NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-7030

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREEDOM WATCH, INC., *et al.*,
APPELLANTS,

v.

GOOGLE INC., *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PROOF BRIEF FOR THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 1

SUMMARY OF ARGUMENT..........2

ARGUMENT 4

I. A Place Of Public Accommodation Need Not Be A Physical Location..........4

A. The text of the DCHRA is not limited to physical locations 4

1. The statutory text encompassed more than physical locations in 1977..........6

2. The statutory text encompasses internet-based entities and digital platforms today 9

B. Limiting the DCHRA's reach to physical locations contradicts its purpose..........12

C. The Office of Human Rights has rejected a physical location requirement 14

D. *United States Jaycees v. Bloomfield* is neither controlling nor persuasive 16

E. If in doubt, this Court should certify the question to the D.C. Court of Appeals..........22

CONCLUSION..........25

ADDENDUM

TABLE OF AUTHORITIES*

Cases

Blair-Bey v. Quick, 151 F.3d 1036 (D.C. Cir. 1998) 16

Blodgett v. Univ. Club, 930 A.2d 210 (D.C. 2007) 5

**Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192 (2002) 16, 19, 20, 22

Brown v. D.C. Dep't of Emp't Servs., 83 A.3d 739 (D.C. 2014) 14, 16

Burks v. Poppy Constr. Co., 370 P.2d 313 (Cal. 1962) 6

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 21

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 21

Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp., 35 A.3d 1127 (D.C. 2012) 23

Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp., 640 F.3d 369 (D.C. Cir. 2011) 23, 24

Council of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999) 18

Daly v. D.C. Dep't of Emp't Servs., 121 A.3d 1257 (D.C. 2015) 21

Esteños v. PAHO/WHO Fed. Credit Union, 952 A.2d 878 (D.C. 2008) 4

Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp., 749 A.2d 724 (D.C. 2000) 5

George Wash. Univ. v. D.C. Bd. of Zoning Adjustment, 831 A.2d 921 (D.C. 2003) 4

* Authorities upon which we chiefly rely are marked with asterisks.

Jackson v. D.C. Bd. of Elections & Ethics,
999 A.2d 89 (D.C. 2010) (en banc) 5, 10

Johnson v. Capital City Mortg. Corp., 723 A.2d 852 (D.C. 1999)..........................18

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)..9

Lively v. Flexible Packaging Ass'n, 830 A.2d 874 (D.C. 2003) 4

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) 21

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) 7

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005)...22

Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017)........................... 23, 24

Packingham v. North Carolina, 137 S. Ct. 1730 (2017)...11

Quarles v. United States, 139 S. Ct. 1872 (2019) 13

Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987) 15

Republic of Sudan v. Owens, 194 A.3d 38 (D.C. 2018)..23

Rivera v. Lew, 99 A.3d 269 (D.C. 2014)..23

Rivera v. Lew, No. 13-5222 (D.C. Cir. Jan. 30, 2014)..23

Samuels v. Rayford, No. 91-CV-365,
1995 WL 376939 (D.D.C. Apr. 10, 1995) 8, 17

Schuchart v. La Taberna Del Alabardero, Inc., 365 F.3d 33 (D.C. Cir. 2004)........24

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) 10

Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002) 25

Taylor v. FDIC, 132 F.3d 753 (D.C. Cir. 1997) 18

Timus v. D.C. Dep't of Human Rights, 633 A.2d 751 (D.C. 1993) (en banc) 14

U.S. Power Squadrons v. State Human Rights Appeal Bd.,
452 N.E.2d 1199 (N.Y. 1983) 7, 15

**United States Jaycees v. Bloomfield*,
434 A.2d 1379 (D.C. 1981)...................................... 2, 16, 17, 18, 19, 20, 21, 22

United States v. Godoy, 706 F.3d 493 (D.C. Cir. 2013)..5

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) 17, 18

Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993)............................. 14, 15

Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018) 9

Statutes

D.C. Code § 11-723 23

D.C. Code § 2-1401.01 .... 1, 3, 4, 12

D.C. Code § 2-1401.02 .... 2, 5, 6, 10

D.C. Code § 2-1402.01 12

D.C. Code § 2-1402.31 ....2, 13

42 U.S.C. § 2000a 15

Other Authorities

Br. for Technology Companies as Amici Curiae, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2)...10

Br. for the United States as Amicus Curiae, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) 11

Anthony DePalma, *Mexico City Journal: A Glittering Vision of Suburbia Supplants a Dump*, N.Y. Times, June 23, 1993 8

