Nos. 19-7030

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREEDOM WATCH, *et al.*,

Plaintiffs-Appellees

v.

GOOGLE, INC. *et al.*,

Defendants-Appellants

On Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-02030-TNM

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, counsel for *amici curiae* certify that the Lawyers' Committee for Civil Rights Under Law and the Washington Lawyers' Committee for Civil Rights and Urban Affairs are not publicly held corporations, do not have parent corporations, and no publicly held corporation owns 10 percent or more of their stock. *Amici curiae* are nonprofit, nonpartisan organizations whose purpose is to protect civil rights and advance equal opportunity.

/s/ David Brody
David Brody

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STATEMENT OF INTEREST

Amici curiae are a national and a regional civil rights organization who advocate for racial justice and regularly litigate discrimination and equal opportunity cases, including discrimination in public accommodations under the DCHRA. *See, e.g.*, *Dumpson v. Ade*, 2019 WL 3767171 (D.D.C. Aug. 9, 2019).[1]

The Lawyers' Committee for Civil Rights Under Law ("National Lawyers' Committee") is a nonprofit, nonpartisan organization founded at the request of President John F. Kennedy in 1963 to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African Americans and other racial and ethnic minorities. The principal mission of the National Lawyers' Committee is to secure equal justice for all through the rule of law; the organization frequently participates as *amicus curiae* to protect the interests of these communities. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Bethune-Hill v. Va. State*

[1] *Amici curiae* file this brief pursuant to the Court's September 3, 2019 Order granting leave to participate. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no one other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Bd. of Elections., 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Stewart v. Azar*, No. 19-5095 (D.C. Cir. 2019). The National Lawyers' Committee's Stop Hate Project works to combat online hateful activities, which can have chilling effects on the free expression of targeted communities. *See, e.g.*, *Shen v. Albany Unified Sch. Dist.*, No. 3:17-cv-02478-JD (N.D. Cal. 2017); Kristen Clarke and David Brody, *It's time for an online Civil Rights Act*, The Hill (Aug. 3, 2018).[2]

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers' Committee") is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in Washington, D.C. and the surrounding areas. In furtherance of this mission, the Washington Lawyers' Committee represents some of the most vulnerable persons and populations, including individuals who are discriminated against on the basis of their race, national origin, gender, and disability. The Washington Lawyers' Committee frequently enforces the DCHRA on behalf of our clients, and has an active practice aimed at reducing barriers to public services and public accommodations so that

[2] https://thehill.com/opinion/civil-rights/400310-its-time-for-an-online-civil-rights-act.

everyone, regardless of race, gender, disability or language can be free from discrimination in civic participation, economic activity and social engagement. *See, e.g.*, *Farmer v. Sweetgreen, Inc.*, No. 1:16-cv-02103 (S.D.N.Y. 2016); *Stanley v. Barbri, Inc.*, No. 3:16-cv-01113 (N.D. Tex. 2016); *Am. Council of the Blind v. U.S. Gen. Serv. Admin.*, No. 1:14-cv-00671 (D.D.C. 2014).

SUMMARY OF ARGUMENT

Amici curiae file this brief to address one significant error of the District Court: its legal determination that online businesses are exempted from the provisions of the District of Columbia Human Rights Act (DCHRA) that ban discrimination in public accommodations. Ignoring the plain text, which contains no such exception, and the statutory history, which makes clear that the statute was designed to eradicate all discrimination in public accommodations, the District Court instead improperly relies upon a case deciding that a private club was not subject to the DCHRA's anti-discrimination provisions when it held events in public spaces over which it had no control. Because the impact of the Court's decision in this case will go beyond the instant parties and facts, *amici curiae* urge the Court to carefully consider the scope, intent, text, history, and function of the DCHRA and to reverse the trial court's decision on this issue.

When a business posts a sign that says, "Whites Only," it does not matter if it is written in ink or pixels. The discrimination is the same. The harm is the same. And under District of Columbia law, the transgression is the same. Places of public accommodation include "all places included in the meaning of such terms as . . . establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). There is no text, history, or case law suggesting that the DCHRA does not apply to modern online commerce simply because it is online. To the contrary, the statute and the D.C. Council are as explicit as they can possibly be that the DCHRA is meant "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit," D.C. Code § 2-1401.01, and that "the elimination of discrimination within the District of Columbia should have the highest priority." D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report of Bill 2-179, at 3 (July 5, 1977). To hold that the Act does not apply to the entire universe of online businesses—including, *inter alia*, online retailers, banks, insurers, travel agencies, airlines, hotel booking services, entertainment venues, accounting services, food delivery services, and social media services—means that Appellees and other businesses could discriminate against consumers without repercussion under D.C. civil rights law. For example, they could explicitly refuse service based on race, charge higher

prices based on religion, provide subpar products based on gender, or ignore the accessibility needs of persons with disabilities. This outcome is antithetical to the text, history, and caselaw underlying a statute that was explicitly written to be "powerful, flexible, and far-reaching." *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

