No. 22-CV-418

IN THE 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

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF JURISDICTION

There is no final order under D.C. Code § 11-721(a)(1) resolving all of the District of Columbia's claims in this case because multiple counts in its complaint remain unresolved. *See* App. 9-24. This Court has jurisdiction instead under D.C. Code § 11-721(a)(2)(A) because the Superior Court granted a permanent injunction on a subset of the District's claims. In particular, this Court has jurisdiction over the "interlocutory order[] granting injunctive relief" and over "orders the relief is based on." *Moon v. Family Fed'n for World Peace & Unification Int'l*, 281 A.3d 46, 60 n.15 (D.C. 2022). That includes the order granting partial summary judgment on liability to the District and encompasses the related question whether Mr. Burrello and his company were entitled to a jury trial on liability. But because the injunction was not "based on" the amount of the civil penalty, the Court lacks jurisdiction to review that issue to the extent that it is raised in this appeal. *See infra* Part II.

STATEMENT OF THE ISSUES

The D.C. Human Rights Act ("DCHRA") prohibits landlords from publishing advertisements that discriminate against individuals who use housing vouchers to pay their rent. Jose Burrello, a real estate broker, and his company, The Burrello Group, LLC,[1] advertised a rental property as "Not approved for vouchers" on at least

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[1] Both Mr. Burrello and The Burrello Group, LLC were defendants in the trial court and are appellants here. For simplicity, we refer to "Mr. Burrello" when

nine websites. The advertisement remained on at least three of those websites for at least 158 days. The District sued. The trial court determined that the advertisement was facially discriminatory and granted summary judgment to the District on its discriminatory advertising claims, concluding that a defendant's arguably benign intent is irrelevant if its actions are facially discriminatory. In granting the District's request for remedies on those claims, the trial court imposed a permanent injunction and a $158,000 civil penalty. This appeal raises two issues:

1. Whether the District was entitled to summary judgment on liability under the DCHRA where the advertisement was facially discriminatory as to an individual's source of income; and

2. Whether Mr. Burrello's right to a jury trial, if any, was satisfied by the Superior Court's orders granting summary judgment and awarding a civil penalty, and whether this Court has jurisdiction to even consider that question with respect to the award of the civil penalty.

STATEMENT OF THE CASE

The District sued Mr. Burrello and his company under the DCHRA for source-of-income discrimination in housing advertising, disparate impact based on race, and discrimination by a real estate salesperson. App. 9-24. The District moved

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referring to actions taken by Mr. Burrello on his own behalf or on behalf of his company and when referring to both parties' arguments on appeal.

for summary judgment on liability on the source-of-income discrimination claims. App. 40-49. The trial court initially denied that motion. App. 266-70. The District moved for reconsideration, which the trial court granted; the court thus entered summary judgment for the District on those claims. App. 287-90. The District then moved for remedies, App. 291-303, which the trial court granted on May 13, 2022, App. 318-25. The court imposed an injunction and a $158,000 civil penalty. App. 325. Mr. Burrello and his company filed a timely notice of appeal on June 6.

STATEMENT OF FACTS

1. Statutory And Regulatory Background.

A. Voucher programs.

The ability to access affordable housing free from discrimination is a top civil rights priority of District residents.[2] Housing assistance programs, including subsidized rent programs, are particularly crucial in the District, where high rents consume a disproportionate share of household expenditures.[3] Vouchers are a form of monetary assistance available to low- and moderate-income District residents to help pay rent for privately owned rental housing. The District's housing voucher programs include Housing Choice (commonly referred to as Section 8), a federally

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[2] Office of the Attorney General, *Community Voices: Perspectives on Civil Rights in the District of Columbia* 4 (Nov. 2019), https://tinyurl.com/2xhkkju6.

[3] Tom Acitelli, *Nearly half of D.C.-area renter households 'cost-burdened,' report says*, Curbed DC (Oct. 15, 2019), https://tinyurl.com/4395379t.

created and funded program administered by District agencies. App. 14; *see* 42 U.S.C. § 1437f.