Bryan A. Garner et al., *The Law of Judicial Precedent* (2016) 19, 21, 24

Scott Harris, *The Pendulum Swings in Favor of Braude*, L.A. Times, Mar. 6, 1988 8

Headquarters & Offices, Ally.com 11

How It Works, SoFi.com 11

N.R. Kleinfield, *A.T.&T. Trying to Lift Morale*, N.Y. Times, Apr. 14, 1979 8

Jay Loomis, *Wachovia Banking on Selling Insurance*, Winston-Salem Journal, July 10, 1997 8

**Pool & Geller v. Boy Scouts of America*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001) 14, 15, 20

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 9, 12

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the District of Columbia files this brief under Federal Rule of Appellate Procedure 29(a)(2) to address a single aspect of this case: the interpretation of the term "place of public accommodation" under the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1401.01 *et seq*. The District has a clear interest in the proper interpretation of this key provision of its foremost antidiscrimination law. Although the final say in interpreting the DCHRA lies with the D.C. Court of Appeals, absent further guidance from that tribunal this Court's interpretation will control in any case adjudicated in federal court in this Circuit. The District therefore urges the Court to reject the district court's flawed reading of the statute.

BACKGROUND

Appellants Freedom Watch, Inc. and Laura Loomer ("Freedom Watch") are "conservative activists who allege that America's major technology firms have conspired to suppress their political views." Op. 1 (JA__). Freedom Watch filed this suit against several of those firms, contending, among other things, that the firms' activities violate the DCHRA. It argued that the firms' websites and digital platforms are places of public accommodation under the DCHRA, and that the firms have denied Freedom Watch "the full and equal enjoyment" of those websites' and platforms' services because of its political affiliation or religion. Op. 10 (JA__)

(quoting D.C. Code § 2-1402.31(a)). The district court dismissed Freedom Watch's DCHRA claim on the theory that the firms' websites and platforms were not places of public accommodation under the statute. Op. 10-12 (JA__-__). That was so, according to the district court, because an "alleged place of public accommodation must be a physical location." Op. 11 (JA__). In the district court's view, this "physical location" interpretation was "authoritatively" established by *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981), and Freedom Watch's arguments were therefore unavailing. Op. 11-12 (JA__-__).

SUMMARY OF ARGUMENT

The district court's holding that a place of public accommodation must be a physical location within the District was incorrect and should be reversed. The DCHRA provides an expansive, nonexhaustive definition of "place of public accommodation," which must be generously construed in favor of greater protection against discrimination. That definition includes several categories of entities—such as "establishments dealing with goods or services of any kind," "insurance companies," "financial institutions, and credit information bureaus"—that can operate in the District without having any physical location here. D.C. Code § 2-1401.02(24). At the time of the DCHRA's enactment in 1977, for instance, mail-order businesses that sold to District residents would have clearly been covered by

the definition. And today, that definition easily encompasses many internet-based businesses, such as Amazon.com and online banks that cater to District residents.

Any doubt about the definition of "place of public accommodation" is resolved by looking to the statute's purpose. That purpose includes giving every District resident "an equal opportunity to participate fully in the economic, cultural and intellectual life of the District." *Id.* § 2-1402.01. Allowing the many businesses that operate in the District without physical locations to discriminate at will would substantially undermine this goal.

Principles of administrative deference also foreclose the district court's interpretation. The D.C. Court of Appeals applies the equivalent of *Chevron* deference to District agencies' reasonable interpretations of the statutes they administer. In 2001, the D.C. Commission on Human Rights, the adjudicatory arm of the D.C. Office of Human Rights, concluded that the Boy Scouts, despite not being (or operating) a physical location in the District, was a place of public accommodation. Because the Commission's rejection of a physical location requirement was reasonable, that interpretation would bind the D.C. Court of Appeals—and so should govern here too.

The district court's constricted view of the statute rested entirely on its belief that the D.C. Court of Appeals' 1981 decision in *Jaycees* authoritatively established a physical location requirement. But *Jaycees*—a preliminary ruling, reached without

adequately adversarial briefing and superseded by the Commission's 2001 decision—is neither controlling nor persuasive. And if this Court is left with serious doubts on that score, it should certify this question to the D.C. Court of Appeals.[1]