The District Court's decision is fully at odds with the text and purpose of the DCHRA, and the Court consequently conducted an incorrect and cursory extrapolation of *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). *U.S. Jaycees* narrowly held that a specific membership-based club was not a public accommodation when it hosted public events at locations that it did not own or substantially control. *Id*. 434 A.2d at 1382. The instant case presents a fundamentally different issue that *U.S. Jaycees* does not even begin to address: whether an online business should be exempted from the same civil rights obligations that apply to a brick-and-mortar business.[3] Comparing one private civic service organization's social events in 1981 to the multi-billion dollar online services offered by the largest technology companies in the world in 2019 is unfounded and erroneous.

[3] The other case briefly cited by the District Court is similarly inapplicable; it dealt with a doctor denied the ability to work at a hospital and held the hospital was a private venue. *Samuels v. Rayford*, 1995 WL 376939, at *7-8 (D.D.C. 1995).

Racial discrimination and bigotry are just as common online as in brick-and-mortar storefront operations. When the D.C. Council gives D.C. residents the right to "equal opportunity to participate in all aspects of life," D.C. Code § 2-1402.01, equal opportunity in online commerce is a subset of such right.

ARGUMENT

I. THE DCHRA'S PUBLIC ACCOMMODATIONS PROVISIONS ARE PIVOTAL TO PROTECTING THE CIVIL RIGHTS OF THE RESIDENTS OF THE DISTRICT OF COLUMBIA.

Public accommodations laws like the D.C. Human Rights Act (DCHRA) were an essential component of ending *de facto* race segregation and currently protect broad classes of individuals from discrimination in evolving marketplaces and town squares. As this Court interprets the DCHRA, it is important to recognize what these laws do, why they were necessary, and the role they continue to play.

A. The D.C. Council intentionally created a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds."

The DCHRA is intentionally one of the most comprehensive and powerful civil rights laws in the nation, designed to prohibit all kinds of discrimination. "It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than individual merit[.]" D.C. Code § 2-1401.01. The Council "reinforce[d] … [its] view that the Human Rights Act is among our most important laws and is to be

vigorously enforced." D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report of Bill 2-179, at 1 (July 5, 1977); *see also id.* at 3 ("the Council's intent [is] that the elimination of discrimination within the District of Columbia should have the highest priority").

Moreover, the Council wrote the Act to be broad, flexible, and inclusive. The Act covers more protected characteristics, more types of activities, and more entities than most states in order to be as inclusive as possible. *See id.* at 2 (DCHRA "widely hailed as the most comprehensive of its kind in the nation"); D.C. Code § 2-1402.01 ("Every individual shall have an equal opportunity to participate fully in the economic, cultural, and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.").

B. Public accommodations laws were enacted to stop and prevent racial segregation, discrimination, and hateful persecution.

A public accommodation is a business that offers goods or services to the general public, such as restaurants, hotels, banks, retail stores, insurance companies, public houses, taxis, and travel agencies. Before modern public accommodations laws, these venues often openly refused to serve African

Americans, *see, e.g., Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953) (restaurant refused to serve African Americans solely on account of race); insurance companies and banks charged people of color more based on their race, *see, e.g.*, Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 Nw. J. L. & Soc. Pol'y. 360 (2009); and white supremacists routinely harassed, assaulted, and lynched minorities who challenged Jim Crow segregation. *See, e.g.*, Gillian Brockell, *The deadly race riot 'aided and abetted' by The Washington Post a century ago*, Wash. Post (July 15, 2019).[4]

Congress, States, and the District enacted public accommodations laws and other statutes to end Jim Crow. Importantly, these laws prohibit not only segregation and discrimination by businesses that serve the general public, but also interference by third parties in the equal enjoyment of such businesses. *See* D.C. Code § 2-1402.61. For example, these laws both forbid a lunch counter from denying service on the basis of race as well as bar a racist interloper from threatening those seeking equal access to the lunch counter.

