
14 Transit Authority?

15 MS. GOODELL: The City is, your Honor.

16 THE COURT: Does the City acknowledge ownership
17 of the New York City Transit Authority?

18 MR. BOWE: Your Honor, I can't speak to ownership
19 of the New York City Transit Authority.

20 THE COURT: Maybe someone else owns it.

21 MR. BOWE: To my knowledge, your Honor, the City
22 as an entity does not control the New York City Transit.

23 THE COURT: Control and ownership are two
24 different issues. I didn't ask you about the control of the
25 New York City Transit Authority. I picked my words very

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1 carefully. Who owns the New York City Transit Authority?

2 MR. BOWE: If I may, your Honor, just add, the
3 issue of owner outfit possession is addressed in our papers.
4 Owners who are not legally in possession have been, as set
5 forth in our papers, been dismissed as improper defendants
6 when some other person is in control of property. There is
7 clearly no dispute that the City owns the City -- the City
8 owns the City.

9 THE COURT: The City owns the City, I like that.

10 MR. BOWE: But plaintiffs cannot dispute -- and
11 they don't, your Honor, they don't -- that the City does not
12 have any control over any facility when the lease was signed
13 resting control of the transit system from the City even the
14 equipment within the facilities went fee simple to the MTA
15 and the TA defendants. Again, your Honor, plaintiffs cites
16 no case where a defendant has been ruled, a proper defendant
17 when they had no ability to act or acted in a way that
18 caused -- proximately caused an injury. This goes to the
19 standing argument. There is no dispute with respect to the
20 accessibility issues presented in this case, very, very,
21 very serious issues.

22 There's also no dispute in plaintiff's papers
23 that the City can effect no change whatsoever. There is no
24 proximate cause alleged with respect to any injury alleged
25 in the complaint, therefore, there is no standing. The City

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1 is not a proper defendant.

2 THE COURT: I have to tell you I'm a little
3 confused. I never heard proximate cause as an element in a
4 discrimination case. This is not a personal injury that
5 someone fell down where you have proximate cause. The New
6 York City Human Rights Law provides for a shifting burden.
7 If there's a legitimate reason for the discrimination, there
8 is no proximate cause that I know of. You're making an
9 argument as if someone tripped and fell in a subway. And,
10 correct, under that scenario, I have dismissed the City of
11 New York out because there is no proximate cause. But this
12 has nothing to do with proximate cause, that argument is
13 irrelevant.

14 MR. BOWE: But, your Honor, if the Court doesn't
15 have the power to issue an order that compels the City to do
16 something, the City is not a proper defendant.

17 THE COURT: Who says that the Court has no power
18 to compel the City to do something?

19 MR. BOWE: If an order of the Court to the City
20 defendant to do something cannot be complied with as a
21 matter of law because the City has no control over the
22 subway system, then the City is not a proper defendant. The
23 plaintiffs do not dispute, your Honor, that the City cannot
24 go into a TA/MTA facility and effect any kind of change.

25 THE COURT: Okay. Let me ask this question and

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1 this is simple. Let's say the City of New York is called
2 upon by the MTA to provide access to the street level for an
3 elevator to be sited in a certain area for the elevator to
4 go down into the MTA facility; who is going to give that
5 permission, is it the MTA or is it the City of New York?

6 MR. BOWE: As your Honor knows, the City of New
7 York works with the TA and MTA as needed, always. There is
8 no allegation that the City fails in its obligations to work
9 with the TA and MTA, that issue is not presented in this
10 complaint, your Honor.

11 THE COURT: Counsel, in opposition?

12 MS. GOODELL: Thank you, your Honor. I would
13 just briefly say that we absolutely do cite cases including
14 the Coleman case that I just mentioned that we would dispute
15 the issue of control, but I don't know that we need to get
16 there. And I think that your Honor is also correct that the
17 City is a necessary party for relief because they would need
18 to grant some of the permissions required to do the work --

19 THE COURT: Okay.

20 MS. GOODELL: -- to remedy this issue. And then
21 I would just point to the agreement of the lease which is
22 attached to the affirmation of Mr. Bowe's reply -- in his
23 reply paper. This is ECF document number 42, it has an
24 agreement of lease. It clearly states that the City is the
25 owner of the subway system and retains some responsibility

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1 for paying half of the costs.

2 MR. BOWE: If I may be heard very briefly, your
3 Honor, the doctrine -- the doctrine of necessary party
4 there's -- there is no allegation in the complaint that
5 could give rise to a -- to the need for the Court to decide
6 whether the City is a necessary party. Again, there are no
7 allegations that the City doesn't cooperate with the MTA and
8 the TA as needed. So to suggest that because the City would
9 need to be involved in certain legal processes and is thus
10 just sort of flung at the court, unnecessary party, there is
11 no support in the plaintiff's papers.

12 THE COURT: Let's just do this. What did you put
13 in the complaint with regard to the City of New York? What
14 was the allegation against the City of New York? I don't
15 remember the allegation, it's been so long. Let's see if
16 you actually put any allegations with regard to the City of
17 New York. Do you have the complaint handy? You may have to
18 amend the complaint and make them a nominal defendant if
19 that's what you're asking for.

20 MS. GOODELL: Your Honor, the complaint alleges
21 that all defendants are violating the New York Human Rights
22 Law. I don't believe that there are specific allegations
23 about the City's actions as opposed to the MTA's actions,
24 but it does allege that all defendants are violating the New
25 York City Human Rights Law by continuing to exclude the

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1 members of the punitive class from the subway system. And,
2 as I just mentioned, the City and the complaint explains
3 this is the owner of the subway system. So under the New
4 York City Human Rights Law, plain language, they are liable
5 for the continued violation, and continued I think
6 inaccessibility of the subway system.

