Case No. A18-1271

STATE OF MINNESOTA
IN SUPREME COURT

Fletcher Properties, Inc., et al.,

Appellants,

v.

City of Minneapolis,

Respondent.

BRIEF OF AMICI CURIAE HOUSING JUSTICE CENTER, NATIONAL HOUSING LAW PROJECT, AND THE POVERTY & RACE RESEARCH ACTION COUNCIL

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STATEMENTS OF INTEREST OF AMICI CURIAE

Housing Justice Center (HJC) is a nonprofit legal organization based in Saint Paul, Minnesota, the mission of which is to employ legal and advocacy strategies to preserve and expand the supply of affordable housing. Staff attorneys at HJC have been working on expanding the acceptance of Section 8 Housing Choice Vouchers for the last decade through education, direct advocacy and litigation.[1]

The National Housing Law Project (NHLP) is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys, policy advocacy, and co-counseling on key litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. Since 1981 NHLP has published *HUD Housing Programs: Tenants' Rights*, the seminal authority on the rights of HUD tenants—including families participating in the Housing Choice Voucher program.

NHLP also coordinates the Housing Justice Network, a collection of over 1,400 legal aid attorneys, advocates, and organizers from around the U.S. that has collaborated on important and complex housing law issues for over 40

[1] Rule 129.03 Certification: this brief was authored entirely by counsel for Amici Curiae and no one other than amici made a monetary contribution to the preparation or submission of the brief.

years, including through a dynamic listserv, working groups, and a periodic national conference. NHLP and its staff have extensive experience both advocating for and enforcing state and local laws prohibiting discrimination in housing based on voucher use or other lawful sources of income.

The Poverty & Race Research Action Council ("PRRAC") is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long-term consequences of segregation for low-income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities. For over a decade, PRRAC has engaged in research, policy analysis, and advocacy on the barriers facing families using federal Housing Choice Vouchers (HCVs) to move to higher opportunity areas. One of the key barriers is the prevalence of discrimination against HCV families. As part of its work PRRAC has researched best practices in local source of income discrimination laws, and since 2005, has maintained a directory of all state and local statutes and ordinances barring source of income discrimination.

ARGUMENT

The City of Minneapolis enacted Ordinance No. 2017-078 to prohibit discrimination in rental housing based on the use of public benefits, especially federally-funded Housing Choice Vouchers,[2] aiming to improve the housing opportunities available to people who rely on such benefits. The City passed the Ordinance based on extensive evidence that large numbers of Minneapolis landlords refused to accept vouchers.[3] In enacting the Ordinance, Minneapolis joined twelve states, the District of Columbia, and more than 80 other cities and counties that have restricted or prohibited housing discrimination based either on the use of a voucher subsidy to pay rent, or, more broadly, on a tenant's source of income.[4]

The trial court struck down the Ordinance on substantive due process grounds, finding the measure arbitrary because "discrimination" can supposedly only entail "socially evil" practices motivated by prejudice and unfair stereotypes, whereas landlords may have other reasons (i.e., not prejudice or stereotypes) for

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[2] See 42 U.S.C. § 1437f(o) (creating voucher program); see 24 C.F.R. § 982.1 for overview of voucher program.

[3] See *Fletcher Properties, Inc., v. City of Minneapolis*, Hennepin County Dist. Ct. No. 27-CV-17-9410, Memorandum on Order Granting Plaintiffs' Motion and Denying Defendant's Motion for Summary Judgment at 21-22 (June 7, 2018) (hereafter referred to as "Opinion").

[4] See Poverty & Race Research Action Council, "Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program," Appx. B: State, Local, and Federal Laws Barring Source-of-Income Discrimination (December 11, 2019), on-line at: https://www.prrac.org/pdf/AppendixB.pdf

avoiding tenants who rely on public benefits.[5] The trial court further found that the Ordinance violated the Minnesota Equal Protection Clause by exempting from its coverage certain very small landlords; again making the presumption that "discrimination" necessarily implies nefarious motives, the court found no rational basis to prohibit animus-based discrimination by large owners but not small owners.

Both rulings were properly rejected by the Court of Appeals. Nonetheless, Appellants' arguments to this Court[6] continue to invoke the same false premise as reflected in the District Court's decision: that "discrimination" can only occur when the different treatment is "invidious" and motivated by "animus"—i.e., hostility, fear, or prejudice, rather than business or economic reasons. This premise is false because "discrimination," both as a general concept and as specifically used in the Minneapolis ordinance, means differential treatment based on *any* particular characteristic, irrespective of its motive or purpose. Without this faulty premise, which—as discussed below—runs counter to

[5] See Opinion at 29-30, 38.

