No. 22-CV-418

DISTRICT OF COLUMBIA COURT OF APPEALS

THE BURRELLO GROUP, LLC; JOSE BURRELLO,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CASE NO. 2020-CA-002870-B

REDACTED BRIEF OF *AMICUS CURIAE* LEGAL AID OF THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEE DISTRICT OF COLUMBIA AND URGING AFFIRMANCE

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RULE 28(a)(2)(A) STATEMENT

Legal Aid of the District of Columbia is a 501(c)(3) nonprofit corporation. It has no parent corporations, subsidiaries, or stockholders.

Legal Aid certifies that the following listed parties appeared below and on this appeal:

Appellants, Jose Burrello and the Burrello Group, LLC, appeared in the proceeding below and appear on appeal through Eric J. Menhart.

The District of Columbia appeared in the proceedings below through James Anthony Towns, Kate Vlach, Samantha Hall, and Thomas Simone. The District is represented by Caroline Van Zile and Marcella Coburn on appeal.

Amicus curiae Legal Aid of the District of Columbia did not participate below and is represented by Jonathan H. Levy and Alec Sandler on appeal.

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INTERESTS OF *AMICUS CURIAE*

Legal Aid of the District of Columbia is the oldest general civil legal services program in the District. Legal Aid's mission is to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, art. II, § 1. Legal Aid's Barbara McDowell Appellate Advocacy Project has participated in over 100 cases before this Court both as counsel for individual litigants and as *amicus curiae*, including several cases involving housing for low-income District residents.

Legal Aid has a particular interest in this case because the Housing Voucher Choice Program and the District of Columbia Human Rights Act's source-of-income antidiscrimination provision are critical to confront the District's low-income housing crisis. Legal Aid frequently receives calls from residents on the voucher waitlist, many of whom are living in unaffordable units or are about to be evicted. Legal Aid also works to ensure that voucher holders can use their vouchers and realize safe, affordable housing free of discrimination.

This brief is being submitted along with a renewed motion to participate as *amicus curiae*. *See* D.C. App. R. 29(a)(2). Legal Aid filed its previous motion to participate as *amicus curiae* on January 5, 2023, and this Court denied that motion without prejudice on January 24, 2023.

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REDACTED BRIEF OF *AMICUS CURIAE* LEGAL AID OF THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEE DISTRICT OF COLUMBIA AND URGING AFFIRMANCE

BACKGROUND

Jose Burrello and his company, the Burrello Group, LLC, advertised a residential rental property as "Not approved for vouchers" on at least nine websites. Aplt. App. 51, 266. The advertisement stayed up for over five months on at least three of the websites. Aplt. App. 52. The District sued and sought summary judgment on liability because the advertisements were facially discriminatory as to

source of income, which violated the District of Columbia Human Rights Act (DCHRA). Aplt. App. 40. Initially, the trial court denied summary judgment based on the possibility that, despite placing facially discriminatory advertisements, Mr. Burrello might not have had the subjective intent to discriminate. Aplt. App. 269. The District moved for reconsideration, explaining that Mr. Burrello's subjective intent was irrelevant under the DCHRA, which forbids facially discriminatory advertisements regardless of subjective intent. Aplt. App. 271. The trial court agreed and granted summary judgment. Aplt. App. 288-89. The court issued a permanent injunction, entered a civil penalty, and awarded attorney's fees. Aplt. App. 319-22, 324. Mr. Burrello (and his company) appealed.

SUMMARY OF THE ARGUMENT

As part of ongoing efforts to address its affordable housing crisis, the District provides tenant-based housing subsidies in the form of vouchers that enable low-income families to afford safe housing. Unfortunately, many landlords discriminate against voucher holders, limiting the choice, mobility, and safety the voucher program is designed to achieve. This type of "source-of-income" discrimination means that more low-income families are unhoused or living in substandard housing.