District residents are eligible for vouchers if they meet certain requirements, including annual income limits. *See* 14 DCMR § 6106.1. Once someone is issued a voucher, they must find a rental property, apply and be approved by the landlord, and submit a packet of documents to the District including a proposed lease and a federal form to be completed by the property owner. *Id.* §§ 5211, 5212. After the District agency determines that the required documents have been submitted and "[t]he owner has requested a rent [that the agency] will approve," *id.* § 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. *See id.* §§ 5212-5214, 5323.1. Applicants do not identify a rental property before they are issued a voucher; nor is there a process for a property to be deemed "approved for vouchers" before a voucher holder actually applies and is approved by a landlord. *See id.* §§ 5208, 5211.1.

B. The DCHRA.

The DCHRA aims to "end . . . discrimination for any reason other than that of individual merit" in the District, including discrimination based on an individual's "source of income." D.C. Code § 2-1401.01. In particular, the DCHRA makes it unlawful, "wholly or partially for a discriminatory reason," to "publish" an

"advertisement" about a "proposed transaction[] in real property . . . [that] unlawfully indicates or attempts unlawfully to indicate any preference, limitation, or discrimination based on . . . source of income." *Id*. § 2-1402.21(a)(5). Source of income discrimination includes discrimination against individuals using Section 8 housing vouchers. *Id*. § 2-1402.21(e).

The Attorney General may bring a civil action for violations of the DCHRA and, under section 2-1403.16a(1), obtain equitable relief and civil penalties. *Id.* § 2-1403.16a(1) (2021)[4] (citing *id.* § 2-1403.13(a)(1)). As to equitable relief, the trial court may enjoin future unlawful conduct and require defendants to take affirmative actions to prevent future violations. *Id.* § 2-1403.16a(1)(C) (2021) (citing *id.* § 2-1403.13(a)(1)). The trial court may also award civil penalties up to $10,000 "for each action or practice in violation of [the DCHRA] and, in the context of discriminatory advertisement, for each day the advertisement was posted." *Id*. § 2-1403.16a(1)(B) (2021) (citing *id.* § 2-1403.13(a)(1)(E-1)(i)).

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[4] This provision was originally enacted as emergency legislation in July 2020. Coronavirus Support Temporary Amendment Act of 2020, D.C. Act 23-334, § 702, 67 D.C. Reg. 8,622 (July 7, 2020). The operative version at the time the trial court awarded remedies provided that the Attorney General could obtain equitable relief and civil penalties in civil actions for violations of the DCHRA brought between March 11, 2020, and November 5, 2021. Public Emergency Extension & Eviction & Utility Moratorium Phasing Temporary Amendment Act of 2021, D.C. Act 24-168, § 3(cc), 68 D.C. Reg. 9,496 (September 1, 2021).

2. Mr. Burrello Advertises His Property As "Not Approved For Vouchers."

Mr. Burrello is a real estate broker who owns the real estate company The Burrello Group, LLC. App. 266. At the time the District sued him and his company, Mr. Burrello had been a licensed real estate broker in the District for over 20 years. App. 163. Real estate professionals licensed in the District are required to abide by the DCHRA. *See* 17 DCMR § 2609.1. They must also complete at least 15 hours of approved continuing education requirements every two years. *Id.* § 2605.3. Mr. Burrello had taken fair housing trainings many times as part of those continuing education requirements, including training on discriminatory advertising. App. 51.

Mr. Burrello owned a building in northeast DC that had two rental units. App. 51, 214-15. In September 2019, he began advertising for tenants on at least nine different websites. App. 51, 266. On each website, the advertisement stated that the property was "Not approved for vouchers." App. 51, 266. Mr. Burrello explained in his deposition that he included that language "to let people know" that he and the property "ha[ve] not gone through the process" to be approved for vouchers. App. 226-27. When people called to ask whether the property was "approved for vouchers," Mr. Burrello "would say no." App. 227. Mr. Burrello acknowledged that it was a "weak excuse" and that he was "incorrect" in posting the advertisement, but he "figured this would let people know before they called [him] to ask . . . if it

was approved for vouchers." App. 226-27. On at least three of the websites, the advertisements stayed up for 158 days each—until February 2020. App. 52.

