No. 10-1032

In the Supreme Court of the United States

Steven Magner, *et al.*,

Petitioners,

v.

Thomas J. Gallagher, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Charles W. Thompson, Jr.
Devala A. Janardan
International Municipal
Lawyers Association
Suite 1440
7910 Woodmont Avenue
Bethesda, MD 20814

Kevin M. Decker
Counsel of Record
Amie E. Penny
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400
kdecker@briggs.com

Attorneys for Amicus Curiae
International Municipal Lawyers Association

2011 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

Blank Page

No. 10-1032

In the
Supreme Court of the United States

Steven Magner, *et al.*,

Petitioners,

v.

Thomas J. Gallagher, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The International Municipal Lawyers Association ("IMLA") respectfully moves for leave to file the attached *amicus curiae* brief pursuant to Rule 37.2(b). Petitioners Steven Magner, *et al.* consented to the filing of this *amicus curiae* brief. Respondents Thomas J. Gallagher, *et al.* withheld consent. Nonetheless, in accordance with Rule 37.2(a), IMLA provided notice to respondents' counsel of IMLA's intent to file a brief.

INTEREST OF THE *AMICUS CURIAE*

IMLA is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since

1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA members regularly enact and enforce minimum standards under property maintenance codes in order to ensure the health, safety, and general welfare of their citizens. IMLA members have a strong interest in the Court resolving the Circuit Court conflict regarding the appropriate standards for disparate impact claims under the Fair Housing Act. Providing a clear, uniform test across the Circuits will provide predictable and unmistakable boundaries within which municipalities can work to promote safe housing for all.

CONCLUSION

IMLA respectfully requests that its motion for leave to file an *amicus curiae* brief in support of Petitioners be granted.

Respectfully submitted,

Kevin M. Decker
Counsel of Record
Amie E. Penny
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
651-977-8400
kdecker@briggs.com

Dated: March 18, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of *amicus curiae* International Municipal Lawyers Association ("IMLA") is set forth in the accompanying Motion for Leave to File a Brief.

SUMMARY OF ARGUMENT

The Federal Housing Act ("FHA") can have but one meaning. Yet, had the City of St. Paul faced the exact disparate impact claim raised below, but instead within the Fourth Circuit, Seventh Circuit, or Tenth Circuit, the result would have been directly opposite the Eighth Circuit's holding. The FHA itself cannot be subject to disparate treatment among the Circuit Courts. The Court should grant a writ of certiorari to resolve the indisputable and intolerable conflict among the Circuit Courts regarding the force and effect of the Nation's singular anti-discrimination-in-housing law.

ARGUMENT

I. The FHA Has Become Fractured

The Court has never condoned disparate impact claims under the FHA, much less articulated

---

[1] The parties were notified ten days prior to the due date of this brief of IMLA's intention to file. Petitioners consented to the submission of this brief. Respondents did not consent to the submission of this brief. Pursuant to Rule 37.2(b), a motion for leave to file this brief has been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief. *Amicus curiae* and their counsel were not compensated in any way.

the applicable standard for such claims. *See Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (declining to address whether disparate impact claims are appropriate under the FHA because the parties conceded the validity of such a claim). Lacking the Court's guidance, the Circuit Courts have developed substantively different standards against which to judge such FHA accusations. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 52 (1st Cir. 2000) (Stahl, J., dissenting) (describing disparate impact claims under the FHA as a "morass" that is "inchoate" and "increasingly incoherent") (citation omitted). The varying tests are not merely an academic split among the circuits; instead, they yield different outcomes. For example, under the facts in the proceedings below, the same housing code enforcement would have passed FHA muster in, for example, the City of Baltimore within the Fourth Circuit, the City of Indianapolis within the Seventh Circuit, or the City of Denver within the Tenth Circuit, but the Eighth Circuit found an FHA violation by the City of St. Paul. Such cannot be the result under the would-be unifying legislation of the FHA.

The various disparate impact tests employed by Circuit Courts are premised upon "two entirely distinct and not always consistent sources: constitutional equal protection principles and . . . statutory employment discrimination cases." Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409, 416 (1998). These different underpinnings

have created "an increasingly incoherent body of case law." *Id.* at 439.

Equal protection notions have led the Fourth, Sixth, Seventh, and Tenth Circuits to adopt various iterations of a balance-of-factors test. In general, these Circuit Courts consider: (1) the strength of plaintiff's showing of discriminatory impact; (2) a quantum of evidence of discriminatory intent; (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or an injunction to restrain defendants from interfering with property owners who wish to provide housing.[2] *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

In contrast, Title VII employment discrimination theory has driven a burden shifting analysis for the Third, Eighth, and Ninth Circuits. *See Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) ("We apply Title VII discrimination analysis in examining [FHA] discrimination claims.") (citation omitted). For instance, in the Third Circuit: (1) plaintiff must show disparate impact; (2) defendant must establish justification for the action; and (3) defendant must prove no reasonable alternative means was available. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977). In the Eighth and Ninth Circuits, the first and second prongs remain unchanged, but the burden shifts to

---

[2] The Sixth and Tenth Circuits utilize a modified version of the balancing factors test, declining to adopt the "discriminatory intent" consideration. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986).

the plaintiff on the third prong to prove there was a viable alternative means available. *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003) (plaintiff may prevail "by showing another policy would accomplish [defendant's] objectives without the discriminatory effects").