To remedy this problem, the District of Columbia Human Rights Act (DCHRA) bans source-of-income discrimination by landlords. Of particular relevance here, the statute targets "any notice, statement, or advertisement, with

respect to a transaction, or proposed transaction, in real property . . . which . . . unlawfully indicates or attempts unlawfully to indicate any preference, limitation, or discrimination based on . . . source of income . . . ." D.C. Code § 2-1402.21(a)(5). Mr. Burrello's advertisements that his property was "not approved for vouchers" conveyed to any prospective tenant that voucher holders were disfavored and thus – without more – violated the statute. As the trial court correctly concluded, in cases of direct, facial, explicit discrimination like this, the landlord's subjective state of mind is irrelevant. If a landlord advertises a residential unit as "unfit for unmarried couples," that landlord has violated District law; it is unnecessary and indeed inappropriate to conduct any inquiry into the landlord's claim that they had no subjective discriminatory purpose in mind.

ARGUMENT

I. Safe, Affordable Housing is Difficult to Find in the District, Even for Voucher Holders.

The District is one of the most expensive places to live in the entire country. Steve Thompson, *1 In 4 Public Housing Units Sit Vacant During D.C. Affordability Crisis*, WASHINGTON POST (Oct. 19, 2022), available at https://www.washingtonpost.com/dc-md-va/2022/10/19/dc-public-housing-vacancy-spirals/. The high cost of living makes it nearly impossible for low-income District individuals and families to find affordable housing. To address the problem,

the District provides both site-based and tenant-based housing subsidies. Without these subsidies, many more residents would remain unhoused, struggle to afford housing, and be at risk of losing their housing.

The District's Housing Choice Voucher Program, often called HCVP or Section 8, is a federally funded program administered by the District of Columbia Housing Authority (DCHA). 42 U.S.C. § 1437f; D.C. Code § 6-202. The program provides financial assistance to eligible low-income families to help them afford housing in the private market. *See* 14 DCMR § 6106.1 (listing eligibility requirements). For a city facing an affordable housing crisis, the HCVP is critical.[1]

In 2016, 73% of low-income households in the District spent more than half of their monthly income on rent and utilities. D.C. ACCESS TO JUSTICE COMMISSION, DELIVERING JUSTICE: ADDRESSING CIVIL LEGAL NEEDS IN THE DISTRICT OF COLUMBIA, (2019), available at https://dcaccesstojustice.org/assets/pdf/Delivering_Justice_2019.pdf. Over the last twenty years, low-income renters in the District saw their rents rise by double digit percentages, even though incomes stagnated. *Id*.

[1] The HCVP is the largest such program in the District, but it is not the only one. Some of the other similar programs are funded by District, rather than federal, funds.

The HCVP provides financial assistance to cover the gap between what a family can afford to pay in rent and the market cost. It makes privately rented housing more affordable for voucher holders. It also provides landlords with more consistent and reliable monthly payments; if a tenant loses income, the government voucher payment goes up. This program has helped mitigate the District's housing crises, reduced the number of unhoused individuals, and ensured consistent rent payments to landlords. Unfortunately, the program does not receive enough funding for those in need. And, more relevant here, even the lucky few who receive vouchers do not always acquire safe, affordable housing as a result. There are a number of reasons why a family with a voucher might not get affordable housing, but one key reason – and the issue currently before this Court – is discrimination against voucher holders.

As an initial matter, an eligible family needs a voucher to take advantage of the HCVP. As of last year, nearly 40,000 people were on the waitlist for a voucher, which has been closed to new applicants for a decade. Annemarie Cuccia, *With 40,000 People on the D.C. Housing Authority's Waitlist, D.C. Funds Only 20 New Vouchers for that List*, DCIST (June 24, 2022), available at https://dcist.com/story/22/06/24/dc-housing-authority-waitlist-voucher-funding/. Legal Aid regularly receives calls from residents who would be eligible for subsidized housing if the waitlist were open as well as calls from "lucky" residents

who are on the waitlist but have waited for years, sometimes even decades, and not yet received vouchers. Some residents on the waitlist are unhoused for years before receiving a voucher. And even the lucky few who ultimately receive vouchers face obstacles to safe, affordable housing.

A family with a voucher must find a rental property whose rent falls within the applicable payment standard, that meets applicable housing quality standards, and that also includes the minimum number of bedrooms based on the size of the family. 14 DCMR § 5211. Once a family finds a property that meets all these requirements, someone from the household typically visits the property. According to Legal Aid clients, landlords usually show their properties during the workweek, which often requires clients to take off work and incur travel and other costs.