ARGUMENT

I. A Place Of Public Accommodation Need Not Be A Physical Location.

A. The text of the DCHRA is not limited to physical locations.

The goal of the DCHRA is "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. Given this "sweeping statement of intent," the D.C. Court of Appeals has stressed that courts "must read the words of the DCHRA liberally." *Esteños v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 887 (D.C. 2008). "The Human Rights Act is a broad remedial statute, and it is to be generously construed." *George Wash. Univ. v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003). This principle of "generous construction" means that uncertainties about the DCHRA's scope should be resolved in favor of broader rather than narrower coverage. *See, e.g.*, *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 887-90 (D.C. 2003) (en banc) (adopting broader view of hostile work environment claims as "consistent with the 'generous construction' principle"); *Exec. Sandwich Shoppe, Inc. v. Carr Realty*

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[1] The District takes no position on the merits of Freedom Watch's other claims, or on whether Freedom Watch's DCHRA claim fails for reasons other than those addressed in this brief.

Corp., 749 A.2d 724, 731-32 (D.C. 2000) (adopting broader interpretation of term "any person"). Generous construction ensures that the DCHRA remains the "powerful, flexible, and far-reaching prohibition against discrimination of many kinds" that the D.C. Council "undoubtedly intended [it] to be." *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 98 (D.C. 2010) (en banc) (quoting *Exec. Sandwich Shoppe*, 749 A.2d at 732).

Consistent with its expansive overall sweep, the DCHRA "defines 'place of public accommodation' broadly." *Blodgett v. Univ. Club*, 930 A.2d 210, 218 n.5 (D.C. 2007). The term "means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels," and dozens of other examples, including "wholesale and retail stores, and establishments dealing with goods or services of any kind"; "banks" and "all other financial institutions"; "insurance companies"; and "travel or tour advisory services, agencies or bureaus." D.C. Code § 2-1401.02(24) (reproduced in full in the addendum). The words "*all* places" and "*such* terms as" show that the definition is capacious and the examples non-exhaustive. *See United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013) ("The phrase 'such as' typically indicates that enumerated examples are not comprehensive."). The only express exclusion is for "any institution, club, or place of accommodation that is distinctly private." D.C. Code § 2-1401.02(24).

Nothing in the DCHRA's definition requires a "place of public accommodation" to be a physical location in the District. To be sure, some of the listed examples are necessarily physical locations—for instance, "swimming pools" and "public halls and public elevators of buildings." *Id.* But others are not. Indeed, several of the listed terms naturally encompass commonplace businesses and entities that operate in the District but are not tied to physical locations here. And contrary to the firms' suggestion, this was as true in 1977, when the DCHRA was enacted, as it is today. *See* Appellees' Reply to D.C.'s Opposition to Motion for Summary Affirmance 4 (June 20, 2019) ("MSA Reply").

1. The statutory text encompassed more than physical locations in 1977.

Consider first "establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). An "establishment" need not be a physical location. As the California Supreme Court held—15 years before the DCHRA's enactment—in construing California's analogous civil rights statute, the word "establishment" "includes not only a fixed location . . . but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business).'" *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962) (quoting dictionary definitions). A company that sells its products to District residents through a mail-order catalog is thus an "establishment[] dealing with goods . . . of any kind." Mail-order retailing was commonplace at the time of the DCHRA's enactment, and many such retailers

would have no physical storefront in the District. *See, e.g.*, *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 753-55 (1967) (describing "mail order house" with no Illinois facilities).

It is likewise easy to conjure examples of "establishments dealing with . . . services" that would have existed in 1977 and operated without physical locations, such as locksmith, lawncare, housecleaning, and handyman businesses. Pointing to precisely these types of businesses, the New York Court of Appeals unanimously declined to read a physical location element into New York's nearly identical definition of "place of public accommodation." *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1202-04 & n.1 (N.Y. 1983); *see id.* at 1204 ("Analytically, such establishments may discriminate by denying goods and services without denying individuals access to any particular place, e.g., home delivery service or services performed in the customer's home and mail order services.").

The DCHRA's definition of "place of public accommodation" also expressly refers to "insurance companies," "financial institutions, and credit information bureaus." In 1977, many such entities could—and predictably would—operate in the District without having physical locations here. A Connecticut insurance company could sell policies to District residents through door-to-door salesmen. And a New York stock brokerage—or an Illinois credit reporting agency—could

solicit District customers and manage their accounts by mail and phone. The DCHRA's express coverage of these types of entities thus refutes the notion that only physical locations qualify.