3. The Trial Court Ultimately Grants The District Summary Judgment On Its Source-Of-Income Discrimination Claims And Awards Relief.

The District sued, alleging violations of the DCHRA, and it moved for summary judgment on liability for the source-of-income discrimination claims. App. 40. The trial court initially denied summary judgment because it found that a reasonable jury might conclude that Mr. Burrello did not subjectively intend to discriminate against voucher holders. App. 269. The District moved for reconsideration, explaining that under *Feemster v. BSA Ltd. Partnership*, 548 F.3d 1063, 1070-71 (D.C. Cir. 2008), Mr. Burrello's subjective intent was irrelevant because the advertisement was discriminatory on its face. App. 271. The trial court agreed and granted summary judgment to the District for that reason. App. 288-89. In particular, the trial court explained that the District had "proffer[ed] direct evidence of intentional discrimination," that Mr. Burrello and his company "committed a facial violation of the DCHRA, and as *Feemster* correctly held, motive is therefore irrelevant." App. 289.

After that, the District sought and the trial court granted an injunction ordering Mr. Burrello and his company not to engage in real estate services or post advertisements that violate the DCHRA; to maintain and distribute to company employees and to the District written policies reflecting the DCHRA's prohibitions

against source-of-income and other kinds of discrimination; to provide annual training to employees on discrimination and fair housing laws; to keep records for three years on any complaints received alleging violations of the DCHRA and to share those records with the District; and to keep records of all advertisements for three years. App. 319, 323-24. The trial court then turned to the civil penalty. After assessing the severity of harm, any potential bad faith by Mr. Burrello, and the value of deterrence, the trial court imposed a $158,000 civil penalty—$1,000 for each day that the discriminatory advertisement was posted online. App. 319-22, 324. The trial court also awarded $79,490.80 in attorney's fees to the District. App. 322-24.

STANDARD OF REVIEW

The Court "review[s] grants of summary judgment de novo and appl[ies] the same standard as the trial court: a party is entitled to summary judgment only upon demonstrating that no genuine issue of material fact remains for trial and that judgment is warranted as a matter of law." *Caesar v. Westchester Corp.*, 280 A.3d 176, 184 (D.C. 2022) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

This Court should affirm the entry of summary judgment for the District on liability on its source-of-income discrimination claims and reject Mr. Burrello's challenge to the civil penalty.

1. The trial court properly granted summary judgment to the District. A facially discriminatory policy is direct evidence of discrimination that establishes, as a matter of law, a causal link between a defendant's action and the protected characteristic. No further analysis of motive or burden-shifting test is required in such cases.

Mr. Burrello's advertisement that the property was "not approved for vouchers" was facially discriminatory under the DCHRA because it indicated to an ordinary reader a preference or limitation based on an individual's source of income. Indeed, there is no other reasonable inference to be drawn from the phrase "not approved for vouchers." Mr. Burrello's attempt to rewrite the advertisement to suggest that the property was not "eligible" for vouchers fails—the plain language of the advertisement still violates the DCHRA and the attempted rewrite is not an accurate representation of how housing vouchers work.

Finally, and as the D.C. Circuit and Supreme Court have held, Mr. Burrello's supposed "benign" intent is irrelevant in cases involving facially discriminatory advertisements. Concluding otherwise would undermine the DCHRA's protections in cases involving the most blatant discrimination. There is therefore no dispute of fact on liability and the District was entitled to judgment as a matter of law.

2. The Court should reject Mr. Burrello's attempt to challenge the civil penalty based on his claimed right to a jury trial. As this Court has long explained,

a trial court does not violate the Seventh Amendment by properly granting summary judgment on liability. To the extent the brief suggests Mr. Burrello was entitled to a jury trial on the *amount* of the civil penalty imposed, that argument fails for three independent reasons. First, this Court lacks jurisdiction to consider it because the injunction that gives the Court jurisdiction in no way turns on this issue. Second, the argument is forfeited because Mr. Burrello raised it in only the most cursory fashion in his opening brief. Third, the argument is wrong because the Supreme Court has explained that the jury trial right does not attach to determinations of the amount of civil penalties.