Local public accommodations laws, like the DCHRA, serve an important function over and above federal law. They can be tailored to community needs,

[4] https://www.washingtonpost.com/history/2019/07/15/deadly-race-riot-aided-abetted-by-washington-post-century-ago/.

more easily updated, and more protective than federal baselines. The DCHRA, for example, covers more protected classes and more industries than Title II of the Civil Rights Act of 1964. *Compare* 42 U.S.C. § 2000a *with* D.C. Code §§ 2-1401.02(24), 2-1402.31. The DCHRA protects individuals from discrimination based on twenty protected traits, including *inter alia* sex, age, sexual orientation, and gender identity or expression, whereas Title II only addresses race, color, religion, and national origin. 42 U.S.C. § 2000a; D.C. Code § 2-1402.31. The DCHRA also allows disparate impact claims. D.C. Code § 2-1402.68; *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987) (en banc).

C. Online Discrimination and Intimidation Disproportionately Harm African Americans, People of Color, and Other Marginalized Communities.

Today, as the District Court acknowledged, it is indisputable that platforms like Facebook and Twitter have changed the ways people interact with each other, and these social media networks now permeate most aspects of our lives. *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019). Online discrimination impacts the economic, cultural, and intellectual life of District residents and is the type of discrimination that the Council sought to eliminate when it enacted the DCHRA. District residents are often subject to discrimination

in online businesses where they are entitled to public accommodation, both when they are explicitly denied services because of their protected characteristics and when they experience such severe harassment that their equal enjoyment of the business is inhibited.

Businesses operating online may use personal data in discriminatory ways. "Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new worries that big data technologies could be used to 'digitally redline' unwanted groups, either as customers, employees, tenants, or recipients of credit." *Big Data: Seizing Opportunities, Preserving Values*, The White House, at 53 (May 2014).[5] *See also, generally, Big Data: A Tool for Inclusion or Exclusion?*, FTC (Jan. 2016).[6] Online retailers can unfairly discriminate on price. *See* Julia Angwin et al, *When Algorithms Decide What You Pay*, ProPublica (Oct. 5, 2016) (online test prep company charged higher prices in ZIP codes with large Asian

[5] *Available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

[6] *Available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

populations);[7] *Big Data and Differential Pricing*, The White House (Feb. 2015);[8] Jennifer Valentino-DeVries et al, *Websites Vary Prices, Deals Based on Users' Information*, Wall Street J. (Dec. 24, 2012).[9] Online advertising systems can enable discriminatory targeting that directly blocks equal opportunity, *see* Julia Angwin and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016),[10] as well as entrench disparate impacts into their ad delivery algorithms. *See* Louise Matsakis, *Facebook's Ad System Might Be Hard-Coded for Discrimination*, WIRED (April 6, 2019);[11] Tracy Jan and Elizabeth Dwoskin, *HUD is reviewing Twitter's and Google's ad practices as part of housing discrimination probe*, Wash. Post (March 28, 2019).[12] Online travel companies, like their offline counterparts, can engage in racial discrimination. *See* Kristen

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[7] https://www.propublica.org/article/breaking-the-black-box-when-algorithms-decide-what-you-pay.

[8] *Available at* https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf.

[9] https://www.wsj.com/articles/SB10001424127887323777204578189391813881534.

[10] https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race.

[11] https://www.wired.com/story/facebooks-ad-system-discrimination/.

[12] https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.

Clarke, *Does Airbnb Enable Racism?*, N.Y. Times (Aug. 23, 2016);[13] Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. Times (June 21, 2016).[14] "[B]oth online and face-to-face lenders charge higher interest rates to African American and Latino borrowers." Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Berkeley Haas Sch. of Bus. (Nov. 13, 2018).[15] The "cutting edge of the insurance industry" is using A.I. to profile consumers, but "artificial intelligence is known to reproduce biases that aren't explicitly coded into it." Sarah Jeong, *Insurers Want to Know How Many Steps You Took Today*, N.Y. Times (April 10, 2019);[16] *see also* Justin Volz, *Health Insurers Are Vacuuming Up Details About You – And It Could Raise Your Rates*, ProPublica (July 17, 2018) (insurers use race and marital status data).[17] Online home security services often amplify racial profiling. *See* Caroline Haskins, *Amazon's Home Security Company Is Turning Everyone Into Cops*, Motherboard

[13] https://www.nytimes.com/2016/08/23/opinion/how-airbnb-can-fight-racial-discrimination.html.

[14] https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html.

[15] https://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/.

[16] https://www.nytimes.com/2019/04/10/opinion/insurance-ai.html.