Nor does the mere use of the word "place" imply such a restriction. *Cf. Samuels v. Rayford*, No. 91-CV-365, 1995 WL 376939, at *8 (D.D.C. Apr. 10, 1995) ("[T]o be a 'place of public accommodation,' a challenged entity must first be a 'place.'"). As the list of statutory examples itself demonstrates, it is common to use "place" to refer to businesses and service-providers as entities, rather than as physical locations. Other real-world examples prove the point as well:

- "Compared to most places, you'd have to say [A.T.&T. is] a good place to work." N.R. Kleinfield, *A.T.&T. Trying to Lift Morale*, N.Y. Times, Apr. 14, 1979, at 29.
- "His favorite place to shop, his wife reported, is the Sears Roebuck catalogue." Scott Harris, *The Pendulum Swings in Favor of Braude*, L.A. Times, Mar. 6, 1988, at B1.
- "[A] 911-type emergency service . . . will give residents a central place to call for help for the first time." Anthony DePalma, *Mexico City Journal: A Glittering Vision of Suburbia Supplants a Dump*, N.Y. Times, June 23, 1993, at A4.
- "Wachovia Corp. . . . wants to be known as a place to buy insurance." Jay Loomis, *Wachovia Banking on Selling Insurance*, Winston-Salem Journal, July 10, 1997, at D1.

There was thus no basis at the time of the DCHRA's enactment to interpret "place of public accommodation" as encompassing only physical locations in the District.

2. The statutory text encompasses internet-based entities and digital platforms today.

Because the term "place of public accommodation" in the DCHRA has never been limited to physical locations, it embraces websites, internet-based entities, and digital platforms that otherwise meet the statutory definition. Granted, the list of statutory examples does not specifically mention websites, the internet, or digital platforms. *See* Op. 11 (JA__) ("Not one of these examples is an online or virtual platform."). But that is both unsurprising and immaterial. Unsurprising, because no one had ever heard of these technologies when the DCHRA was enacted in 1977. Immaterial, because a statute's reach is not limited to the applications its drafters anticipated. "While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Thus, an electronic funds transfer qualifies as "money remuneration" even under a statute enacted in 1937. *Id.* at 2074-75. Or as Justice Scalia put it, "[a] 19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens . . . ." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 323 (1988) (concurring in part and dissenting in part); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 85-87 (2012).

The principle that general statutory language reaches new and unexpected technologies applies with special force to the DCHRA. The DCHRA was

specifically "intended to 'provide a regulation of sufficient scope and flexibility to be responsive to future needs for the protection of civil and human rights,' since 'there may be contexts and reasons for discrimination tomorrow that we do not anticipate today.'" *Jackson*, 999 A.2d at 120 (quoting legislative history). Thus, the mere fact that websites and digital platforms were an unanticipated context for discrimination in 1977 is of no moment, provided that they fall within the statutory text. Many plainly do.

For example, consider once again the category "wholesale and retail stores, and establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). Although websites like Amazon.com and Wayfair.com are not physical locations, they are no doubt "retail stores" and "establishments dealing with goods or services of any kind." Indeed, Amazon.com describes itself as "one of the world's largest and best known online retailers and cloud service providers." Br. for Technology Companies as Amici Curiae 2, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2). And the Supreme Court has described Wayfair as "a leading online retailer of home goods and furniture." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). Online stores with no physical location thus fit comfortably within the statutory definition of "place of public accommodation."

Consider also "banks," "financial institutions," and "insurance companies." In the internet age, many such institutions provide services to District residents

without having any physical location that customers can visit, either inside the District or elsewhere. Ally Bank, for example, is an online bank that offers services to District residents but has no physical branches anywhere.[2] The same is true for the financial services and insurance firm SoFi.[3] These and other online businesses that operate in the District are just as much places of public accommodation as their brick-and-mortar competitors.

Once again, the word "place" is no impediment. Using "place" to refer to a website or a digital platform is perfectly ordinary English usage. In fact, the district court, quoting the Supreme Court, did just that, noting that "Facebook and Twitter are among the 'most important places (in a spatial sense) for the exchange of views' in society today." Op. 13 (JA__) (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)). And the United States recently described "retail websites" as "hold[ing] themselves out to the public as places (or virtual places) of general accommodation." Br. for the United States as Amicus Curiae 27, *Wayfair*, 138 S. Ct. 2080 (No. 17-494). Contrary to the district court's conclusion, then, the term

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[2] *See Headquarters & Offices*, Ally.com, https://www.ally.com/about/locations (last visited October 15, 2019) ("As an online bank we don't have physical branches . . . .").

[3] *See How It Works*, SoFi.com, https://www.sofi.com/how-it-works (last visited October 15, 2019) ("Since we don't have brick-and-mortar branches, we save on operating costs.").