[6] Appellants' Statement of Issues, Part I, rests its due process claim on an alleged "irrebuttable presumption of invidious intent to discriminate." Appellants' brief at part I.A. is an argument that "The Ordinance Creates An Unlawful Presumption Of Invidious Intent." See, pgs. 26-27 (unlawful presumption of "invidious intent"); 31 and 34 (ordinance violates due process by using a conclusive presumption of "nefarious intent"); 36 (unconstitutional prohibition of nonparticipation without "predatory intent"). This part of Appellants' argument is rebutted in Part A of this amicus brief. Appellants similarly argue, in part I.B. of their due process argument.

decades of fair housing legislation and court decisions as well as the plain language of the Ordinance, Appellants' arguments fully collapse.

Appellants' arguments fail because Minneapolis had a rational basis for prohibiting discrimination against voucher holders and other benefits recipients: increasing housing opportunities for voucher holders and benefits recipients. Such discrimination in any form frustrates public policy objectives such as increasing housing opportunities for low-income persons, combating residential segregation, and affirmatively furthering fair housing. These adverse effects from income-based discrimination occur whether that discrimination is motivated by animus (e.g., as a proxy for racial or other prejudice-based discrimination) or economic concerns (such as avoiding costs associated with voucher program participation). Appellants' due process argument thus fails because prohibiting discrimination against voucher holders (because of the requirements of the voucher program) bears a rational relationship to achieving these goals.

Appellants' equal protection argument also fails in light of the City's objectives. Because the legislation effectively requires landlords to shoulder the ordinary requirements of participating in voucher programs, the City rationally exempted some single family and duplex owners—small landlords who may find the requirements of participating in voucher programs more difficult to fulfill.

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A. Animosity or prejudice against public assistance recipients is not necessary to support a prohibition of housing discrimination against such persons.

1. Discrimination can occur in the absence of animus.

As strictly defined, "discrimination" means only "[t]he intellectual faculty of noting differences and similarities." Black's Law Dict., 10th Ed., "discrimination" (2014). Thus, discrimination occurs whenever one person is treated differently than another, no matter the basis or rationale for the different treatment. Accordingly, the term appears in various contexts throughout American law, ranging from the Bankruptcy Code's prohibition on certain forms of discrimination against "bankrupts" and "debtors," see 11 U.S.C. § 525, to a federal law against certain forms of employment discrimination against military reservists, see 38 U.S.C. § 4311 et seq., to interpretations of communications laws barring discrimination by common carriers of long-distance services in the rates and terms available to similarly-situated customers, see *AT&T Co. v. Central Office Telephone, Inc.,* 524 U.S. 214, 223; 118 S.Ct. 1956 (1998) (interpreting 47 U.S.C. § 203(a) to establish a "policy of nondiscriminatory rates [that] is violated when similarly situated customers pay different rates for the same services.").

In the fair housing context "discrimination" generally means unequal treatment on a statutorily-proscribed basis, such as race, sex, familial status, religion, disability, or, as here, participation in a public assistance program. However, it is well-established that animus is not necessary to demonstrate a Fair Housing Act violation. See, e.g., *Williams v. Matthews Co.,* 499 F.2d 819,

827 (8th Cir. 1974) (rejecting lower court's conclusion that "subjective good intentions could overcome the prima facie showing of discrimination"); see also *Comm. Servs, Inc. v. Wind Gap Municipal Auth*., 421 F.3d 170, 177 (3d Cir. 2005) (noting that the "discriminatory purpose need not be malicious or invidious, nor need it figure in ['']solely, primarily, or even predominantly['] into the motivation behind the challenged action") (citations omitted); *Developmental Services of Nebraska v. City of Lincoln,* 504 F. Supp. 2d 726, 737 (D. Neb. 2007) (failure to provide a reasonable accommodation claim "does not require proof of discriminatory animus"); *Fair Housing Congress v. Webe*r, 993 F. Supp. 1286, 1293 (C.D. Cal. 1997) (even if policy of not renting certain apartments to families with children is based on "legitimate safety concerns," this does not cure fair housing violation); *Horizon House Developmental Servs, Inc. v. Township of Upper Southhampton,* 804 F. Supp. 683, 696 (E.D. Pa. 1992) ("[I]t is not necessary to show an evil or hostile motive," as it is a fair housing violation to discriminate "even if the motive was benign or paternalistic."); *United States v. Reece*, 457 F. Supp. 43, 48 (D. Mont. 1978) (rejecting landlord's "allegedly benign motivation" of refusing to rent apartments to women who did not own cars due to concerns for their safety).