[17] https://www.propublica.org/article/health-insurers-are-vacuuming-up-details-about-you-and-it-could-raise-your-rates.

(Feb. 7, 2019) (posts on the app "disproportionately depict people of color, and descriptions often use racist language or make racist assumptions about the people shown").[18] And businesses often fail to make their websites and apps accessible to people with disabilities. *See, e.g.*, *Farmer v. Sweetgreen, Inc.*, No. 1:16-cv-02103 (S.D.N.Y. 2016) (Defendant agreed in settlement to rework website and app that were not accessible to people with visual impairments); *Stanley v. Barbri, Inc.*, No. 3:16-cv-01113 (N.D. Tex. 2016) (Barbri failed to offer accessible online test prep materials); *Am. Council of the Blind v. U.S. Gen. Servs. Admin.*, No. 1:14-cv-00671 (D.D.C. 2014) (GSA award management website inaccessible).

In addition to direct discrimination, African Americans, other people of color, women, LGBTQ individuals, religious minorities, immigrants, people with disabilities, and other marginalized communities are also frequent targets of third-party threats, intimidation, and harassment online. These hateful acts interfere with their equal enjoyment of online services, chill their speech and civic engagement, and cause serious harm. The use of communications technology to subjugate, exclude, or silence protected classes is not new. *See, e.g.*, Fannie Lou Hamer, Testimony before the Credentials Committee, Democratic National Convention

[18] https://www.vice.com/en_us/article/qvyvzd/amazons-home-security-company-is-turning-everyone-into-cops.

(Aug. 22, 1964) ("Is this America . . . where we have to sleep with our telephones off the hooks because our lives be threatened daily, because we want to live as decent human beings, in America?").[19] A study by the Pew Research Center of online harassment found that 41% of Americans have been personally subjected to harassing behavior online, including nearly one-in-five Americans who were targeted for physical threats, sustained harassment, sexual harassment, or stalking, and 66% have witnessed these behaviors directed at others. Maeve Duggan, *Online Harassment 2017*, Pew Research Center, at 1 (July 11, 2017).[20] Marginalized groups are more likely to be targeted based on their protected characteristics. 25% of African Americans and 10% of Latinos report being targeted for online harassment on the basis of their race or ethnicity, compared with 3% of whites. Maeve Duggan, *1 in 4 black Americans have faced online harassment because of their race or ethnicity*, Pew Research Center (July 25, 2017).[21] One third of U.S. women have experienced online abuse or harassment and the majority of the perpetrators were complete strangers. *Toxic Twitter*, Amnesty Int'l, Chp. 3 (March

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[19] http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html.

[20] https://www.pewinternet.org/2017/07/11/online-harassment-2017/.

[21] https://www.pewresearch.org/fact-tank/2017/07/25/1-in-4-black-americans-have-faced-online-harassment-because-of-their-race-or-ethnicity/.

2018).[22] Online intimidation often causes serious injuries including emotional trauma, reputational harm, interpersonal and professional harms, and financial loss. *Online Harassment 2017* at 2. It also causes silencing and withdrawal: 27% of Americans have self-censored after witnessing online harassment and 13% have quit a platform altogether. *Id*. at 1. 81% of American women who experience online harassment change the way they use social media; 35% said they stopped posting content expressing their opinions on certain issues. *Toxic Twitter*, Chp. 5.[23]

The DCHRA is designed to protect individuals experiencing direct and indirect discrimination in public accommodations – including denials of service, discriminatory pricing, and online harassment that interferes with the equal enjoyment of public accommodations. Online threats, intimidation, and harassment can violate the DCHRA. D.C. Code §§ 2-1402.31, 2-1402.61. In *Dumpson v. Ade*, white supremacists targeted the plaintiff—the first African American woman elected student body president of American University—for a real-world hate crime and subsequent online harassment and threats. 2019 WL 3767171 (D.D.C. Aug. 9, 2019). The District Court held neo-Nazi Andrew Anglin violated the

[22] https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-3.

[23] https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5.

DCHRA when he used his white supremacist website, *The Daily Stormer*, to incite his followers to harass and threaten the plaintiff on social media. The court held the online harassment violated the DCHRA because it interfered with plaintiff's equal enjoyment of American University, a place of public accommodation. *Id*.

II. THE DCHRA'S PUBLIC ACCOMMODATIONS DEFINITION DOES NOT DISTINGUISH BETWEEN ONLINE AND OFFLINE ENTITIES; TO HOLD OTHERWISE WOULD YIELD DISCRIMINATORY OUTCOMES AND GUT THE DISTRICT'S PRIMARY CIVIL RIGHTS LAW.