7 MR. BOWE: Your Honor, briefly, the City is
8 liable. Again, there are no facts --

9 Counsel has failed to present the Court with
10 anything other than a conclusory statement that the City is
11 named as a defendant because it excludes certain people from
12 the subways. That's the furthest counsel just went on
13 facts. The City does nothing to exclude anyone from the
14 subway system. The City doesn't have the authority to
15 determine who can enter and who cannot.

16 THE COURT: Okay. So right now we have the
17 motion to dismiss and I must accept the allegations of the
18 complaint to be true. I think I will deny without
19 prejudice, the motion by the City. If it turns out you have
20 no control, you don't own it, you take no responsibility
21 whatsoever, you can renew the motion. Let plaintiffs have
22 some discovery on that issue because that's unclear from the
23 record.

24 I'm not sure about that issue at this stage, but
25 given that there is a 3211 motion which I have to give every

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1 favorable inference to the plaintiffs, I will give that
2 favorable inference at this time. If it turns out that
3 there is actually no control whatsoever, that you don't own
4 it, which you admit you do own it and that you have not
5 prohibited and acted in any way to contribute to the alleged
6 violations of the New York City Human Rights Law, you can
7 move to dismiss or move for summary judgement at a later
8 time. The motion is denied without prejudice.

9 Please order the transcript. What is the next
10 step? I want to move the case along. You have to have an
11 answer, correct?

12 MR. KERWIN: It would seem so, yes.

13 THE COURT: How much time would the defendants
14 need to interpose an answer?

15 MR. KERWIN: Twenty days your Honor.

16 THE COURT: Counsel for the City?

17 MR. BOWE: Your Honor, if I may move the Court
18 very briefly on a issue for request for stay. I think it
19 would be appropriate to make this application orally,
20 Counsel is in another case that's in federal court which
21 deals with the issue of accessibility or lack of
22 accessibility with people of disabilities due to maintenance
23 failures. I think the Court is aware of that case.

24 THE COURT: I read the case, the complaint
25 actually.

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1 MR. BOWE: In that case, your Honor, at our
2 request, counsel agreed to first stay the case as against
3 the City as opposed to the other defendants the MTA and the
4 TA. We submitted a request -- a joint request to stay the
5 City. The arbitrary judge in that case rejected that and
6 says if the City's not a proper party, dismiss the City from
7 the case without prejudice without a high burden of showing
8 for counsel to bring the City back in if there was a need.
9 So I would request that the Court stay the case as against
10 the City rather than burden the City at this point with the
11 need to put papers in, with the need to participate in
12 discovery until such time that counsel can make a showing to
13 the Court why the City is a necessary party.

14 MS. GOODELL: Your Honor, we would oppose that
15 request.

16 THE COURT: You would oppose?

17 MS. GOODELL: We would oppose that request. That
18 was a very different case that involved just the repairs,
19 the maintenance of the elevators, and whether they were
20 being properly maintained. So in that case, we did agree
21 that there was no dispute that that was really the MTA's job
22 to keep the elevators working. This is a separate question,
23 a separate issue, and it's similar to other cases that we
24 have in federal court where the City is the defendant.

25 THE COURT: So I'm going to deny the oral

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1 request. If you want to make a motion on papers, you will
2 brief it. I'm not going to orally entertain a stay request.
3 As you know I read the papers, we have oral arguments, I
4 make the decision. I think that would short-circuit and
5 preempt the arguments on this issue. And, therefore, this
6 Court is denying without prejudice your oral application to
7 making a full motion to be briefed and argued at a later
8 date. So you must interpose an answer or at least seek a
9 stay through an order to show cause within the twenty-day
10 period.

11 MR. BOWE: Thank you, your Honor.

12 THE COURT: Anything further? Do we want to have
13 another conference at a later time?

14 I think we should schedule another conference.

15 MR. BROWN: I think we should because we
16 obviously have not had a preliminary conference to set
17 schedule.

18 THE COURT: When do you want to come back again,
19 summertime or --

20 MR. BROWN: Maybe a week or two after the answer.

21 THE COURT: August, September? When are we
22 talking about?

23 MR. FOLEY: Your Honor, maybe three weeks after
24 the answer.

25 THE COURT: Give me an idea when you want to come

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1 back, please.

2 MR. BROWN: Three weeks after the answer is fine.

3 THE COURT: You have a calendar with you?

4 MR. BROWN: I'm looking at one.

5 MR. KERWIN: That would be the end of July.

6 THE COURT: I'm sorry. I couldn't hear you. The

7 30th or the 31st?

8 MR. FOLEY: If we can do the 1st or 2nd of

9 August.

10 THE COURT: I can do the 1st. I cannot do the

11 second.

12 MR. FOLEY: August 1st.

13 THE COURT: Is August 1st good?

14 MR. BROWN: Okay.

15 THE COURT: August 1st at 10 o'clock.

16 MR. FOLEY: That's fine, your Honor. Your Honor,

17 just one issue. Maybe you're about to say it, but how to

18 get a copy of the order and so order it.

19 THE COURT: Okay. So that was my next thing I

20 was going to say.

21 MR. FOLEY: Thank you, your Honor.

22 THE COURT: You're prophetic. Please order the

23 transcript. I will so order the transcript and that will be

24 my decision and order.

25 MR. FOLEY: Thank you, your Honor.

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1 THE COURT: Thank you. Have a good day. Thank
2 you all for coming.

3 * * *

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5 Certified to be a true and accurate transcript of the foregoing
6 proceedings.

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LATONIA LEWIS, RPR, CRR
Senior Court Reporter

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Please note signatures in blue ink signifies a certified transcript.

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