A legislative example of how prohibiting discrimination serves broader public policy goals than counteracting animus is the federal Fair Housing Act Amendments of 1988, which prohibits housing discrimination against families with children. See 42 U.S.C. § 3604 ("familial status," added by Pub. L. 100-

430). Congress passed this law based on findings that "25 percent of all rental units did not allow children; 50 percent were subject to restrictive policies that limited the ability of families to live in those units; and almost 20 percent of families were living in homes they considered less desirable because of restrictive practices." H.R. Rep. No. 711, 100th Cong., 2d Sess. 1988, 1988 U.S.C.C.A.N. 2173, 2180. Congress found discrimination against families with children contrary to public policy goals such as "protecting families as 'perhaps the most fundamental social institution of our society' and "provid[ing] a decent home and suitable living environment for every American family." *Id*. at 2180. Importantly, in the House Report accompanying the 1988 amendments, Congress made no findings that the prevalence of familial discrimination was related to animosity or a hatred of children. *See generally id*.[7]

[7] As noted above, discriminatory animus is not required to prove intentional discrimination – for example, a real estate ad stating "Section 8 not accepted" or "children not accepted" is sufficient evidence of intent, regardless of the landlord's motivation. Indeed, under the Fair Housing Act, liability can be even established in some cases without any "intent" at all, where an unjustified discriminatory outcome is caused by an otherwise neutral policy. See *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507, 2520 (2015). *See also* 24 C.F.R. § 100.500(a) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.").

2. The Minneapolis ordinance definition of discrimination does not include animus as a required element of discrimination.

Discrimination based on characteristics such as race and religion has, throughout history, been driven by fear, animosity, and other manifestations of prejudice. However, just as federal anti-discrimination laws serve broader policy goals and are not limited to counteracting animus, so are those at Chapter 139 of the Minneapolis City Code—which does not include animus as a required element of discrimination. See M.C.O. § 139.20:

> *Discriminate* or *discrimination*: Includes any act, attempted act, policy or practice, which results in the unequal treatment, separation or segregation of or which otherwise adversely affects any person who is a member of a class or combination of classes protected by this title.

Indeed, Minneapolis has recognized that discrimination based on certain characteristics harms the public interest *not only* "by, among other things, degrading individuals [and] fostering intolerance and hate," *but also* by "creating and intensifying unemployment, substandard housing, under education, ill health, lawlessness and poverty[.]" M.C.O. § 139.10(a).

3. Minneapolis, like many other jurisdictions, had good reasons for prohibiting discrimination against voucher holders and other public assistance recipients.

The primary objective behind Ordinance 2017-078 was to address the refusal of many housing providers to accept housing vouchers or other forms of public assistance. The refusal to accept vouchers or other public assistance

benefits constitutes a form of unequal treatment—i.e., discrimination (based on public assistance use). Ample evidence in the legislative record showed that housing voucher holders faced widespread discrimination in the Minneapolis rental market, that the discrimination significantly reduced the housing opportunities available to them, and that these dynamics tended to concentrate voucher tenants in high-poverty neighborhoods. See Opinion at 5, 21-22 (noting survey results showing that only 23% of rental listings affordable to voucher holders would accept voucher holders, and "that the vast majority of properties accepting Section 8 vouchers were concentrated in high poverty zip codes in North Minneapolis."). [8] Discrimination against voucher holders thus has frustrated the City's policies around improving housing opportunities for low-income families and deconcentrating poverty.