The DCHRA is a broad remedial statute that protects the civil rights of District residents. The meaning of the DCHRA's public accommodations provisions must be interpreted with the context of the statute as a whole and the D.C. Council's intent in passing the DCHRA. When interpreting a District of Columbia statute, "[c]ourts must not 'make a fortress out of the dictionary,' which is to say that 'even where the words of a statute have 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve." *Expedia, Inc. v. Dist. of Columbia*, 120 A.3d 623, 631 (D.C. 2015) (citations omitted) (holding that D.C. sales tax applied to online travel companies).

The D.C. Court of Appeals has consistently held that the DCHRA is "a remedial civil rights statute that must be generously construed." *Lively v. Flexible*

Packaging Ass'n, 830 A.2d 874, 887 (D.C. 2003) (en banc) (citation omitted); *accord Blodgett v. Univ. Club*, 930 A.2d 210, 218 (D.C. 2007). The Act is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Exec. Sandwich Shoppe*, 749 A.2d at 732. "The right to equal opportunity without discrimination based on race or other such invidious ground is … a warrant for the here and now, and not merely a hope of future enjoyment of some formalistic constitutional or statutory promise." *Harris v. Dist. of Columbia Comm'n on Human Rights*, 562 A.2d 625, 626 (D.C. 1989) (citations omitted).

A. The Act does not exempt online entities.

Affirming the District Court's decision would be contrary to the clear intent of the Council and the plain text of the statute. Nowhere in the statutory definition of "place of public accommodation" is there any language that the statute provides an exception to online businesses or is limited to physical facilities. D.C. Code § 2-1401.02(24).[24] To the contrary, the definition is incredibly broad and inclusive. It

[24] "'Place of public accommodation' means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments

begins by including "all places included in the meaning of such terms as . . ." *Id.* "The term 'all' is unambiguous in its scope and covers the entirety of rights with no limitation whatsoever." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 116 (D.D.C. 2017). The Act then provides an extensive list of categories, including a number that often interface with the public via the Internet: banks and "all other financial institutions;" credit bureaus; insurance companies; a wide variety of entertainment venues, including movie theaters; travel agencies and tour advisory

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dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 2-1402.67. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

(A) Has 350 or more members;
(B) Serves meals on a regular basis; and
(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." D.C. Code § 2-1401.02(24).

services; wholesale and retail stores, and "establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). "Moreover, the word 'any' … 'read naturally … has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Mazza v. Hollis*, 947 A.2d 1177, 1180 (D.C. 2008) (quoting *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 219-20 (2008)). The "of any kind" verbiage means the existence of an "actual physical location" is of little significance in determining the DCHRA's scope. *James v. Team Washington, Inc.*, 1997 WL 633323, at *2 (D.D.C. Oct. 7, 1997).

Businesses that offer goods or services to the general public over the Internet are a subset of "*all* places included in the meaning of such terms as . . . establishments dealing with goods or services *of any kind*." *Id.* (emphasis added). This clause must be "generously construed." *Lively*, 830 A.2d at 887; *Blodgett*, 930 A.2d at 218; *accord Exec. Sandwich Shoppe*, 749 A.2d at 732. Whether goods or services are offered on a website, Internet-enabled app, or brick-and-mortar storefront makes no difference under the DCHRA; the plain text is all-inclusive.

The D.C. Court of Appeals has clarified that businesses that do not principally operate from physical locations within the District may still be subject to the DCHRA so long as they are serving D.C. residents and otherwise satisfy the statutory definition. *See Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C.

2000) (en banc) (D.C. personal jurisdiction extends to the constitutional limit; Maryland corporation with no D.C. stores was still subject to D.C. law when it purposefully solicited D.C. customers through local advertising); *Nat'l Org. for Women v. Mutual of Omaha Ins. Co., Inc.*, 531 A.2d 274, 276-77 (D.C. 1987) (Nebraska-based insurer serving District residents is subject to DCHRA); *James*, 1997 WL 633323 at *2. In *James*, a Delaware-incorporated company operating out of Virginia was an "establishment dealing with goods or services of any kind" when it offered pizza delivery to D.C. residents despite not having any physical presence in the District. *Id.* The DCHRA prohibits "the improper denial of the full and equal enjoyment of the goods and services *of* a place of public accommodation" and it does not matter whether "the challenged conduct take[s] place *in* a particular physical structure." *Id.* (emphasis in original).