"place of public accommodation" can readily encompass websites and digital platforms.

B. Limiting the DCHRA's reach to physical locations contradicts its purpose.

The preceding analysis of the DCHRA's text is reason enough to reject the district court's "physical location" gloss. But the statute's purpose further reinforces that conclusion. *See* Scalia & Garner, *Reading Law*, at 63 ("A textually permissible interpretation that furthers rather than obstructs [a statute's] purpose should be favored.").

The purposes of the DCHRA are laid out in the statute itself. As noted, the act's first provision states that the Council's "intent" was "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit," including discrimination based on race, religion, age, sex, sexual orientation, and various other characteristics. D.C. Code § 2-1401.01. A separate provision then further pledges: "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 in places of public accommodation and other settings. *Id.* § 2-1402.01.

If businesses without physical locations were, as a categorical matter, not places of public accommodation, the promise of "equal opportunity to participate fully" in the District's economic life would be hollow. A mail-order retailer could

refuse to accept orders from District residents with "ethnic-sounding" names. A lawncare company could refuse to work at the homes of black District residents. An out-of-state stock brokerage firm could refuse to open accounts for District women. An online insurance company could refuse to sell its policies to gay District residents. These results clash irreconcilably with the DCHRA's express aims, and they are not compelled by its text.

A physical-location requirement is fundamentally misguided because the goal of prohibiting public-accommodation discrimination is not limited to gaining equal access to physical spaces. The goal is also to ensure "full and equal enjoyment" of "goods, services, . . . privileges, advantages, and accommodations." D.C. Code § 2-1402.31(a)(1). In other words, it is not enough for a brick-and-mortar bank, say, to allow people of color to come inside the building; it must allow them to open checking accounts, obtain credit cards, take out loans, and all the rest. The firms cannot dispute this. And yet their position is that if that same bank decides to close its physical branches and operate solely through a website, it is suddenly free to discriminate against District residents with respect to any or all of its services. The Court should not accept such an irrational, ineffective interpretation of the DCHRA. *Cf. Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) ("We should not lightly conclude that [the legislature] enacted a self-defeating statute.").

C. The Office of Human Rights has rejected a physical location requirement.

Even if the combination of the DCHRA's plain text and its express purposes left any doubt about a physical location requirement, principles of agency deference would remove it. Much as with federal courts and federal agencies, the D.C. Court of Appeals defers to District agencies' reasonable interpretations of the statutes they administer. *See, e.g.*, *Brown v. D.C. Dep't of Emp't Servs.*, 83 A.3d 739, 746 & n.21 (D.C. 2014). Accordingly, interpretations of the DCHRA by the D.C. Office of Human Rights ("OHR") and its adjudicatory arm, the D.C. Commission on Human Rights, are entitled to deference. *See, e.g.*, *Timus v. D.C. Dep't of Human Rights*, 633 A.2d 751, 758-59 (D.C. 1993) (en banc). And nearly two decades ago, OHR rejected the view that a place of public accommodation must be a physical location.

It did so through formal adjudication in *Pool & Geller v. Boy Scouts of America*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001).[4] There, two gay men who sought to be Boy Scout leaders argued that their exclusion from the organization was public-accommodation discrimination under the DCHRA. OHR initially dismissed their complainants, citing *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993), for the proposition that the Boy Scouts was not a place of public accommodation. *Pool & Geller* at 2. *Welsh* had

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[4] *Available at* http://www.glaa.org/archive/2001/poolandgellerruling0621.pdf.

held that the Boy Scouts was not a place of public accommodation under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, because it was not closely tied to a "structural facility"—*i.e.*, a physical location. 993 F.2d at 1269. Later, however, OHR reversed course, dropped its reliance on *Welsh*, and concluded that there was "probable cause to believe that the respondents violated the [DCHRA] in a place of public accommodation." *Pool & Geller* at 2.

After a formal hearing, the Commission sustained the charge. Despite acknowledging that "[n]either the [Boy Scouts] National Council nor the Local Council maintains any facilities in the District of Columbia," the Commission held that the Boy Scouts was a place of public accommodation under the DCHRA. *Id.* at 7, 48-54. In addition to discussing the breadth of the statutory definition of "place of public accommodation," the Commission favorably cited a pair of decisions from New York and Connecticut—"jurisdictions with similar statutes"—which found "that membership organizations like the Boy Scouts are a place of public accommodation." *Id.* at 54 (citing *U.S. Power Squadrons*, 452 N.E.2d 1199, and *Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987)). Both decisions prominently rejected the notion that only physical locations can be places of public accommodation. *See U.S. Power Squadrons*, 452 N.E.2d at 411 ("The place of the public accommodation need not be a fixed location . . . ."); *Quinnipiac Council*, 528 A.2d at 358

("[P]hysical situs is not today an essential element of our public accommodation law.").