Next, the family must leap the hurdle of the landlord approval process. Many Legal Aid clients spend hundreds of dollars on application fees – an expense the voucher program does not cover – and face repeated rejections. If the family is approved by the landlord for a potential rental property, then the family must submit a packet of documents to DCHA including a proposed lease and federal forms to be completed by the property owner. 14 DCMR § 5212. Often Legal Aid's clients end up being responsible for following up repeatedly with the property owner to ensure they submit the necessary documentation. If any of these steps remain uncompleted after 180 days, the voucher is deemed expired. 14 DCMR §§ 5208-5209. Because

the voucher waitlist has been closed for so many years, as a practical matter, a family with an expired voucher cannot even reapply for assistance and has effectively lost all hope of participation in the voucher program and, with it, any reasonable hope for safe, affordable housing in the District. 14 DCMR § 5209.[2]

After DCHA reviews the required documents and "[t]he owner has requested a rent [that the agency] will approve," 14 DCMR § 5212.2(d), the agency schedules an inspection of the unit to ensure it satisfies health and safety criteria, coordinates execution of the payment contract, and releases payment to the property owner on the next payment cycle, *see* 14 DCMR §§ 5212-5214. After DCHA receives all required information and completes its inspection, it has ten business days to "approve" the tenancy. 14 DCMR § 5214. In practice, many Legal Aid clients need to repeatedly follow up with DCHA to get this final approval.

There is no regular process for a property to be deemed "approved for vouchers" before a voucher holder applies.

[2] The regulations require DCHA to extend the initial voucher term "for a period necessary to reasonably accommodate a Family member whose disability has interfered with his or her ability to find housing, in accordance with federal and local law." 14 DCMR § 5208.6. DCHA also gives extensions in additional circumstances not mentioned in the regulations, but extensions are not guaranteed, and many voucher holders do not know they are available.

II. Source-of-Income Discrimination Perpetuates Cycles of Poverty and Inequality.

The HCVP reduces the costs of providing housing for low-income families, avoids concentrations of poverty, and gives low-income families more choices regarding where they live in the District. But this program has these salutary effects only with the unbiased participation of private landlords. Unfortunately, many landlords discriminate against voucher holders, limiting the choice, mobility, and safety the HCVP is designed to achieve. This is a type of "source-of-income" discrimination in housing. *See* Office of Human Rights, Guidance No. 16-01, *"Source of Income" Discrimination in Housing* (Sept. 29, 2016), available at https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHRGuidance16-01_SourceofIncome_FINAL.pdf. While source-of-income discrimination towards voucher holders is illegal under the District of Columbia Human Rights Act (DCHRA), D.C. Code § 2-1402.21(e), such discrimination remains prevalent in the District (and other jurisdictions with and without similar antidiscrimination laws). *See* Press Release, Office of the Attorney General for the District of Columbia, AG Racine Announces Largest Civil Penalty in a Housing Discrimination Case in U.S. History (Oct. 20, 2022), available at https://oag.dc.gov/release/ag-racine-announces-largest-civil-penalty-housing; Forrest Hangen and Daniel T. O'Brien, *The Choice to Discriminate: How Source of Income Discrimination Constrains Opportunity for Housing Choice Voucher Holders*, URBAN AFFAIRS REVIEW 7 (2022). Source-of-

income discrimination results in more low-income families and individuals being unhoused or living in substandard housing.

A. Source-of-Income Discrimination Makes It Even Harder for Low-Income Families to Find Housing.

Source-of-income discrimination has many insidious effects, but most importantly, it prevents some families from using their vouchers. By simply reducing the pool of potential landlords who will accept vouchers, source-of-income discrimination prevents some families from placing their vouchers – which is exactly the same as not having a voucher at all. This effect is documented in studies showing that it is less likely that a voucher will be used in a jurisdiction where source-of-income discrimination is legal. *See, e.g.*, Antonia K. Fasanelli & Phillip Tegeler, *Your Money's No Good Here: Combatting Source of Income Discrimination in Housing*, 44 A.B.A. HUMAN RIGHTS MAGAZINE (Nov. 30 2019), available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/your-money-s-no-good-here--combatting-source-of-income-discrimin/ ("[F]amilies with HCVs [Housing Choice Vouchers] have greater success using their vouchers, and thereby moving out of homelessness, and housing authorities have higher rates of HCV utilization (using all of the vouchers allocated) in jurisdictions with SOI [source-of-income] laws."); Alison Bell, Barbara Sard, and Becky Koepnick, *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results*, CENTER ON BUDGET AND POLICY PRIORITIES 5 (Dec. 20,