ARGUMENT

I. The District Was Entitled To Summary Judgment On Liability For Source-Of-Income Discrimination Under The DCHRA.

A. A facially discriminatory advertisement, in itself, violates the DCHRA as a matter of law.

The DCHRA prohibits housing advertisements that discriminate against renters who use vouchers. The statute makes it unlawful, "wholly or partially for a discriminatory reason," to "publish" an "advertisement" about a "proposed transaction[] in real property . . . [that] 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); *see* 4 DCMR § 1001.1(c) ("Prohibited discrimination may take the form of . . . [a]n expression to [a] prospective . . . renter, or any other person of a preference for or limitation on any . . . renter for a prohibited

reason."). Source-of-income discrimination includes discrimination against individuals using Section 8 housing vouchers. D.C. Code § 2-1402.21(e). Mr. Burrello does not disagree, nor could he—Section 8 vouchers are the provision's "paradigm case." *Feemster*, 548 F.3d at 1070.

"This [C]ourt has often looked to cases construing Title VII to aid . . . in construing the [DCHRA]." *Rose v. United Gen. Contractors*, --- A.3d ---, No. 20-CV-745, 2022 WL 16984725, at *4 (D.C. Nov. 17, 2022) (quoting *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 n.17 (D.C. 1993)). Indeed, Title VII has a provision similar to the DCHRA's that prohibits covered employers from "publish[ing] . . . any notice or advertisement . . . indicating any preference, limitation, specification, or discrimination[] based on" a protected ground. 42 U.S.C. § 2000e-3(b). So does the federal Fair Housing Act. *See id.* § 3604(c), (d) (prohibiting advertisements "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination" based on a protected characteristic).

As the Supreme Court has explained in the context of federal antidiscrimination statutes, liability for disparate treatment "depends on whether the protected trait . . . actually motivated the [defendant's action]." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). "The [defendant] may have relied upon a formal, facially discriminatory policy requiring adverse treatment of [individuals] with that

trait. Or the [defendant] may have been motivated by the protected trait on an ad hoc, informal basis." *Id*. (citations omitted). As this Court recently explained, "[t]he DCHRA prohibits taking [an] action even *partially* for a discriminatory reason." *Rose*, 2022 WL 16984725, at *8 (emphasis added); *see* D.C. Code § 2-1402.21(a) (prohibiting certain acts taken "wholly or partially for a discriminatory reason"). This establishes a causal standard for liability that requires a plaintiff to show "that the protected characteristic was a significant motivating factor" in the defendant's action, even if it was not "the sole factor." *Id.* (internal quotation marks omitted).

That causal standard, in turn, can be proven with evidence of discriminatory intent. "Direct evidence" of discriminatory intent links the defendant's action with the protected characteristic. "Indirect" or "circumstantial" evidence raises an inference of discriminatory intent without any direct link between the defendant's action and the protected characteristic by showing an "absence of any other explanation" for the action. *See McFarland v. George Washington Univ.*, 935 A.2d 337, 346 (D.C. 2007). Cases involving indirect evidence are evaluated under the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Furline v. Morrison*, 953 A.2d 344, 352-53 (D.C. 2008).

This case involves the simplest, most straightforward form of direct evidence—a facially discriminatory policy. *See Hazen Paper*, 507 U.S. at 610. As the Supreme Court and multiple federal courts of appeals have explained, a facially

discriminatory policy is direct—and dispositive—evidence of discrimination that shows a causal link between a defendant's action and a protected ground. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (cited favorably by this Court in interpreting the DCHRA in *Furline*, 953 A.2d at 352 n.21).[5] In *Trans World Airlines*, the Supreme Court held that an airline's policy granting job transfer privileges to former pilots disqualified for any reason other than age—i.e., younger than the airline's mandatory retirement age of 60—was "discriminatory on its face" and amounted to "direct evidence of discrimination." *Id.* "Put another way, direct evidence of intent is supplied by the policy itself." *Hassan v. City of New York*, 804 F.3d 277, 295 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (internal quotation marks omitted).