Finally, a hybrid test developed by the First and Second Circuits merges the balancing factors test based on equal protection principles and the burden shifting test based on Title VII. Specifically: (1) plaintiff must present a *prima facie* case of disparate impact; (2) defendant must "prove that its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect"; (3) the court considers whether any evidence of discriminatory intent was presented; and (4) the court considers whether the plaintiff seeks affirmative relief or an injunction to restrain defendants from interfering with property owners who wish to provide housing. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

Not surprisingly, the many different analyses lead to many different outcomes under the same law. The undeniable Circuit Court conflict warrants this Court's review through a writ of certiorari. *See, e.g., Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility. . . is to ensure the integrity and uniformity of federal law."); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541, 544 (1989) ("[T]he ideal of equality is violated when similarly

situated persons receive disparate treatment because . . . courts . . . have attached different legal consequences to facts that are identical in all relevant respects.").

II. One Law; Different Results

A. The Fourth Circuit

The FHA claim sustained by the Eighth Circuit would not have survived in the Fourth Circuit. *See Williams v. 5300 Columbia Pike Corp.*, Nos. 95-2964, 95-3091, 1996 WL 690064 (4th Cir. Dec. 3, 1996). *Williams* concerned a condominium converted from a cooperative residential building. *Id.* at *1. Due to troubled credit histories and indebtedness, plaintiffs – who were African-Americans – were not able to obtain financing, and sued under the FHA on a disparate impact claim. *Id.* at *2.

The appellate court rejected the disparate impact claim, reasoning that "[a]lthough it is no doubt true that the 'neutral criterion' of price may disparately impact blacks . . . because they may, on average, be poorer than whites . . . this type of injury extends beyond the reach of the Fair Housing Act." *Id.* at *3. In short, "[c]rudely stated, the [action at issue] placed only one obstacle between a resident and the purchase of his or her unit(s): money." *Id.*

The Fourth Circuit's holding stands in stark contrast to the Eighth Circuit's conclusion that a disparate impact claim is possible when (1) a city enforced a housing code, (2) the enforcement imposed increased costs to landlords for compliance, and (3) the landlords increased rents which affected racial

minorities, particularly African-Americans who make up a disproportionate percentage of low-income households in the City of St. Paul. *Gallagher v. Magner*, 619 F.3d 823, 834-36 (8th Cir. 2010). Put simply, "money" carried the day. Unquestionably, the City of St. Paul is faced with a disparate impact claim under the FHA when a Fourth Circuit city, such as Charlotte, would have been protected under the same federal law.

B. The Seventh Circuit

The Seventh Circuit would have likewise rejected the disparate impact claim which the Eighth Circuit sustained. *See Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437 (7th Cir. 1999). In *Hemisphere*, a developer applied for rezoning and a special use permit to build eight residential units that were handicap accessible. *Id.* at 438. The Village Board of Trustees approved building for six units, but not eight, which increased the costs per unit. *Id.* at 439. The developer sued based on disparate impact under the FHA. *Id.* at 438.

The Seventh Circuit concluded an increased costs claim does not pique FHA liability when the increased costs do not injure all of the protected class but rather only those who have "a limited amount of money to spend on housing." *Id.* at 440. The Seventh Circuit reasoned that requiring consideration of financial status would allow developers of handicap-accessible housing to ignore any sort of regulation that increased costs, such as zoning laws, housing codes, minimum wage laws, or safety regulations, and "it would be absurd to think that the FHA[] overrides all local regulation." *Id.*

Yet the Eighth Circuit effectively concluded the opposite. The City of St. Paul is subject to disparate impact claims under the FHA because its housing code requires property owners to provide deadbolts, exterminate rodents, and fix broken windows, which all increase costs. Thus, a housing code enforced by the City of St. Paul is subject to disparate impact claims under the FHA when the exact same housing code enforced within the Seventh Circuit, by the City of Chicago for instance, would not be subject to such claims under the FHA. Again, the FHA can have but one meaning; a federal law should be enforced uniformly throughout the Nation.

C. The Tenth Circuit

Similarly, the City of St. Paul would not be liable under Tenth Circuit precedent. In *Reinhart v. Lincoln County*, plaintiffs could not develop an affordable housing subdivision due to land-use regulations. 482 F.3d 1225, 1225 (10th Cir. 2007). The appellate court concluded plaintiffs had not established a *prima facie* case of disparate impact because it was not enough "to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others." *Id.* at 1230.

The Eighth Circuit ultimately rejected *Reinhart*'s conclusion, reasoning "the existence of a significant statistical disparity, even one resulting from economic inequality, is sufficient to create a *prima facie* case." 619 F.3d at 836. Again, the City of St. Paul faces disparate impact liability under the FHA where a Tenth Circuit city, like Oklahoma City, would not. The Circuit conflict is readily apparent.

CONCLUSION

The Federal Housing Act cannot continue to have one effect for cities within some Circuits, and an entirely different effect for cities within other Circuits. Without this Court's resolution of the Circuit Court conflict the law will remain incapable of serving its intended purpose: establishing a singular anti-discrimination standard equally applicable across the country. IMLA asks that the Court grant the Petitioners' writ of certiorari to harmonize the disparate enforcement of the Federal Housing Act.

Respectfully submitted,

Kevin M. Decker
Counsel of Record
Amie E. Penny
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
651-977-8400