2018), available at https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf ("Several studies have found that voucher holders in areas with voucher non-discrimination protections are more likely to succeed in using their vouchers to lease a unit."). The effects of laws prohibiting source-of-income discrimination are far from trivial; in the District alone, it is estimated that hundreds to thousands of additional families are served because of such laws. *Id*. at 16.[3]

Prohibiting source-of-income discrimination thus allows more families to place their vouchers, providing them with safe, affordable housing and leaving them with more funds for other necessities, including food, healthcare, clothing, and education. Stable, affordable housing is a crucial foundation for addressing poverty more broadly.

B. Source-of-Income Discrimination Can be a Proxy for Other Types of Discrimination.

For the reasons stated above, banning source-of-income discrimination is useful – arguably necessary – for any housing voucher program to succeed. There are other strong reasons to ban such discrimination, most notably that source-of-income discrimination is often used as a proxy for other forms of invidious and/or

[3] Source-of-income discrimination does more than reduce the total number of available units. It decreases the geographic and neighborhood diversity of units available to voucher-holders. And it increases the time and expense of applying for units whose owners refuse to rent to voucher holders, which, in turn, makes it more likely that the voucher will expire before it can be used.

unlawful discrimination. *See, e.g.*, J. Rosie Tighe, Megan E. Hatch, and Joseph Mead, *Source of Income Discrimination and Fair Housing Policy*, 32 JOURNAL OF PLANNING LITERATURE 3, 6 (2017).

In the District, African Americans account for 48% of the population but over 90% of housing voucher holders. Aastha Uprety and Kate Scott, *In the District, Source of Income Discrimination is Race Discrimination Too*, EQUAL RIGHTS CENTER (Oct. 12, 2018), available at https://equalrightscenter.org/source-of-income-and-race-discrimination-dc/. That means discrimination against a voucher holder is 71 times more likely to discriminate against a black renter than a white renter in the District. *Id*. Accordingly, absent the statutory prohibition on source-of-income discrimination, a District landlord who wanted to discriminate against African Americans but was prohibited from doing so could help advance their nefarious goals by discriminating based on source of income instead. *See Blodgett v. University Club*, 930 A.2d 210, 220 (D.C. 2007) (reasonable to infer that individuals who discriminate based on source of income "may often run afoul of other provisions of the Human Rights Act," such as those that prohibit discrimination based on race, age, familial status, and other protected classes). This reality helps explain both why source-of-income discrimination is so common despite the clear financial incentives for landlords to rent to voucher holders, and why having and enforcing laws against such discrimination is vital.

III. The District Prohibited Source-of-Income Discrimination Because It Wanted Voucher Holders to Find Affordable Housing.

The federal Fair Housing Act prohibits discrimination based on several protected classes but does not address source of income. 42 U.S.C. § 3601. The District is one of several jurisdictions that legislatively closed that gap by expressly forbidding source-of-income discrimination. D.C. Code § 2-1402.21(a). As noted above, these provisions are effective. A U.S. Department of Housing and Urban Development study found that laws prohibiting source-of-income discrimination are linked to substantial reductions in landlords refusing to accept vouchers. MARY CUNNINGHAM ET AL., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS (2018). The study found that in jurisdictions without such laws, landlords rejected prospective tenants 77% of the time, while in jurisdictions with such laws, that percentage dropped to 35%. *Id*. In other words, low-income families and individuals have a higher likelihood of voucher placement success – and thus the benefits that flow from safe, affordable housing – in jurisdictions with source-of-income protection. Alison Bell, Barbara Sard, and Becky Koepnick, *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results*, CENTER ON BUDGET AND POLICY PRIORITIES 5 (Dec. 20, 2018), available at https://www.cbpp.org/sites/default/ files/atoms/files/ 10-10-18hous.pdf.