On appeal, the D.C. Court of Appeals reversed the *Pool & Geller* decision. *Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192 (2002). But it did so solely on First Amendment grounds, stating expressly that it was not addressing the statutory question. *Id.* at 1196 & n.4; *id.* at 1204 (Reid, J., concurring). The *Pool & Geller* decision's interpretation of "place of public accommodation" therefore remains intact and constitutes OHR and the Commission's considered reading of the statute. That interpretation's rejection of a physical location requirement is, at minimum, a reasonable reading of the statute, and it is therefore "binding" on the D.C. Court of Appeals. *Brown*, 83 A.3d at 746 n.21. And because this Court is in turn "bound to follow interpretations of D.C. law by the D.C. Court of Appeals," *Blair-Bey v. Quick*, 151 F.3d 1036, 1050 (D.C. Cir. 1998), it governs here as well.

D. *United States Jaycees v. Bloomfield* is neither controlling nor persuasive.

The district court undertook no meaningful analysis of the DCHRA's text or purpose because it believed that the D.C. Court of Appeals had "authoritatively" held that a place of public accommodation "must be a physical location" in *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). Op. 11-12 (JA__-__). That conclusion was mistaken.

In *Jaycees*, a trial court found that excluding women from full membership in the Jaycees (a community service organization) was likely sex discrimination in a place of public accommodation under the DCHRA, and it therefore granted a preliminary injunction. 434 A.2d at 1380. A panel of the D.C. Court of Appeals reversed. *Id.* at 1381-83. Although "the rationale of the [*Jaycees*] opinion is somewhat unclear," *Samuels*, 1995 WL 376939, at *10 n.12, the panel apparently believed that the Jaycees did not qualify as a place of public accommodation because it "[wa]s a voluntary membership organization whose primary function is to render community service" and "d[id] not operate from any particular place within the District of Columbia," *Jaycees*, 434 A.2d at 1381; *see also id.* at 1382 (noting that "Jaycees does not utilize any one particular facility provided by municipal government for its entire operation"). At first blush, then, *Jaycees* might seem to support the district court's decision here. But for at least three reasons *Jaycees* is neither controlling nor persuasive.

First, *Jaycees* is not controlling because it was a tentative ruling on a question of preliminary relief. As *Jaycees* itself noted repeatedly, the court was "review[ing] the trial court's grant of a preliminary injunction only to gauge the likelihood of success, not determine the suit on its merits." 434 A.2d at 1381 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (warning against "improperly equat[ing] 'likelihood of success' with 'success'")); *id.* at 1384 (same). And the court explicitly

framed its holding on the public-accommodation issue in terms of *likelihood* of success. *Id.* at 1381-82 ("[A]ppellees have failed to demonstrate that there is a likelihood of success for their argument that under the [DCHRA] Jaycees is a 'place of public accommodation.'"). The court's construction of the DCHRA was thus tentative, not definitive or binding.

This principle was well explained by then-Judge Alito in *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999). In an appeal after obtaining summary judgment, the plaintiffs in that case argued that a prior panel's decision regarding a preliminary injunction bound the Third Circuit as the law of the case. *Id.* at 69. Not so, Judge Alito explained. In deciding to grant preliminary relief, "the prior panel did not hold that the plaintiffs were *entitled* to succeed; instead, it concluded that they were *likely* to succeed." *Id.* at 70. Because the preliminary injunction standard concerns only *likelihood* of success, he noted, both "the findings of fact" *and* "conclusions of law" reached at that stage—including those reached by an appellate court on interlocutory appeal—are tentative. *Id.* at 69-70 (citing, *inter alia*, *Camenisch*, 451 U.S. at 395). They bind neither the trial court at later stages of the case nor an appellate court in an appeal from final judgment. *Id.*; *see Taylor v. FDIC*, 132 F.3d 753, 766 (D.C. Cir. 1997) (conclusion of prior panel that denied preliminary injunction "lacks authoritative weight for this appeal"); *Johnson v. Capital City Mortg. Corp.*, 723 A.2d 852, 856 (D.C. 1999) ("It

follows from the nature of a preliminary injunction proceeding that any findings on the merits of claims raised are, unless otherwise clearly indicated, merely tentative.").