Improving and expanding rental housing opportunities for low-income families is certainly a legitimate public interest. See *Edwards v. Hopkins Plaza L.P.,* 783 N.W.2d 171, 179 (Minn. App. 2010) ("Increasing affordable housing

[8] These findings of the Minneapolis City Council are reinforced by the latest national study of Housing Choice Voucher discrimination – see Mary Cunningham et al, A Pilot Study of Landlord Acceptance of Housing Choice Vouchers (HUD Office of Policy Development and Research, 2018), available at https://www.urban.org/research/publication/pilot-study-landlord-acceptance-housing-choice-vouchers. Scores of cities and counties around the country have reached the same conclusion in adopting source of income discrimination laws. See Alison Bell, et al, Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results, Center on Budget and Policy Priorities (October 2018), on-line at https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf.

availability is a valid goal that would be advanced if all property owners were willing to participate in Section 8 programs"). Prohibiting landlords from discriminating on the basis of public assistance (including voucher use) directly advances that goal. Therefore, Ordinance 2017-078 had a rational basis and should easily have survived the substantive due process challenge. See *State v. Rey,* 905 N.W.2d 490, 495 (Minn. 2018) ("Under rational-basis review, we will uphold a statute when it provides a 'reasonable means to a permissive objective' and is not 'arbitrary or capricious.'"), quoting *State v. Bernard,* 859 N.W.2d 762, 773 (Minn. 2015).

Appellants echo the trial court's finding that prohibiting discrimination against voucher holders was an arbitrary means of expanding housing opportunities for such persons, because of the view that discrimination can only occur when motivated by animus. But "discrimination" in this context merely means treating voucher holders less favorably, no matter what the reason for the unequal treatment happens to be. The trial court's fundamental misunderstanding of the term "discrimination" as requiring animus led to its flawed conclusion that the City's means of prohibiting discrimination against public assistance recipients was arbitrary. Indeed, the trial court even acknowledged that the City's interest in addressing the shortage of housing available to voucher holders and the concentration of those tenants in high-poverty neighborhoods could justify requiring residential landlords to accept housing vouchers. See Opinion at 37-38 ("The fact that there is shortage of, and

a concentration of, apartments available to Section 8 tenants certainly would make it rational to act directly on the problem, e.g., declare that the privilege of holding a rental housing license in the City of Minneapolis requires accepting Section 8 tenants."). The City did not go so far as to require landlords to accept voucher holders, only to refrain from discriminating against them-and the City's correct use of anti-discrimination terminology in enacting that milder measure surely did not render the ordinance arbitrary.

Whether Minneapolis landlords discriminated against voucher holders out of animus or for other reasons is irrelevant, as the legislative prerogative to determine which forms of housing discrimination to prohibit is not limited to counteracting racial prejudice or other nefarious distinctions. Yet Ordinance 2017-078 does also advance the City's interests in deterring and preventing housing discrimination against members of protected classes. Housing providers that refuse to accept tenants with rental vouchers or other forms of public assistance income diminish rental opportunities available to the low-income households who rely on those programs. When such policies are widespread in a community, such income-based discrimination can profoundly affect recipients' access to certain neighborhoods, schools, and other aspects of community participation. And because families receiving public assistance benefits are more likely to be female-headed, of color, and have members with disabilities, source of income discrimination can also play a significant role in shaping the demographic and socioeconomic contours of an area as well. *See* Kinara Flagg,

"Mending The Safety Net through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law," 20 Colum. J. Gender & L. 201, 206 (2011). "[T]he effects of [source of income] discrimination go well beyond the geographical details of where they sleep at night.[ ] Where a child grows up is directly related to where he or she can go to school, and living in a low-income, racially segregated neighborhood with under-funded public schools can be a significant barrier to racial and economic integration for that family." *Flagg* at 207-208 (internal footnote omitted).

These dynamics give cities like Minneapolis a further legitimate interest in curbing discrimination based on public assistance participation. This remains true no matter what reasons may cause housing providers to adopt policies of refusing to accept vouchers or income from other public benefits. Income-based discrimination that fosters residential segregation and limits educational and economic opportunities for low-income families is just as harmful when driven by business reasons as when motivated by fear or animosity.

4. Minneapolis validly prohibited discrimination based on "the requirements of a public assistance program" to ensure that housing providers shoulder the ordinary requirements of such programs.

Like twelve states, and scores of other cities and counties around the country,[9] the local legislative body in Minneapolis has reasonably balanced the

[9] For a listing of the growing number of cities, counties, and states that have adopted source-of-income discrimination laws, see Poverty & Race Research Action Council, Expanding Choice: Practical Strategies for Building a Successful

needs to foster inclusive communities and make affordable rental housing opportunities available to low-income persons against the additional administrative procedures related to a housing voucher tenancy. In prohibiting discrimination against voucher holders and other public assistance recipients, the Ordinance explicitly reflects a legislative determination that requiring landlords to undertake the administrative procedures associated with receiving those income sources is a reasonable and worthwhile imposition considering the policy objectives that the City's non-discrimination requirement accomplishes.