In a case involving a facially discriminatory policy, "[t]here is no need to probe for a potentially discriminatory motive circumstantially, or to apply the

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[5] *See also UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *City of Los Angeles v. Manhart*, 435 U.S. 702, 715 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (per curiam); *Feemster v. BSA Ltd.*, 548 F.3d 1063, 1070 (D.C. Cir. 2008); *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-54 (9th Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995); *see also Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 147-48 (2008) (confirming "the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the [Age Discrimination in Employment Act]"); *Rodriguez v. Procter & Gamble Co.*, 465 F. Supp. 3d 1301, 1321 (S.D. Fla. 2020) ("A facially discriminatory policy is dispositive evidence of intentional discrimination.").

burden-shifting approach outlined in *McDonnell Douglas*." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 n.16 (10th Cir. 1995). For that reason, Mr. Burrello's insistence that the trial court erred in failing to follow *McDonnell Douglas* here (Br. 7-9) is wrong. *See Furline*, 953 A.2d at 352 (explaining that *McDonnell Douglas*'s framework applies only where claims rely on circumstantial evidence). In line with all this precedent, if Mr. Burrello's "Not approved for vouchers" advertisements were facially discriminatory, they satisfy the DCHRA's prohibition on taking an action "even partially for a discriminatory reason" based on a protected characteristic. *Rose*, 2022 WL 16984725, at *8; *see* D.C. Code § 2-1402.21.

B. Mr. Burrello's advertisements that the property was "not approved for vouchers" are facially discriminatory.

On their face, Mr. Burrello's advertisements violated the DCHRA's prohibition against source-of-income discrimination. As previously noted, the DCHRA—like the Fair Housing Act—prohibits publishing an advertisement for rental housing that "indicates" or "attempts . . . to indicate" "any preference, limitation or discrimination" based on a protected characteristic. D.C. Code § 2-1402.21(a)(5); *accord* 42 U.S.C. § 3604. Under the Fair Housing Act, courts assess from the perspective of an "ordinary" or "reasonable" reader whether an advertisement "indicates" a limitation based on a protected characteristic. *See Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) (explaining that a violation occurs when, "to a

reasonable reader the natural interpretation of defendants' advertisements is that they indicate a racial preference or an intention to make such a preference") (internal quotation marks and ellipsis omitted); *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577-78 (6th Cir. 2013) (adopting same standard). As the Second Circuit concluded in *Ragin*, the term "indicates" is a "critical word" and its "common meaning" is that the statute is "violated if an ad for housing suggests to an ordinary reader that a [protected characteristic] is preferred or dispreferred for the housing in question." 923 F.2d at 999.

This Court should apply the same ordinary-reader standard here and conclude that Mr. Burrello's advertisements that his property was "not approved for vouchers" conveyed that a prospective renter could not pay with a voucher. In other words, they were facially discriminatory as to an individual's source of income. At the very least, "not approved for vouchers"—and in particular, the unambiguous phrase "not approved"—express to the ordinary reader a "preference" for individuals with a non-voucher source of income and a "limitation" on those who seek to pay with vouchers. *See* D.C. Code § 2-1402.21(a)(5). Nothing more is required.

Mr. Burrello's attempt to draw a distinction between "not approved for vouchers" and the myriad phrases he agrees *would* "plainly demonstrate discrimination"—"no vouchers accepted," "applications for voucher holders not accepted," "vouchers will not be accepted," "NO vouchers," "market tenants

only"—falls flat. *See* Br. 9. The only reasonable inference an ordinary reader would draw from "not approved for vouchers" is a preference or limitation based on an individual's source of income that is indistinguishable from "no vouchers." That is especially true because advertising rental property as "not approved for vouchers" is not an accurate reflection of how the voucher program works. There is no pre-approval process for landlords to rent to voucher holders. Only after an applicant has applied for housing, been approved by a landlord, and submitted paperwork and a proposed lease to the District agency does the agency approve or reject rental payment for a voucher holder's chosen property. *See* 14 DCMR §§ 5212-5214.