Importantly, the Council's stated primary goal in enacting the DCHRA was not the abstract and extraordinarily difficult one of changing people's subjective beliefs. Instead, the Council legislated primarily to change their actions. *See* D.C. Code § 2-1401.01 ("It is the intent of the Council of the District of Columbia, in enacting this unit, to secure an end in the district of Columbia to *discrimination* for any reason other than that of individual merit, including, but not limited to, discrimination by reason of . . . source of income . . . . ") (emphasis added); *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 5 (D.C. 1987) ("While the Human Rights Act does not seek to compel uniformity in philosophical attitudes by force of law, it does require equal treatment.").[4]

[4] Also instructive is D.C. Code § 2-1401.03(a), which describes an exception to the general statutory prohibition on discrimination. This provision makes clear that the Council intended to prohibit a "practice which has a discriminatory effect," and that an exception applies only if the discriminatory act was *both* (1) not intended to violate the statute (a subjective requirement) *and* (2) justified by a business necessity (an objective requirement). The Council thus clearly intended to forbid objectively discriminatory acts without allowing subjective beliefs – by themselves – to constitute a valid defense.

IV. Advertisements Like Mr. Burrello's are Unlawful Because They Deter Residents from Applying for, and Obtaining, Housing – Precisely the Result the D.C. Council Wanted to Avoid.

The DCHRA specifically targets "any notice, statement, or advertisement, with respect to a transaction, or proposed transaction, in real property . . . which . . . unlawfully indicates or attempts unlawfully to indicate any preference, limitation, or discrimination based on . . . source of income . . . ." D.C. Code § 2-1402.21(a)(5). Unlawful advertisements may take the form of words, phrases, or expressions "indicating availability or unavailability" based on a protected characteristic. 4 DCMR § 1001.1(c)(1)-(2) & (s). The District correctly argues that Mr. Burrello's advertisement that his property was "not approved for vouchers" indicated that a prospective renter could not pay with a voucher and thus constituted a *per se* DCHRA violation because it discriminated based on source of income. *See* District Br. at 10-18.

When, as here, an advertisement on its face discourages a protected class from applying, that advertisement violates the DCHRA regardless of the subjective intent of the landlord who posted it. *See Feemster v. BSA, LP*, 548 F.3d 1063, 1070 (D.C. Cir. 2008) ("Just as it would constitute a facial violation of Title VII to discriminate in leasing on the basis of a renter's race — *regardless of whether the landlord professed a "benign" motive for so doing* – it is a facial violation of the Human Rights Act to discriminate on the basis of the renter's source of income.") (emphasis

added); *Equal Rights Center v. Properties International*, 110 A.3d 599, 601 (D.C. 2015) ("The listing advertised an apartment for $934.00 in monthly rent and contained the following language: 'Section 8 and other vouchers or certificates [will require] additional cost.' *This language, as the trial court explained, violates the DCHRA's prohibition against discrimination based on source of income*.") (dictum, emphasis added). This Court has never interpreted the DCHRA as requiring additional proof of subjective discriminatory motive when a facially discriminatory act or language is used. Indeed, to the contrary, it has rejected a discriminator's defense of subjective good intent in such circumstances. *Gay Rights Coalition*, 536 A.2d at 26-27 ("The Human Rights Act cannot depend for its enforcement on a regulated actor's purely subjective, albeit sincere, evaluation of its own motivations. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence. It is particularly difficult to recognize one's own acts as discriminatory.") (internal quotation marks and citations omitted).