The District Court's legal analysis of the DCHRA was inadequate, which led to its flawed finding. First, the trial court's cursory analysis failed to account for the voluminous binding precedent instructing that the DCHRA be "generously construed" to effect its remedial purpose. *Lively*, 830 A.2d at 887; *Blodgett*, 930 A.2d at 218; *accord Exec. Sandwich Shoppe*, 749 A.2d at 732. Second, the court disregarded the plain text of the statute by skipping over the "establishments offering goods or services of any kind" clause. Third, the court flouted the

fundamental purpose of the DCHRA, which is to prevent discrimination by retailers, service providers, and other public-facing businesses such as Appellees. Fourth, the court misinterpreted and stretched *U.S. Jaycees* beyond that decision's own bounds.

The District Court's extension of *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981) to the instant case was erroneous because it does not stand for the broad principle that the DCHRA excludes online places of public accommodation. The *U.S. Jaycees* decision was narrow and particularized to a specific entity; it held that conducting community service activities and public events (such as a cherry blossom festival, soap box derby, and public service awards ceremony) were insufficient to transform this private membership-based club into a public accommodation. 434 A.2d at 1381-82. In distinguishing the Jaycees organization from a little league baseball club (a public accommodation), the Court focused on the entities' control over their places of operation and whether they operate from "any particular place." *Id*., at 1381. "[A]lthough Jaycees sponsors civic activities at various public places . . . it does not control these areas to the same extent as does the Little League." *Id*., at 1382. Unlike a private club temporarily renting a hotel or restaurant for one event, most online businesses, including Appellees, (1) are

distinctly public, not private, and (2) continuously operate from and control fixed "places:" their websites and apps.[25]

The District Court in this case failed to do the exact thing the *U.S. Jaycees* and *Samuels* courts did—examine each entity to determine if it falls within the broad definition of a public accommodation in the DCHRA. A case about a private membership-based club from 1981—before the Internet existed—is simply inapposite to deciding a case about online commerce in 2019. There are scores of online companies serving D.C. residents with myriad business models and practices; this one case cannot fairly account for them all. To hang the Act's applicability to the modern "economic, cultural, and intellectual life of the District," D.C. Code § 2-1402.01, on an anachronistic analogy to *U.S. Jaycees* fails to follow the instruction that the Act be "powerful, flexible, and far-reaching," *Exec. Sandwich Shoppe*, 749 A.2d at 732, and a "warrant for the here and now." *Harris*, 562 A.2d at 626.

[25] *Samuels v. Rayford*, cited in passing by the District Court, is also inapt. 1995 WL 376939 (D.D.C. Apr. 10, 1995). The *Samuels* court held that while a hospital is a place of public accommodation when dealing with patients and visitors, it is not a place of public accommodation with regard to a doctor seeking privileges to work at the hospital, because the doctor-hospital relationship is distinctly private. *Id*. at *7-8. This unremarkable conclusion has no relevance for the instant case; Appellees all provide consumer goods and services to the general public.

Moreover, *if* a physical location is a requirement of the DCHRA, online businesses do operate from physical facilities.[26] The Internet exists in the physical world and is not an ethereal construct. All online activity—including the commercial offering of goods and services through a website or app—occurs on computers in physical locations. *See, e.g.*, *United States v. Microsoft*, 138 S. Ct. 1186, 1187 (2018) (addressing territoriality concerns for a search warrant for emails stored by a U.S. company in an overseas data center). Online activity therefore does occur at a physical "place" if one is required. Delivering goods or services through the Internet is no different from delivering goods or services by mail, phone, or courier—at the other end of the communication there is an establishment rendering the service to D.C. residents.

An online service provider discriminating in its offer of services is no different from an insurer making discriminatory coverage decisions in its out-of-state headquarters. *See Mutual of Omaha*, 531 A.2d at 276-77. An e-commerce vendor discriminating in its sale of goods is no different from an out-of-state pizzeria discriminating in its delivery of pizza. *See James*, 1997 WL 633323. An

[26] Amici maintain that the text, history, and purpose of the DCHRA make clear that there is no physicality requirement; all that matters is whether a business is offering a covered good or service to the public. Amici make this argument in the alternative, however, to show that a physicality requirement makes no difference to the ultimate outcome in this case.

online business that purposefully solicits D.C. customers for its goods or services—such as through targeted advertising—or otherwise engages in commerce in the District must abide by D.C. law, including the DCHRA. *See Shoppers Food Warehouse*, 746 A.2d 320.[27]

B. Appellees are places of public accommodation with regard to the online goods or services they offer to District residents.