The same logic applies with even more force to the *Jaycees* decision. In reversing the preliminary injunction, the panel did not hold that the Jaycees were *entitled* to succeed on the public-accommodation claim, only that they were *likely* to succeed. 434 A.2d at 1381-82. Thus, the panel's interpretation of the DCHRA in *Jaycees* would not have bound the Court of Appeals even in a later appeal in *Jaycees* itself. *A fortiori*, that interpretation is not binding here, for "a decision that doesn't bind the court that issued it or the litigants cannot bind nonparties." Bryan A. Garner et al., *The Law of Judicial Precedent* 232 (2016); *see id.* at 230-32 (discussing the limited force of nonfinal decisions).

That *Jaycees* did not conclusively hold that only physical locations can be places of public accommodation is confirmed by the D.C. Court of Appeals' later decision in *Boy Scouts*, 809 A.2d 1192. That appeal from the Commission's *Pool & Geller* decision raised two questions: (1) whether the Boy Scouts' exclusion of gay Scout leaders was public-accommodation discrimination under the DCHRA, and (2) if so, whether that exclusion was nonetheless protected by the First Amendment. The court sidestepped the first question, "assum[ing] without deciding that the Human Rights Act was intended to reach a membership organization such as the Boy

Scouts as a 'place of public accommodation,'" but noting—with a citation to *Jaycees*—that "[t]he issue is a complex one." *Id.* at 1196 & n.4. Despite the canon of constitutional avoidance, the court jumped ahead to the First Amendment question and ruled for the Boy Scouts on that ground. *Id.* at 1196-1203. If *Jaycees* had resolved the physical-location issue, the Court of Appeals would not have considered the question of the Boy Scouts' status "a complex one." It would have been a trivially easy one, for the Boy Scouts is no more a physical location than is the Jaycees. *See Pool & Geller* at 7 ("Neither the [Boy Scouts] National Council nor the Local Council maintains any facilities in the District of Columbia.").[5]

Second, both the precedential and persuasive force of *Jaycees* is undermined by the failure of the appellees in that case to seriously contest the meaning of "place of public accommodation." On the one hand, they claimed to "embrace the reasoning employed by the trial court," which had rejected a physical location requirement. 434 A.2d at 1381. But on the other, they expressly surrendered on the

[5] At the summary affirmance stage, the firms tried to dispute this implication of *Boy Scouts*. "The 'complex' issue," they said, "was not whether there was a physical location requirement, but instead whether the statutory definition's reference to 'institutions' and 'clubs' encompassed membership organizations such as the Boy Scouts." MSA Reply 3. But even if that were so, the Court of Appeals *never would have reached* that uncertainty if *Jaycees* established a per se rule that only physical locations can be places of public accommodation.

key question: "Appellees candidly concede (Brief at 6) that Jaycees 'is not a place of public accommodation to which women will be denied equal access.'" *Id.*

This explicit concession would be enough on its own to rob *Jaycees* of binding force on this issue. The D.C. Court of Appeals does not consider points conceded in one case to be binding in others. In *Daly v. D.C. Department of Employment Services*, 121 A.3d 1257 (D.C. 2015), for example, the court addressed whether formal service of an agency order was necessary to trigger a workers-compensation deadline. An earlier decision had treated service as the triggering event. *Id.* at 1262. But the *Daly* court said that because the point had been "essentially conceded during oral argument" in the prior case, that decision's discussion of the issue was "not binding precedent." *Id.* The same logic applies to *Jaycees*.

The appellees' concession in *Jaycees* also radically diminishes any *persuasive* force it might otherwise appear to have. "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)). Accordingly, opinions "written without the benefit of full briefing or argument on [an] issue" carry little weight. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 202 (2014); *see* Garner et al., *Law of Judicial Precedent*, at 226 (noting the "diminished" authority

of cases "submitted without argument, or on scanty or insufficient argument"). It is hard to imagine anything further from a "vigorous defense" of the DCHRA's breadth than the appellees' express concession in *Jaycees* that the organization was "*not* a place of public accommodation." 434 A.2d at 1381 (emphasis added) (quoting appellees' brief).