While the case law interpreting the DCHRA is sparse, this Court interprets that statute following several similar federal statutes, none of which requires proof of subjective state of mind when there is direct evidence of facial discrimination. For example, the operative DCHRA language quoted above comes from the federal Fair Housing Act, specifically 42 U.S.C. § 3604(c) (making it unlawful to issue an

advertisement for a rental property "that indicates any preference, limitation, or discrimination based on [enumerated factors]"). Accordingly, this Court can and should look to case law interpreting the Fair Housing Act to interpret this provision of the DCHRA. *See Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d 1, 16 (D.D.C. 2016) (the "plain language of the DCHRA commands the same finding as the language of the FHA" when the two statutes have similar language); *Hunter v. District of Columbia*, 64 F. Supp. 3d 158, 179 (D.D.C. 2014) (where the DCHRA language parallels analogous provisions of the FHA, the "section of the DCHRA and the FHA should be interpreted in a parallel fashion").

The similarly worded Fair Housing Act unquestionably prohibits discriminatory language without regard to the subjective intent with which it was uttered or written. That was the conclusion of six of the seven judges on the federal Court of Appeals for the D.C. Circuit. In two separate opinions in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc), these six judges held that the Recorder of Deeds violated the Fair Housing Act by accepting for filing illegal racial covenants regarding real property. The court reached this conclusion without conducting any inquiry regarding the Recorder's subjective intent; indeed, there was no allegation that the Recorder harbored or acted out of any racist motive. Instead, the violation of this statutory prohibition on discriminatory publications and advertisements applied regardless of subjective beliefs because the statute "prohibits notices of

racial preference." *Id.* at 633 (Wright, J., concurring). What is prohibited is a specific "type of notice," namely one expressing a racial preference, not one issued with a particular subjective belief. *Id.* at 634. And because the statute is intended to foster fair housing, it is reasonable to read it as applying to actions that thwart that purpose, regardless of their intent. *Id.* at 635. The bottom line is that, under the Fair Housing Act, "racially restrictive covenants may not be permitted" because they constitute a "discriminatory housing practice" regardless of the motive behind them. *Id.* at 650 & n.18 (Wilkey, J., concurring). This view is enshrined in the federal regulation interpreting the Fair Housing Act. *See* 24 C.F.R. § 100.500(a) ("Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect on members of a protected class under the Fair Housing Act *even if the specific practice was not motivated by a discriminatory intent*.") (emphasis added).

In addition to being interpreted in line with similarly worded portions of the Fair Housing Act, the DCHRA is interpreted in accordance with Title VII of the Civil Rights Act, *see, e.g.*, *Lively v. Flexible Packaging Association*, 830 A.2d 874, 890 (D.C. 2003) (noting this Court's "practice of looking to federal Title VII cases in interpreting the DCHRA"); *Knight v. Georgetown University*, 725 A.2d 472, 478 n.5 (D.C. 1999) ("when interpreting the DCHRA we have long referred to federal cases interpreting Title VII"); 4 DCMR § 500.2 (District of Columbia Office of

Human Rights and Commission on Human Rights shall follow principles of Title VII when interpreting the DCHRA), with the caveat that the Council intended to "go above and beyond" protections afforded by Title VII, *Estenos v. PAHO/WHO-FCU*, 952 A.2d 878, 886-87 (D.C. 2008).

In the context of Title VII jurisprudence, this case is one of "facial discrimination" because it involves direct evidence of discrimination – the explicit discouraging of applications by voucher holders – rather than circumstantial evidence or a facially neutral act with disparate impact. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Furline v. Morrison*, 953 A.2d 344, 352 (D.C. 2008). As a result, the burden-shifting test applicable in many cases involving more nuanced discrimination cases does not apply. *See Trans World Airlines*, 469 U.S. at 121; District Br. at 13 n.5. The advertisement here expressly singled out a protected class and informed voucher holders that they were disfavored applicants and less likely to be rented a unit than individuals who were not seeking to use vouchers. Legally, the advertisement was equivalent to one stating that "people with disabilities require additional approvals" or "Christians not welcome," or "everyone else who lives in this building is a racist." And discouraging members of a protected group from applying is just as much a form of unlawful discrimination as refusing to rent to them once they do apply. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("The application process itself might not adequately reflect the actual

potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."); *Miami Valley Fair Housing Center, Inc. v. The Connor Group*, 725 F.3d 571, 575 (6th Cir. 2013) ("If an ordinary reader who is a member of a protected class would be discouraged from answering the advertisement because of some discriminatory statement or indication contained therein, then the fair housing laws have been violated."). Thus, by discouraging voucher holders from seeking to even apply for housing, Mr. Burrello violated the DCHRA.