When Appellees Google, Facebook, Twitter, and Apple offer consumer goods or services to District residents, they are places of public accommodation under the DCHRA. Google offers numerous goods and services, including consumer electronics and computers; software; YouTube; and an online marketplace for media, video games, and third-party software. Facebook offers social media and entertainment services through websites and apps for its namesake platform, Instagram, Messenger, and WhatsApp, as well as various online marketplace services.[28] Twitter offers social media services. Google,

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[27] Appellees are headquartered out-of-state, but if an online business was located within the District of Columbia, the analysis becomes even simpler. This is another reason why the location of a facility should not confound the question of whether an online business could be a public accommodation.

[28] *See, e.g.*, *Marketplace*, Facebook, www.facebook.com/marketplace (last visited Oct. 11, 2019) ("Buy and sell local goods, or shop new items shipped from stores. Use your Facebook account to find what you want and sell what you don't.").

Facebook, and Twitter allow any user to buy online advertisements. Apple sells consumer electronics and computers, as well as myriad software and online services to use with such hardware; it also operates an online marketplace where anyone can buy or sell apps and other media. Notably, Apple also has two physical stores in the District at 1229 Wisconsin Avenue NW and 801 K Street NW.

Beyond the catchall of "dealing with goods or services of any kind," many of Appellees' services either match or closely mirror other categories of public accommodations as well, including banking and credit,[29] travel and tour advisory

[29] Google and Apple offer online payment services so their users can send and receive money and make purchases at stores. Google Pay, pay.google.com/about (last visited Sept. 20, 2019); Apple Pay, www.apple.com/apple-pay (last visited Sept. 20, 2019). Google and Apple also offer financing options for devices they sell in their stores, either directly or in partnership with banks. *See* Terms, Google Fi, https://fi.google.com/about/tos/#device-plan-terms (last visited Oct. 11, 2019) ("Pay Monthly Device Plan Terms and Conditions"); *Two great ways to buy. Choose the one that's right for you.*, Apple, https://www.apple.com/us-hed/shop/browse/financing (last visited Oct. 11, 2019). Apple also offers its own credit card. *Id*.

services,[30] insurance,[31] food delivery,[32] and entertainment.[33] In other words, the goods and services offered by Appellees are the exact types of public

[30] Google Travel is an online portal for buying plane tickets, booking hotel rooms, and planning trips. *Want the best prices for your trip? Google can help.*, Google (Aug. 8, 2019) https://www.blog.google/products/flights-hotels/best-prices-for-your-trips/. Both Google Maps and Facebook enable users to hail a ride from Uber or Lyft. *Ride with Lyft and Google Maps*, Lyft Blog (Sep. 8, 2016) https://blog.lyft.com/posts/lyft-and-google-maps; *Say Hello to Uber On Messenger*, Uber Newsroom (Dec. 17, 2015) https://www.uber.com/newsroom/messengerlaunch. Google Maps, Apple Maps, and Facebook provide recommendations for nearby restaurants, local events, and/or other activities happening near your location. *Explore and Eat Your Way Around Town with Google Maps*, The Keyword (May 8, 2019), https://www.blog.google/products/maps/explore-around-town-google-maps; Apple Maps Connect, https://mapsconnect.apple.com/ui/help (last visited October 10, 2019); *Updating Pages to Make it Easier to Interact with Customers*, Facebook Business (Oct. 19, 2016), https://www.facebook.com/business/news/page-call-to-action-updates.

[31] Google and Apple offer insurance policies for the devices they sell in their stores. AppleCare+, https://www.apple.com/legal/sales-support/applecare/applecareplus/ (last visited October 10, 2019); Google Store Preferred Care, https://store.google.com/us/magazine/preferred_care (last visited October 10, 2019).

[32] Google and Facebook offer the ability for users to purchase meals for delivery from local restaurants. *What's for Dinner? Order it with Google*, The Keyword (May 23, 2019) https://www.blog.google/products/assistant/order-your-favorite-food-with-google/; *Facebook Now Lets You Order Food Without Leaving Facebook*, The Verge (Oct. 13, 2017) https://www.theverge.com/2017/10/13/16468610/facebook-food-ordering-new-feature/.