Having done so, Minneapolis has made discrimination against voucher families a freestanding violation of law, not subject to business-justification defenses related to features of the voucher program itself.[10] Importantly, the

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Housing Mobility Program, Appendix B: State, Local, and Federal Laws Barring Source-of Income Discrimination," (2019), http://www.prrac.org/pdf/AppendixB.pdf; see also Alison Bell, et al, Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results, Center on Budget and Policy Priorities (October 2018), https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf.

[10] The Appellant's assertion that the ordinance ignores the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is inapposite to the case at hand and misapplies the *McDonnell Douglas* framework. The *McDonnell Douglas* framework is designed to adjudicate claims of intentional discrimination based on indirect or circumstantial evidence and is unnecessary when direct evidence is present—such as when an owner explicitly denies occupancy based on the administrative requirements of the voucher program. The *McDonnell Douglas* framework might be employed in a voucher discrimination case if, for instance, a landlord rejected a voucher holder for a pretextual stated reason, but the evidence showed that the landlord's true motivation was a desire to avoid renting to a family with a voucher. In such a case, the alleged administrative burdens of the voucher program would not be a legitimate, non-discriminatory reason justifying the discrimination, because

Minneapolis ordinance *does* recognize an affirmative defense for a landlord who shows that participation would pose an "undue hardship." But prohibiting discrimination based on "the requirements of a public assistance program" was necessary to ensure that rental housing providers accept the ordinary obligations and impacts of such programs.[11]

Courts in Connecticut,[12] the District of Columbia,[13] Maryland,[14] and New Jersey,[15] have all upheld state and local laws prohibiting source of income discrimination in the face of challenges that alleged the laws posed administrative burdens for landlords. These courts have held that permitting challenges based on the administrative requirements of various sources of

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refusing to rent because of the voucher program requirements is part of the definition of discrimination. In any event, the McConnell Douglas test is an evidentiary mechanism and has no bearing on the power of a legislative body to determine what types of discrimination may be prohibited.

[11] Thus, the Minneapolis ordinance describes "*Discrimination in property rights*" to include "status with regard to a public assistance program, *or any requirement of a public assistance program is a motivating factor*." (emphasis added) M.C.O.§139.40(e).

[12] *Commission on Human Rights & Opportunities v. Sullivan Assocs*., 739 A.2d 238, 248, 250 (Conn. 1999) (permitting an exception based on program requirements would thwart purpose and constitute an unstated exception to a remedial statute).

[13] *Feemster v. BSA Ltd Partnership*, 548 F.3d 1063, 1070-71 (D.C. Cir. 2008) (permitting owner to refuse vouchers based on program requirements would vitiate intended legal safeguards).

[14] *Montgomery County v. Glenmont Hills Assocs*. 936 A.2d 325, 340-41 (Md. App. 2007)("Most of the courts that have addressed an administrative burden defense have rejected it.")

[15] *Franklin Tower One v. N.M*., 725 A.2d 1104, 1114 (N.J. S.C. 1997) (permitting a landlord to decline participation in the voucher program to avoid "bureaucracy" would leave no section 8 housing available.)

income would thwart the intended purposes of the statute and would impermissibly read unstated exceptions into remedial statutes.

In *Edwards v. Hopkins Plaza Ltd. Partnership*, 783 N.W.2d 171 (Minn. Ct. App. 2010), the Court noted that the voucher program is voluntary under federal law, but that federal law explicitly does not preempt state or local laws prohibiting discrimination against voucher holders. *Edwards* at 176, citing 24 C.F.R. § 982.53(d). The *Edwards* court concluded that no state law required owner participation in the voucher program and, contrary to the decisions cited above, that the Minnesota Human Rights Act did not make discriminatory a refusal to participate "for a legitimate business reason." In drawing that conclusion, the Court specifically distinguished the MHRA from a Massachusetts statute which makes discriminatory a refusal to rent because of the requirements of a public assistance program.[16] While the reasoning in *Edwards* may itself be fairly questioned, it has no bearing on the present case, because, contrary to Appellants' arguments, the *Edwards* court did *not* conclude that owner participation was necessarily voluntary in Minnesota, but only that no then-current state laws operated to make participation mandatory.