Third, on top of everything else, *Jaycees* has been superseded by the decision of OHR and the Commission in *Pool & Geller*. When *Jaycees* was decided, no administrative decision or rulemaking had addressed whether a place of public accommodation under the DCHRA must be a physical location. *Jaycees* itself noted that it was not applying the "deferential" standard that would govern if "an administrative agency order" were at issue. 434 A.2d at 1382 n.6. But in 2001, the Commission issued the *Pool & Geller* decision, which rejected a physical location requirement. *See supra* Part I.C. Because, at the very least, the DCHRA does not foreclose that reading, *see Boy Scouts*, 809 A.2d at 1196 & n.4, it trumps any contrary interpretation in *Jaycees*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (holding that agency interpretations entitled to deference supersede contrary judicial interpretations).

E. If in doubt, this Court should certify the question to the D.C. Court of Appeals.

For the reasons explained, the Court should hold that a place of public accommodation under the DCHRA need not be a physical location and that a website

or digital platform can qualify. If, however, the Court has serious doubts about that conclusion, it should certify the question to the D.C. Court of Appeals. *See* D.C. Code § 11-723 (authorizing certification).

In recent years, this Court has repeatedly certified questions of District law, and the Court of Appeals has answered. *See, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 811-12 (D.C. Cir. 2017), *certified question answered*, 194 A.3d 38 (D.C. 2018); Order, *Rivera v. Lew*, No. 13-5222 (D.C. Cir. Jan. 30, 2014), *certified question answered*, 99 A.3d 269 (D.C. 2014). This Court has said that certification is proper when (1) "District of Columbia law is genuinely uncertain," and (2) "the question is of extreme public importance." *Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp.*, 640 F.3d 369, 373 (D.C. Cir. 2011) (internal quotation marks omitted), *certified question answered*, 35 A.3d 1127 (D.C. 2012). Here, assuming the Court is unwilling to overrule the district court's holding outright, both certification criteria are satisfied.

First, as this brief has shown, the notion that only a physical location can qualify as a place of public accommodation is *at least* "genuinely uncertain" (and in fact certainly wrong). No doubt the firms will say *Jaycees* proves otherwise. But as discussed, *Jaycees* never established a binding per se rule, and it was in any event superseded by the *Pool & Geller* decision. *Cf. Companhia*, 640 F.3d at 372-73 (finding uncertainty where "a subsequent decision of the D.C. Court of Appeals"

"arguably" limited the reach of an earlier decision). The fact that, after *Jaycees*, the high courts of New York and Connecticut rejected a physical location requirement under their similar antidiscrimination laws also creates uncertainty. *See Owens*, 864 F.3d at 812 (finding uncertainty where "[o]ther states have reached different conclusions on th[e] question"). And even if *Jaycees* stood for everything the district court thought it did, it was decided nearly 40 years ago, did not apply the principle of "generously construing" the DCHRA that has since become firmly settled, and did not examine the remarkable consequences of excluding all but physical locations from the DCHRA's public-accommodation protections. Certification would therefore still be appropriate because, in circumstances like these, a state high court might decide that "it no longer feels bound by an earlier decision." Garner et al., *Law of Judicial Precedent*, at 627 (discussing certification).

Second, the question here is surely of extreme public importance. Among the questions that this Court has found satisfy this standard are:

- whether fraudulent petitions sent to federal agencies in the District provide a basis for establishing personal jurisdiction over the petitioners (*Companhia*, 640 F.3d at 373);

- whether a claim for intrusion upon seclusion arises when "a restaurant discloses to a third party the dining habits of a patron without the patron's consent" (*Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 38 (D.C. Cir. 2004)); and

- whether a plaintiff is barred from recovering on a contract to perform architectural services in the District if she is licensed to practice architecture

only in another jurisdiction (*Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1303 (D.C. Cir. 2002)).

Those questions were indeed important, but the issue here—which touches the lives of many more District residents—is even more so. If in fact only physical locations are places of public accommodation under the DCHRA, then the countless businesses and institutions that operate in the District without brick-and-mortar facilities here have a blank check to discriminate on the basis of race, sex, age, and other protected characteristics in the provision of goods and services. This Court should not endorse such an extraordinary proposition without letting the D.C. Court of Appeals address it—on the merits, and with adequate briefing—in the first instance.

CONCLUSION

The district court's holding that a place of public accommodation "must be a physical location" should be reversed.

Respectfully submitted,

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ADDENDUM

D.C. Code § 2-1401.02

§ 2-1401.02. Definitions.

The following words and terms when used in this chapter have the following meanings:

* * *

(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 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.

* * *

CERTIFICATE OF SERVICE

I certify that on October 15, 2019, electronic copies of this brief were served on counsel for all participants in this case through the Court's ECF system.

/s/ Graham E. Phillips
GRAHAM E. PHILLIPS

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29(a)(5) because it contains 5742 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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