[33] Google and Apple sell music, video, and video games through their online stores. Google Play, https://play.google.com/store (last visited Oct. 11, 2019); Apple Music, https://www.apple.com/apple-music/ (last visited Oct. 10, 2019); *App Store*, Apple https://www.apple.com/ios/app-store/ (last visited Oct. 11, 2019).

accommodations to which the D.C. Council intended the DCHRA to apply. Exempting these exceedingly popular businesses from a broad, remedial civil rights statute would create absurd results and hinder equal opportunity, especially as online commerce continues to grow. *See* D.C. Code § 2-1402.01.

C. Exempting online businesses would create absurd results and disadvantage District-based brick-and-mortar businesses against online competitors.

If online businesses are not places of public accommodations under the DCHRA, it would create an incompatible dichotomy between brick-and-mortar covered businesses and their online competitors or counterparts—especially for D.C.-based online businesses. An online retailer with an Etsy shop operating out of the District, such as Sneekis, which sells D.C. themed t-shirts, could discriminate against a buyer while a brick-and-mortar company offering the exact same goods would be prohibited from discrimination.[34] Online restaurants such as Galley, which offers locally-prepared chef-made meals to District residents, would be permitted to refuse to deliver to African Americans or be inaccessible to blind

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Google's YouTube is equivalent to a movie theater, in that it is a communal place to consume video entertainment and interact with others. Facebook and Twitter's social media platforms are similarly centers for communal entertainment, akin to digital public squares, as well as services for consuming music and video.

[34] *Sneekis*, Etsy, https://www.etsy.com/shop/Sneekis?ref=simple-shop-header-name&listing _id=572225854 (Last visited Sept. 30, 2019).

users, while a brick-and-mortar restaurant must, rightfully, serve patrons of all races and be accessible.[35] Peapod, an online grocery delivery service operating in the District, could refuse to serve the elderly while its parent company, Giant, could not discriminate in its store.[36] The D.C. Credit Union, which offers online banking and a mobile platform, could charge different fees for customers using online banking based on the customer's sexual orientation while of course the DCHRA would prohibit such discrimination at a storefront bank.[37] An online travel agency or insurer could refuse service or price gouge religious minorities or immigrants, while storefront travel agencies or insurers could not. And misogynists could sexually harass and threaten a woman patronizing an online business, whereas such conduct in a bar or physical store would violate the Act. These dichotomies are illogical. Holding that the DCHRA does not apply online would allow discrimination to flourish and cause a chilling effect on the District's economic, cultural, and intellectual life.

[35] Galley, https://www.galleyfoods.com/welcome (Last visited Sept. 30, 2019).

[36] Peapod, https://www.peapod.com/ (Last visited October 14, 2019).

[37] DC Credit Union, https://www.dccreditunion.coop/personal/online-banking/ (Last visited Sept. 30, 2019).

III. IF THE COURT IS UNCERTAIN AS TO THE MEANING OF THE DCHRA, IT MUST CERTIFY THE LEGAL QUESTION TO THE D.C. COURT OF APPEALS.

If this federal Court is uncertain about whether the DCHRA's public accommodations provisions create a special exception for online commerce, it should certify the issue to the D.C. Court of Appeals so that the local high court can interpret the District's own law. D.C. Code § 11–723. "A federal court sitting in diversity should normally decline to speculate on such a question of local doctrine." *Delahanty v. Hinckley*, 845 F.2d 1069, 1070 (D.C. Cir. 1988). The Court should certify legal questions to the D.C. Court of Appeals if the Court concludes that District of Columbia law is "genuinely uncertain," with respect to a dispositive question, *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988), and the case concerns "a matter of public importance, in which the District of Columbia has a substantial interest." *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014) (citation omitted). For the reasons discussed at length above, this case is one of extreme public importance; the D.C. Council stated that the elimination of discrimination is the District's "highest priority" and the Act was one of "our most important laws." Report of Bill 2-179, at 1-3. The District of Columbia has a substantial interest in the interpretation of the DCHRA to preserve the intent of the Act and safeguard the civil rights of the District's residents.

Moreover, to the extent the Court has concerns about the applicability of *U.S. Jaycees*, the D.C. Court of Appeals is better situated to clarify the meaning of that case.

IV. CONCLUSION

For the reasons discussed above, the Court should either hold that the DCHRA does not exempt online businesses offering goods or services to D.C. residents, such as Appellees, from providing public accommodations free from discrimination, or certify the legal question to the D.C. Court of Appeals.

Respectfully Submitted,

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October 16, 2019

RULE 32(g) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure. It contains 6469 words.

/s/ David Brody
David Brody
Oct. 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and that service to the participants in this appeal, all of whom are registered CM/ECF users, will be accomplished by the appellate CM/ECF System.

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Oct. 16, 2019