The Massachusetts Supreme Judicial Court had ruled similarly to *Edwards* with respect to that state's initial source of income discrimination law. *Attorney General v. Brown,* 511 N.E.2d 1103 (Mass. 1987). In reaction to the decision, the

[16] Mass. General Laws, c. 151B, § 4(10).

Legislature added language very similar to that adopted by Minneapolis, prohibiting discrimination "because of the requirements" of assistance programs.[17] In response to an owner's refusal to participate in a local voucher program because of requirements of the program, the state Supreme Judicial Court held that the Legislature had weighed program administrative burdens and balanced those impacts against the public interest in making housing affordable. *DiLiddo v. Oxford St. Realty, Inc*., 876 N.E.2d 421, 429 (Mass. 2007). The Minneapolis City Council has struck a similar balance.

In *DiLiddo*, the defendant also made an argument similar to that of Appellants, asserting that there was no discrimination because it was acting for business reasons rather than from "animus." The court rejected this argument, holding that the statute contains no language requiring a showing of animus. *Id*.

B. Minneapolis rationally concluded that prohibiting housing discrimination based on participation in subsidy programs would expand housing opportunities for voucher holders.

Appellants and their supporting amici urge the Court to find that the City's ordinance imposes crushing burdens on landlords, fails to expand (and even diminishes) housing opportunities for low-income families, and therefore lacks even a rational basis for its imposition. Yet ample evidence suggests that prohibiting discrimination against voucher holders expands housing opportunities for low-income households, and imposes only modest burdens on landlords.

[17] *Id*.

1. HCV participation is not unduly burdensome on landlords.

Amici acknowledge that participation in the federal Housing Choice Voucher Program imposes some obligations on landlords that would not exist in non-HCV tenancies. In particular, owners must include a HUD-prescribed "tenancy addendum" in their contracts with tenants, comply with "Housing Quality Standards," and enter into a "Housing Assistance Payments (or "HAP")" contract with the Minneapolis Public Housing Authority (MPHA). See 24 C.F.R. §§ 982.308(f) (tenancy addendum), 982.404 (housing quality standards), 982.451 (housing assistance payments contract). However, the duties these provisions impose on landlords are similar to those duties landlords owe under common law and generally-applicable landlord-tenant statutes.

The tenancy addendum, for instance, sets forth provisions governing the rent, and other charges, and security deposits that may be assessed, duties pertaining to maintenance and utilities service, termination of the lease, and so on. See 24 C.F.R. § 982.308(f), see form HUD-52641-A (on-line at: https://www.hud.gov/sites/documents/52641-A.PDF). Appellants first claim the addendum prohibits termination of the tenancy except for "serious or repeated violations of the lease." App. Br. at 4-5. Yet this restriction applies only during the initial term of the lease and any extensions thereof, and the addendum does not preclude an owner from declining to renew a tenancy, regardless of cause. See addendum at ¶ 8(b). The addendum does not materially differ from Minnesota law, under which a landlord may not terminate a tenancy during its

term without grounds, but may decline (without cause) to renew a lease upon expiration. See Minn. Stat. § 504B.285(a)(2).

Even if a voucher lease is renewed, the tenancy addendum authorizes termination after the initial term for many reasons other than serious or repeated violations. Id. at ¶ 8(d)(3) ("After the initial lease term, such good cause may include: (a) The tenant's failure to accept the owner's offer of a new lease or revision; (b) The owner's desire to use the unit for personal or family use or for a purpose other than use as a residential rental unit; or (c) A business or economic reason for termination of the tenancy[.]"). Appellants have not given an example of a legitimate reason for lease termination that an owner could not fit within this provision, and Amici cannot conceive of one.

Appellants also assert that the addendum "does not allow the owner to terminate for nonpayment by MPHA or other violations of the owner's lease." App. Br. at 5. But a *tenant's* violation of the lease can establish grounds for termination of the tenancy, see addendum at ¶ 8(b). MPHA is not a party to the *lease* and thus cannot violate it, but does owe obligations to the landlord under the HAP contract including the duty to make the subsidy payments "promptly when due to the owner." HAP Contract, form HUD-52641, ¶ 7(a)(2) (on-line at: https://www.hud.gov/sites/dfiles/OCHCO/documents/52641.pdf). The HAP contract is fully enforceable against MPHA, and also authorizes the owner to collect late fees from the PHA in the event of late payment. Id. at ¶ 7(a)(3).

Again, this provision resembles Minnesota law, which authorizes late fees of up to "eight percent of the overdue rent payment." Minn. Stat. § 504B.177(a).