Mr. Burrello's alternative reading of the advertisements is untenable. His argument that "Not approved for vouchers" merely expressed that "the *property* was 'not approved' for vouchers" and "was not, in and of itself, discriminatory as to any particular applicant," Br. 9, makes no sense. Again, that is not how the voucher program works. And besides, stating that the *property* is "not approved for vouchers" still indicates a limitation in a proposed real estate transaction based on an individual's source of income in violation of D.C. Code § 2-1402.21(a)(5). Moreover, contrary to Mr. Burrello's contention, the DCHRA does not require the advertisement to be "discriminatory as to any *particular* applicant." Br. 9 (emphasis added). An advertisement of a proposed real estate transaction merely has to "indicate [a] preference [or] limitation . . . based on . . . [the] source of income . . . of

any individual." D.C. Code § 2-1402.21(a)(5). An ordinary reader would think "Not approved for vouchers" does so. *See* App. 269 (trial court concluded that "discourag[ing] voucher holders" was "the predictable result of the wording [Mr. Burrello] chose").

The advertisement in *Miami Valley* is a useful contrast. There, the Sixth Circuit determined that an apartment advertised as a "great bachelor pad for any single man looking to hook up" could be reasonably interpreted in multiple ways—perhaps as a "preference for single men," which would violate the Fair Housing Act, but also as "an opinion about who would find the apartment appealing," which would not violate the Act. 725 F.3d at 578. Because "reasonable minds could differ," the Court declined to hold that the advertisement was discriminatory as a matter of law. *Id*. "Not approved for vouchers" is not similarly susceptible to multiple reasonable interpretations.

Mr. Burrello also suggests that the Court should consider the message he subjectively intended to convey. *See* Br. 12 ("The language 'not approved for vouchers' could reasonably be understood, *and was intended*, to mean that the property has not undertaken an inspection process by the [agency] . . . .") (emphasis added). But the question is what the advertisements "indicate[]" to the ordinary reader—that is, what an ordinary reader would reasonably understand—not what the

advertiser intended to convey. *See* D.C. Code § 2-1402.21(a)(5); *Ragin*, 923 F.2d at 1000; *Spann*, 899 F.2d at 29.

C. Mr. Burrello's supposedly benign motive is irrelevant where the advertisements are discriminatory on their face.

Mr. Burrello's remaining argument is that, even if the advertisements were discriminatory on their face, the trial court was required to conduct a "mixed motive" or "motivating factor" analysis to assess whether he subjectively intended to discriminate against voucher holders. Br. 10-12. Whether he had a discriminatory motive, he argues, is a material dispute of fact that precludes summary judgment. Br. 12-13. Mr. Burrello's argument is simply incorrect.

As the trial court properly held in reliance on the D.C. Circuit's decision in *Feemster*, Mr. Burrello's supposedly benign motive is irrelevant. App. 288-89. In that case, a landlord refused to accept tenants' federal housing vouchers as rent payment but demanded and accepted payment from the tenants' own funds. 548 F.3d at 1065, 1070. Similar to Mr. Burrello here, the landlord in *Feemster* claimed that it had not violated the DCHRA because it was not "motivated by animus against vouchers or their users"—the *Feemster* landlord just wanted the tenants to vacate so it could sell the units and thought the voucher program requirements were too "burdensome." *Id.* at 1069-70. The district court held the plaintiffs failed to prove that the landlord's discriminatory animus motivated its actions and granted summary judgment to the landlord. *Id.* at 1067. The D.C. Circuit reversed, concluding that

plaintiffs were entitled to summary judgment because the landlord's actions were a "facial violation of the [DCHRA] to discriminate on the basis of the renter's source of income" and that the absence of a malevolent motive was irrelevant. *Id.* at 1070-71.

Mr. Burrello offers no reason for this Court to deviate from the D.C. Circuit's reasoning. *Feemster* follows Supreme Court precedent holding that facially discriminatory policies violate federal antidiscrimination statutes *regardless* of any supposed benign motive. In *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Court held that an employer's policy barring women "capable of bearing children" from certain jobs was "an explicit gender-based policy" amounting to "sex discrimination" under Title VII. *Id.* at 192, 199. The employer had argued that the policy was intended to protect women who might have children from the harmful effects of lead exposure to a fetus. *Id.* at 192. But given the facially discriminatory policy, the Court rejected the employer's supposedly benign motive as irrelevant: "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id*. at 199. As the Court explained, "[w]hether 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." *Id.* "The beneficence of an

employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . . ." *Id*. at 200.