Mr. Burrello's defense is unavailing. He argues that, despite the objective reality that his advertisement conveyed to prospective applicants that voucher-holders would be disfavored and/or rejected, his subjective intent was merely to convey that the property had not yet been inspected by DCHA. *See* Burrello Br. at 3. The Superior Court correctly rejected that argument; rental units are not approved by DCHA for a voucher holder until *after* the voucher holder applies and several other steps take place. *See* page 7, above. Therefore, the statement that the unit was not approved for voucher holders conveyed no information and served no purpose other than to discourage voucher holders from applying.

More importantly, Mr. Burrello's subjective intent is irrelevant as a matter of law for the reason described above: when a policy or action (or advertisement) is discriminatory on its face, the subjective motive is irrelevant. *See International*

Union v. Johnson Controls, 499 U.S. 187, 199 (1991) ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Trans World Airlines*, 469 U.S. at 121 (policy that is discriminatory on its face violates statute regardless of subjective intent).[5] That is particularly true under the DCHRA, which is even broader than federal civil rights statutes. *See Estenos*, 952 A.2d at 886-87; *Blodgett*, 930 A.2d at 218.

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[5] This legal precept is repeated often and in the context of many different antidiscrimination statutes. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir. 2014) ("[P]laintiffs challenging policies that facially discriminate on the basis of sex need not separately show either 'intent' or 'purpose' to discriminate."); *EEOC v. Baltimore County*, 747 F.3d 267, 273 (4th Cir. 2014) ("To prove facial discrimination under the ADEA, a plaintiff is not required to prove an employer's discriminatory animus. Rather, a policy that explicitly discriminates based on age is unlawful regardless of the employer's intent."). This is summed up in *Community Services Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 177 (3d Cir. 2005) (internal citations and quotation marks omitted):

> Where a regulation or policy facially discriminates on the basis of the protected trait, in certain circumstances it may constitute per se or explicit . . . discrimination because the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis. Hence, where a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, a plaintiff need not prove the malice or discriminatory animus of a defendant. Rather, the focus is on the explicit terms of the discrimination.

The law in this area aligns with common sense. When a landlord says something facially discriminatory, for example, that they do not want to rent to black tenants because they ask for repairs more than white tenants,[6] that statement violates the DCHRA *per se*. It would contradict the Council's intent and basic standards of human decency to say that, even in that circumstance, the landlord would not be liable unless the tenant could prove that the landlord subjectively intended to discriminate, beyond the landlord's facially discriminatory actions or statements.

The Council passed the DCHRA and included a source-of-income antidiscrimination provision in part to curb discrimination and create safe, affordable public housing opportunities for voucher holders. But when an ordinary voucher holder read Mr. Burrello's advertisement, they would be deterred from attempting to rent from him. That outcome contravenes the DCHRA's language and is the antithesis of the statute's purpose.

CONCLUSION

A facially discriminatory advertisement like the one posted multiple times by Mr. Burrello violates the DCHRA as a matter of law. The advertisement here

[6] This hypothetical is largely based on the real-world situation in *District of Columbia v. O-Shokunbi*, No. 2020 CA 003373 B, at *1 (D.C. Super. Ct. May 2, 2022) (landlord violated DCHRA by telling a prospective tenant that she didn't want to rent to a tenant who called "every second for repairs" and that she "never had any problems with [her] white tenants").

expressly invoked a protected characteristic in a manner indicating that the owner viewed voucher-holding applicants less favorably than other applicants. Accordingly, no further evidence of subjective intent was required, and the Superior Court correctly held that Mr. Burrello violated the statute. This Court should affirm.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual's social-security number
- Taxpayer-identification number
- Driver's license or non-driver's' license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

(1) the acronym "SS#" where the individual's social security number would have been included;
(2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
(3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(4) the year of the individual's birth;
(5) the minor's initials; and
(6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or

location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ *Jonathan H. Levy*
Signature

22-CV-418
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Amicus Curiae* Brief to be delivered electronically through this Court's e-filing system on February 3, 2023, to:

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