This provision makes an owner whole in the event MPHA fails to pay due to an error or other bureaucratic issue. For MPHA simply not to pay the subsidy, however, requires that a landlord engage in some malfeasance or at least serious noncompliance with the HAP Contract. Typically this involves a failure to maintain the premises in accordance with the Housing Quality Standards. See HAP Contract at ¶ 3(a); see 24 C.F.R. § 982.404(a)(2) (authorizing "termination, suspension or reduction of housing assistance payments" for owner's failure to maintain dwelling unit in accordance with HQS). Maintaining fit and habitable premises is likewise a vital obligation that all residential landlords owe tenants under Minnesota law. See Minn. Stat. § 504B.161 Subd. 1(a) (landlords to ensure that leased premises "are fit for the use intended," kept "in reasonable repair during the term of the lease," made " reasonably energy efficient," and maintained "in compliance with the applicable health and safety laws"). Particularly given Minnesota's statutory directive for terms such as "fit" premises and "reasonable repair" to be given liberal construction, the HQS requirements do not materially differ from these state law obligations. *Id*, Subd. 3.

MPHA inspections and administrative tasks that voucher participation requires of landlords, such as incorporating tenancy addenda into their leases, signing HAP contracts, and undergoing HQS inspections may impose some additional costs. But the fact that there are currently in the U.S. about 5.26

million people living in about 2.28 million units with vouchers,[18] indicates that very large numbers of owners throughout the country have found tolerable whatever administrative burdens are involved. The City's determination that such minor costs did not outweigh the value of fair housing access for voucher holders was fully sound and rational.

2. The City had a rational basis for adopting the ordinance.

Section B.2. of Appellants' brief argues that there is no rational basis for the ordinance. The argument in B.2.a. is simply a repeat of the argument discussed above that an anti-discrimination ordinance necessarily prohibits only discrimination motivated by animus.

Appellants' argument in B.2.b. is that the ordinance will not increase housing opportunities. The argument begins with Appellants confusing "opportunities," with "success." Increasing the number of apartments to which voucher holders may apply obviously increases the number of opportunities at which vouchers might be used. Further, contrary to Appellants' view, increasing opportunities to apply for vouchers does, as a matter of logic, increase the likelihood of success. Minneapolis has a very low rental housing vacancy rate. Widespread refusal of owners to accept vouchers makes that already very low vacancy rate much lower for voucher holders. Eliminating the widespread refusal opens many new opportunities to apply for, and thus to actually find housing.

[18] https://www.huduser.gov/portal/datasets/assthsg.html.

Appellants assert that lawful screening criteria make voucher placement difficult “for some” voucher holders. Then three sentences later implicitly change “for some” to “for all” by asserting that the ordinance cannot increase voucher holder opportunities because of lawful screening criteria. While lawful screening may still rule out “some” voucher holders, the ordinance still makes far more apartments potentially available to the voucher holders who can meet legitimate screening criteria. Without the ordinance, housing providers can (and often do) prohibit voucher holder categorically from applying-thus denying housing to those who would meet legitimate screening criteria as well as those who do not..

Appellants’ are also mistaken because of their confusion regarding what they refer to as the MPHA’s “placement rate.” What they are referring to is that MPHA is able to have a very high percentage of its HUD-funded vouchers constantly in use. What Appellants fail to recognize is that the agency, like most voucher issuers, has far more voucher-holders searching for housing at any moment than it has funding authority for. It does this precisely because a high percentage of voucher holders fail to find housing.

One sense in which the ordinance increases opportunity for voucher holders is to widen the pool of available housing and thus increase the likelihood that voucher holders searching for housing will be successful.

The other sense in which the ordinance was adopted to increase “opportunity” is by allowing voucher holders a wider choice of housing locations. Regardless of how locational “opportunity” might be defined, whether in terms of

wealth/poverty or racial concentrations, or simply where individual voucher holders wish to live, Minneapolis has rental housing in those areas, some of which is now not available because owners will not accept vouchers.[19] The ordinance removes that barrier and thus increases the chances for voucher holders to finding housing in areas of "opportunity" as the voucher holders define such locations.

In section B.2.c. Appellants simply repeat the above arguments in the context of police power, arguing again that the ordinance will not accomplish the desired end of increasing voucher holders' opportunity to find housing. This version of the argument fails for the same reasons as set out above.

C. Exempting certain owners from Ordinance No. 2017-078 does not make an arbitrary classification contrary to the Minnesota Equal Protection Clause.