Other courts agree that further evidence of a discriminatory motive is not required when a facially discriminatory policy is shown. *See, e.g.*, *Bangerter*, 46 F.3d at 1501 (holding that, where a plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, "a plaintiff need not prove the malice or discriminatory animus of a defendant"); *Wind Gap*, 421 F.3d at 177 (same); *see also City of Los Angeles v. Manhart*, 435 U.S. 702, 715 (1978) (rejecting employer's explanation that a facially discriminatory policy favoring men was justified because women live longer than men).

Mr. Burrello does not cite a single case to the contrary. Instead, the cases that he cites involve not facially discriminatory policies, but individual employment decisions that require inferences from circumstantial evidence in order to assess whether an adverse action was taken for a discriminatory reason. *See, e.g.*, *Little v. D.C. Water & Sewer Auth.*, 91 A.3d 1020, 1025 (D.C. 2014).[6]

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[6] Mr. Burrello argues that the Supreme Court's recent decision in *Comcast Corp. v. National Ass'n of African-American Owned Media*, 140 S. Ct. 1009 (2020), creates a "motivating factor, but-for analysis." Br. 11-13. That misunderstands *Comcast*, which held that a plaintiff can prevail under 42 U.S.C. § 1981 only by showing but-for causation, not merely that discrimination was a motivating factor. As this Court recently explained, the "but-for" analysis in *Comcast* does not apply to liability for discrimination under the DCHRA. *See Rose*, 2022 WL 16984725, at

Here, Mr. Burrello posted facially discriminatory advertisements that "indicate[d]" a "preference" or "limitation" based on "source of income." D.C. Code § 2-1402.21(a)(5). That violates the DCHRA. Allowing Mr. Burrello to argue that he meant only to "give notice that the property in question, to the best of his knowledge, was not 'eligible' for the voucher program," Br. 12, would create a giant loophole in the statute that would let individuals evade liability for the most blatant, facially discriminatory policies. This would undermine the DCHRA's purpose as "a broad remedial statute, to be generously construed." *Blodgett v. Univ. Club*, 930 A.2d 210, 218 (D.C. 2007). This Court should follow the D.C. Circuit—and the Supreme Court in applying comparable federal law—in expressly rejecting that argument.

II. Mr. Burrello's Right To A Jury Trial Was Not Violated.

The remainder of Mr. Burrello's brief argues that the trial court was not permitted to impose damages without the input of a jury under the Seventh Amendment. Br. 13-17. To begin, the premise of Mr. Burrello's argument is wrong: the trial court imposed a *civil penalty* under the DCHRA, not damages. App. 334-37. The District never even sought damages in its motion for remedies. App. 291-303.

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*8 & n.6 (citing 42 U.S.C. § 2000e-5(g)(2)(B)). Instead, the DCHRA "is violated if [a defendant] took the action with one discriminatory motive, even if the [defendant] had other lawful motives." *Id.* As in *Feemster* and the Supreme Court cases discussed *supra*, Mr. Burrello's facially discriminatory advertisement meets that standard.

Thus, Mr. Burrello's Seventh Amendment right to have a jury decide damages was not violated because the trial court did not impose damages.

That crucial point aside, Mr. Burrello argues that *Tull v. United States*, 481 U.S. 412 (1987), undermines the District's request for remedies because that case held that a defendant had a right to a jury trial to determine its liability on an issue that could lead to a civil penalty. *Id.* at 422-25; *see* Br. 15-16. But Mr. Burrello's right to a jury trial was not violated when the trial court properly granted summary judgment to the District on liability. As this Court has explained, "the constitutionality of summary judgment has long been settled," and "when no genuine issue of fact exists for resolution by the trier of fact, no jury trial is required by the Seventh Amendment." *Mixon v. WMATA*, 959 A.2d 55, 58 (D.C. 2008). The Court should therefore affirm the trial court's imposition of the $158,000 civil penalty.