Appellants challenge two exemptions from the ordinance as denying equal protection under the state Constitution: owner occupied duplexes, and rental of single family homes for 36 months after homesteading.

Article 1, Section 2 of the state Constitution provides that no member of the state shall be deprived of any of the rights or privileges secured to any citizen

[19] HUD's most recent Comprehensive Housing Affordability Strategy (CHAS) data indicate that 71% of 0 and 1-bedroom units, 60% of 2-bedroom units; and 51% of 3-bedroom units, with rents affordable to households with incomes at or below 50% of area median income, are located outside of census tracts designated as Racially/Economically Concentrated Areas of Poverty by the Metropolitan Council. Data at: https://www.huduser.gov/portal/datasets/cp.html, data download page, census tract data for Hennepin County.

thereof. A three part test is used for analyzing claims that a law violates this constitutional provision; (1) distinctions must not be "manifestly arbitrary," but must be "genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;" (2) classifications must be relevant to the purpose of the law; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve. *Gluba v. Bitzen & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007). Courts are to presume statutes to be constitutional and to "exercise [their] power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Id* at 719.

The Appellants' equal protection argument is that an ordinance that aims to prevent discrimination may not permit any discrimination without failing each part of the test. The argument fails for at least two reasons.

First, Appellants misstate the City's purpose in adopting the Ordinance. The City's purpose in adopting the ordinance was to "increase stable housing opportunities for low income citizens without creating undue hardships for property owners." District Court Opinion at 13. The City acted reasonably in exempting duplex owner-occupants and owners of single family homes who are attempting to sell them from the prohibition because the administrative requirements of voucher program participation may fall more heavily on small property owners than larger property management firms or absentee landlords.

The appropriate question in employing the state equal protection test is not whether there is a genuine and substantial difference in animus toward voucher holders between owners of owner-occupied duplexes and larger owners, but rather, whether there is a genuine and substantial difference between them in light of the City's purpose to facilitate use of Section 8 vouchers while minimizing undue hardships on owners. Owners of larger buildings are better able to afford professional management equipped to address regulatory and administrative details associated with property ownership and the rental housing business. For them, any burdens associated with additional administrative requirements of the Section 8 program are minor. That is not necessarily the case for owners without professional management or rental experience. Owners of owner-occupied duplexes are likely not to be in the rental business at all, but rather simply seeking some additional income to cover their mortgage payments.

The second reason the Appellants' argument fails is that state and federal courts have repeatedly recognized, in deciding equal protection challenges, that legislation need not address every aspect of a problem and that the lines drawn between what is addressed by legislation and what is not are necessarily imprecise. In *Federal Distillers v. State*, 229 N.W.2d 144, 156 (Minn. 1975) the Court stated that "legislative economic reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind." Appellants argue that the statement is not relevant because the ordinance is not about economic reform. But the preceding sentence in

Federal Distillers was from a federal equal protection case, making clear that as a general principle "The Fourteenth Amendment does not compel a legislature to prohibit all the evils or none, and a legislature may hit at an abuse which it has found even though it fails to strike at another," citing *United States v. Carolene Products Co.* 304 U.S. 144, 58 S. Ct. 778 (1938). See also, *Williamson v Lee Optical of Oklahoma, Inc*., 348 U.S. 483, 489 (1955) ("reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

In *Gluba*, the Minnesota Supreme court cited to Oliver Wendell Holmes as quoted in *Hegenes v. State*, 328 N.W.2d 719, 721,722 (Minn. 1983) that when there is no precise way of precisely drawing lines "the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Gluba*, at 724-25.

The line the City has drawn in establishing an exemption for very small owner occupants is similar to, but more modest than, that drawn by Congress in the federal Fair Housing Act (FHA). The FHA exempts owner occupied residences with units for four or fewer families total, known as the so-called "Mrs. Murphy" exemption. 42 U.S.C. § 3603(b)(2). If the exceptions in the Minneapolis Ordinance are not rationally related to a legitimate governmental purpose, then neither is the FHA's Mrs. Murphy exception.

CONCLUSION

For the reasons set forth above, the decision of the Court of appeals should be upheld and the case remanded to the District Court.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01. This brief is produced with a proportional 13-point font. The length of this brief is 6,380(#278348) AT&T words. This brief was prepared using Microsoft Word 2013 and saved as a pdf file with Adobe Acrobat.

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