Mr. Burrello gestures at the argument that a jury trial is also required by the Seventh Amendment to determine the *amount* of a civil penalty (which, again, his brief repeatedly and incorrectly calls "damages"). *See* Br. 17. There are three insurmountable problems with that argument.

First, this Court lacks jurisdiction to address it. Because there is no final order, this Court has jurisdiction to review only the grant of the injunction under D.C. Code § 11-721(a)(2)(A). To be sure, that includes jurisdiction to review Mr. Burrello's arguments about summary judgment and his related Seventh Amendment

right to have a jury determine his liability under the DCHRA "because injunctive relief was granted pursuant to [the summary] judgment [order in this case]." *District of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 8 (D.C. 2000) (internal quotation marks omitted); *Moon*, 281 A.3d at 60 n.15 (holding that the Court's jurisdiction to review the grant of an injunction includes "orders the [injunctive] relief is based on").

But the trial court did not grant injunctive relief based on its determination of the *amount* of the civil penalty. The trial court separately assessed the severity of harm, bad faith, and the value of deterrence, and assessed a civil penalty of $1,000 for each day Burrello violated the DCHRA (a fraction of the potential statutory maximum of $4.8 million). App. 320-22. Unlike the other issues in this case, review of this otherwise unappealable issue is in no way "necessary to ensure meaningful review of the [injunction]." *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011). Because the Court's D.C. Code § 11-721(a)(2)(A) jurisdiction "extends to review of orders the [injunctive] relief is based on" but no further, *Moon*, 281 A.3d at 60 n.15, the Court has no jurisdiction to review this argument.

Second, the argument is not squarely presented in Mr. Burrello's opening brief and has therefore been forfeited. *See Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001) ("[I]t is not enough merely to mention a possible

argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

Third, assuming that the Seventh Amendment argument is preserved and that the Court has jurisdiction to address it, Mr. Burrello's argument is incorrect in any event. There is no right to a jury trial on the *amount* of civil penalties under the DCHRA. The Supreme Court in *Tull* explained that the Seventh Amendment requires a jury to "determine the remedy in a trial in which it must determine liability" only where determining the remedy is "necessary to preserve the substance of the common-law right of trial by jury." 481 U.S. at 425-26 (internal quotation marks omitted). Juries, however, are not necessary to determine civil penalties because "assessment of a civil penalty is not one of the most fundamental elements" of the jury trial right. 481 U.S. at 426-27 (internal quotation marks omitted). To the contrary, where the legislature has the authority to set a civil penalty by statute, "it may delegate that determination to trial judges." *Id.* at 427. Thus, in *Tull*, the Court upheld a statute that set a maximum penalty amount, but where the actual amount was determined by a judge using "highly discretionary calculations that take into account multiple factors." *Id.* The Court explained that "a determination of a civil penalty is not an essential function of a jury trial, and . . . the Seventh Amendment does not require a jury trial for that purpose in a civil action." 481 U.S. at 427. So too here, and Mr. Burrello has cited no case to the contrary. Notably, the only

arguably on-point case Mr. Burrello identifies came to the same conclusion. *See District of Columbia v. Equity Residential Mgmt., LLC*, 2019 D.C. Super. Lexis 21, at *3 (D.C. Super. Nov. 4, 2019) (noting in the context of a Consumer Protection Procedures Act claim that "the question of whether or not [the defendant] is to pay a civil penalty is one for a jury," but "the amount of civil penalties owed is determined by trial judges").[7]

CONCLUSION

This Court should affirm the decision below.

[7] The "long line of precedent" Mr. Burrello cites "demonstrating that government suits for money or civil penalties are commonly tried to a jury," Br. 15, does not help his point. The Supreme Court considered the exact same cases in *Tull* and still concluded that "a determination of a civil penalty is not an essential function of a jury trial, [so] the Seventh Amendment does not require a jury trial for that purpose in a civil action." *Tull*, 481 U.S. at 416-17, 426-27.

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December 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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) (both provisions attached).

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/ Marcella Coburn
Signature

22-CV-418
Case Number

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CERTIFICATE OF SERVICE

I certify that on December 12, 2022, this brief was served through this Court's electronic filing system to:

Eric J. Menhart

/s/ Marcella Coburn
MARCELLA COBURN